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1930

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Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1930 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1930 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, MADRAS SERIES, for the year 1930, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No 1 denotes pages of I. L. R. 53 MADRAS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 53 Madras=All India Reporter

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54	"	"	16	233	"	"	785	420	"	"	209	670	"	"	138	826	"	"	874
61	"	"	534	237	"	"	779	439	"	"	441	680	"	"	606	838	"	"	30
69	1929	"	906	243	"	"	356	444	"	"	246	688	"	"	483	861	"	"	972
72	"	"	884	245	1931	"	198	449	"	"	609	692	1930	*PC*	297	865	"	"	863
80	"	"	841	248	1930	"	376	475	"	"	721	702	"	*M*	124	870	"	"	1001
84	"	"	586	262	"	"	381	480	"	"	218	708	"	"	577	873	"	"	766
119	"	"	881	266	"	"	392	487	"	"	354	714	"	"	540	881	"	"	801
127	"	"	794	270	"	"	382	491	"	"	490	716	1931	"	249	900	"	"	761
137	"	"	522	288	"	"	389	508	"	"	430	722	1930	"	648	904	"	"	808
141	"	"	817	297	"	"	496	510	"	"	449	737	1931	"	12	921	"	"	836
147	1930	"	74	309	"	"	132	533	"	"	618	750	1930	"	688	937	"	"	857
151	"	"	21	320	"	"	242	540	"	"	597	761	"	"	701	943	"	"	921
155	"	"	20	334	"	"	514	549	"	"	727	767	"	"	674	952	1931	"	207
158	"	"	427	352	"	"	600	581	"	"	538	771	"	"	512	968	1930	"	1004
160	1929	"	837	367	1931	"	194	585	"	"	446	775	"	"	505	979	"	"	896
165	1930	"	187	378	1930	"	528	590	"	"	682	780	"	"	1000	1023	"	"	981
167	"	*PC*	44																

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1930 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

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MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.		
1	1929	*PC*	283	127	1930	*M*	287	252	1930	*PC*	38	410	1930	*M*	629	562	1930	*M*	555
7	1930	"	57	137	"	"	268	257	"	"	28	414	"	"	483	571	"	"	510
10	"	*M*	113	145	1929	"	903	260	"	*M*	209	417	1931	"	274	575	"	"	674
23	"	"	126	148	1930	"	242	275	"	*PC*	86	420	1930	"	382	579	"	"	785
29	"	"	154	156	"	*PC*	35	285	"	"	42	435	"	"	428	581	"	"	449
36	"	"	276	170	"	*M*	356	293	"	"	59	437	"	"	560	602	"	"	457
39	"	"	129	171	"	*PC*	22	300	"	"	120	440	1929	*PC*	288	604	1929	*PC*	158
46	"	"	124	178	"	"	26	318	"	*M*	577	446	1930	"	79	613	1930	*M*	714
54	"	"	159	184	"	"	44	322	"	*PC*	93	453	"	"	76	622	1930	"	510
57	"	"	221	187	"	*M*	354	337	"	*M*	626	468	"	*M*	534	623	1931	"	249
59	1929	*PC*	279	189	"	"	544	341	"	"	561	477	1929	*PC*	240	629	1930	*PC*	170
68	1930	*M*	121	193	"	"	430	343	"	"	471	483	1930	"	60	635	"	"	144
74	1929	*PC*	300	195	1931	"	198	349	"	"	173	490	"	*M*	446	641	"	"	103
83	1930	"	17	197	1930	*PC*	54	352	"	"	190	494	"	"	392	649	"	*M*	507
89	"	*M*	430	204	"	"	56	355	"	"	538	497	"	"	597	651	"	"	699
95	"	"	123	207	"	*M*	353	358	"	*PC*	133	503	1929	"	794	653	"	"	606
98	"	"	785	210	"	"	218	363	"	"	57	509	1930	"	509	658	"	"	520
101	"	*PC*	29	215	"	*PC*	82	369	"	*M*	389	510	"	"	376	675	"	"	514
104	"	*M*	216	218	"	"	83	375	1931	*PC*	51	521	"	"	381	688	"	"	683
107	"	"	302	223	"	"	64	377	1930	*M*	600	524	"	"	582	698	"	"	349
111	"	"	246	226	"	*Notes*	18*d*	388	1931	"	202	536	"	*PC*	113	703	"	"	701
114	"	*PC*	24	229	"	*M*	331	397	1930	"	632	542	"	*M*	573	708	"	*PC*	139
118	"	*M*	195	240	"	"	659	401	1929	*PC*	139	547	"	"	505	714	"	"	142
123	"	*PC*	99																
125	"	"	41	245	"	*PC*	18	406	1930	*M*	588	551	"	*PC*	158	720	"	"	163

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MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.		
1	1930	*PC*	309	201	1930	*PC*	147	379	1930	*PC*	188	585	1930	*M*	490	836	1930	*M*	868
10	"	"	196	208	"	"	198	392	"	"	283	596	"	"	956	839	1931	"	65
14	"	"	139	214	"	"	10	394	"	"	284	607	"	*PC*	193	844	"	"	213
17	"	*M*	779	220	"	*M*	763	399	"	"	281	615	"	"	242	850	"	"	16
22	"	"	473	225	"	"	787	403	"	*M*	808	621	"	"	270	853	1930	"	873
28	"	"	512	229	"	"	869	416	"	*PC*	227	629	"	*M*	913	854	"	"	978
30	"	"	576	232	"	"	856	425	"	*M*	915	634	"	"	801	859	"	"	635
33	"	"	618	234	"	"	924	430	"	"	865	650	"	"	648	876	1931	"	180
39	"	"	570	239	"	"	441	435	"	*PC*	300	661	"	*PC*	238	880	1930	*PC*	248
43	"	*PC*	165	242	"	*PC*	151	437	"	"	239	666	"	"	297	881	"	*M*	991
53	"	"	91	256	1931	"	65	444	1931	"	22	674	"	*M*	867	887	"	"	852
61	"	"	134	262	1930	"	177	446	1930	"	253	677	"	"	870	892	1931	"	38
70	"	"	249	265	"	*M*	764	450	"	"	31	682	1931	"	26	893	1930	"	921
74	1931	*M*	194	267	"	"	761	458	"	*M*	854	684	1930	"	795	899	1931	"	69
82	1930	*PC*	100	274	"	"	798	461	"	"	744	686	"	"	834	901	"	"	17
89	1929	"	273	278	"	"	981	469	"	"	833	690	"	"	844	905	1930	*PC*	226
102	1930	*M*	528	283	"	*PC*	245	471	1931	"	177	708	"	"	1001	907	"	*M*	954
111	"	"	941	289	"	"	234	479	"	"	228	710	1931	"	10	911	1931	"	50
114	1931	"	42	296	"	"	224	485	1930	"	824	714	1930	"	881	913	"	"	49
117	1930	"	502	302	"	"	221	501	"	"	458	718	"	"	693	914	1930	"	975
121	"	*PC*	185	308	"	*M*	765	513	"	"	874	731	"	*PC*	45	918	1931	"	6
127	"	"	201	312	"	"	943	520	"	"	704	746	1931	*M*	61	923	"	"	175
134	"	"	232	316	"	"	721	524	"	"	913	752	1930	"	911	928	1930	"	985
139	1931	*M*	218	319	"	"	929	525	"	"	998	755	"	"	963	932	"	"	817
151	1930	*M*	496	321	"	"	751	529	1931	"	37	770	1931	"	12	939	"	"	972
160	"	"	688	328	"	*PC*	205	531	1930	"	479	778	1930	"	1003	941	1931	"	147
169	"	*PC*	179	336	"	"	110	540	"	*PC*	66	782	1931	"	404	945	1930	"	857
177	"	"	183	342	"	"	176									949	1931	"	273
183	"	*M*	755	346	"	*M*	766	548	"	*M*	1004	814	1930	*PC*	209	952	"	"	8
194	"	"	832	351	*Too old*			558	"	"	883	826	"	*M*	1012	956	1930	"	609
196	"	"	821	358	1930	*M*	727	579	"	"	995	833	1931	"	36	974	"	"	549

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MLW))	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.		
1	1929	*PC*	297	176	1930	*PC*	18	304	1930	*PC*	41	476	1930	*M*	496	675	1930	*M*	635
7	"	"	300	182	"	"	22	306	"	"	57	487	"	"	490	692	"	"	287
12	"	"	306	185	"	"	24	309	"	"	59	498	"	"	549	702	"	*PC*	118
16	1930	*M*	242	188	"	"	10	312	"	*M*	560	508	"	"	679	707	"	"	110
24	"	"	295	194	"	*M*	221	315	"	"	354	516	"	"	547	712	"	*M*	202
30	"	"	268	196	"	*PC*	17	317	"	*PC*	38	520	"	"	570	716	"	"	704
38	"	"	138	199	"	"	29	321	"	"	91	524	"	"	483	719	"	"	509
44	"	"	305	202	"	*M*	441	326	"	"	42	526	"	"	563	720	"	"	428
65	"	"	218	205	"	"	430	330	"	"	76	534	"	"	674	721	"	"	648
70	"	"	540	207	"	"	353	336	1931	*M*	274	537	"	"	573	732	"	*PC*	142
71	"	"	246	210	"	"	502	339	1930	"	458	542	"	"	446	735	"	*Notes*	184
75	"	"	356	215	"	"	119	352	"	*PC*	45	546	"	"	520	738	"	*M*	209
76	1931	"	198	223	"	"	121	365	"	*M*	389	561	"	*PC*	83	754	"	"	510
78	1930	"	113	229	"	"	544	371	"	"	382	566	1931	"	51	755	"	"	785
91	"	"	126	233	"	"	190	384	"	"	192	568	1930	"	28	757	"	"	714
97	"	"	154	236	"	"	188	386	"	"	186	570	"	"	35	765	"	"	510
104	1929	"	847	238	"	"	561	387	"	"	473	576	"	"	26	769	"	"	449
106	1930	*PC*	31	241	"	"	185	396	"	"	582	580	"	"	99	789	"	"	457
113	"	*M*	349	243	"	"	331	407	"	*PC*	66	582	"	"	54	792	"	"	698
118	"	*PC*	13	254	1931	"	202	425	"	"	82	587	"	*M*	618	803	"	*PC*	158
126	"	"	1	262	1930	"	577	428	"	*M*	392	592	"	"	555	811	"	"	100
137	"	"	7	266	"	"	538	431	"	*PC*	64	601	"	*PC*	120	817	"	*M*	683
141	"	*M*	124	269	"	"	576	434	"	"	79	617	"	*M*	534	826	"	"	597
150	"	"	159	271	"	"	600	438	"	*M*	626	625	"	*PC*	133	831	"	"	699
153	"	"	654	282	"	"	376	442	"	"	629	627	"	"	144	832	"	"	471
160	"	"	127	292	"	*PC*	44	446	"	"	659	633	1931	*M*	219	837	"	"	507
165	1929	"	860	294	"	*M*	381	451	"	"	632	638	1930	*PC*	113	840	"	"	606
170	1930	"	785	297	"	*PC*	56	455	"	"	609	643	"	*M*	514	845	"	"	701
173	"	"	123	298	"	"	60	473	"	"	588	655	"	"	727	849	"	"	216

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MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R			MLW)	A. I. R.			MLW)	A. I. R.		
1	1930	*PC*	163	165	1930	*M*	763	342	1930	*M*	924	538	1930	*M*	1009	766	1930	*M*	987
4	"	*M*	779	170	"	"	764	347	*Too old*			544	"	"	915	768	"	"	956
8	"	*PC*	139	172	"	"	1000	354	1930	*M*	943	548	"	*PC*	234	779	1929	"	467
13	"	"	139	175	"	"	865	357	"	"	921	555	1931	*M*	58	782	1930	"	983
14	"	"	176	179	"	"	798	363	"	"	836	561	1930	"	963	784	"	"	975
17	"	*M*	671	184	"	*PC*	185	376	"	*PC*	239	574	"	*PC*	265	788	1931	"	50
19	"	*PC*	183	188	1931	*M*	218	381	"	*M*	765	577	"	"	261	789	1930	"	978
23	"	*M*	670	200	1930	"	911	385	"	*PC*	281	582	"	"	272	794	"	"	844
26	"	*PC*	177	203	"	"	863	389	"	*M*	870	584	"	*M*	744	810	1931	"	175
28	"	"	103	206	"	"	821	393	"	*PC*	283	592	1931	"	377	814	"	"	147
34	"	"	93	211	"	"	621	395	"	*M*	801	599	1930	"	995	818	1930	*PC*	188
43	"	"	86	215	"	"	448	407	"	*PC*	245	605	"	*PC*	253	827	1931	*M*	73
51	"	"	170	216	"	"	231	412	"	"	249	608	"	*M*	918	836	1930	"	817
57	1931	*M*	40	220	"	"	972	413	"	"	251	615	1931	"	381	843	"	"	1017
61	1930	"	814	223	"	*PC*	309	416	"	*M*	824	646	1930	*PC*	300	850	"	"	751
66	"	*PC*	147	231	"	*M*	276	431	1931	"	37	647	"	*M*	719	856	1931	"	61
72	"	*M*	181	233	"	"	883	433	1930	"	833	649	"	*PC*	274	862	1930	"	930
79	"	"	512	261	"	"	881	435	"	"	927	656	"	"	297	881	"	*PC*	302
85	"	*PC*	134	265	"	"	981	438	"	"	913	662	1931	*M*	6	893	1931	*M*	26
92	1931	*M*	194	269	"	"	766	439	"	"	954	666	"	"	124	894	1930	"	857
100	1930	"	688	278	"	"	869	443	"	"	998	673	1930	"	1004	898	"	*PC*	238
108	"	"	325	277	"	*PC*	249	446	1931	"	10	680	1931	"	45	901	"	*M*	985
111	"	"	422	280	"	*M*	867	449	1930	"	913	691	1930	"	485	905	1931	"	28
116	"	*PC*	196	283	"	"	929	454	"	"	834	694	1931	"	8	919	"	"	399
118	"	"	165	285	1931	"	42	458	"	*PC*	209	697	1930	*PC*	284	929	1930	*PC*	201
127	"	"	151	287	1930	"	808	467	"	"	205	702	"	*M*	410	935	"	*M*	1003
138	"	*M*	748	299	"	"	856	475	"	*M*	896	704	1931	"	404	940	1931	"	180
143	"	"	721	301	"	"	755	502	"	"	991	729	1930	"	479	943	"	"	199
148	"	"	787	311	"	*PC*	198	507	1931	*PC*	65	736	"	*PC*	193	945	"	"	135
152	"	"	1001	316	"	*M*	941	513	"	*M*	16	742	1931	*M*	38	950	1930	"	1012
154	"	"	761	320	"	"	859	515	1930	*PC*	179	743	1930	"	873	957	1931	"	19
157	"	"	832	324	"	*PC*	242	522	1931	*M*	65	745	"	"	874				
158	"	"	795	329	"	*M*	528	527	"	"	177	754	1931	"	228	963	1930	"	945
160	"	"	590	338	"	*PC*	270	534	1930	"	854	760	"	"	55	978	1931	"	213

1930 Madras Weekly Notes=All India Reporter

NOTE:—*The pages of cases not mentioned below are cases either considered not reportable or not sanctioned by the Hon'ble Judges.*

MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.		
1	1929	*PC*	297	199	1930	*M*	295	496	1930	*M*	632	714	1930	*M*	761	985	1930	*M*	977
6	"	*M*	733	208	"	"	588	500	"	"	971	716	"	"	764	987	"	"	865
14	1930	"	123	211	"	*PC*	214	505	"	"	943	717	"	"	763	991	1931	"	16
16	"	"	218	225	"	*M*	609	508	1931	"	49	719	1931	"	38	994	1930	"	930
20	"	"	124	240	"	"	673	509	"	"	375	759	1930	"	808	1011	1931	"	106
23	"	"	127	243	"	"	629	514	"	"	376	767	"	"	856	1021	1930	"	1017
25	"	"	119	246	1931	"	22	515	"	"	213	777	"	"	457	1028	1931	"	28
29	"	"	626	289	"	"	249	520	1930	"	701	779	"	"	817	1041	"	"	225
32	"	"	486	291	1930	"	597	524	"	"	921	787	"	"	867	1045	1930	"	873
37	"	"	302	295	"	"	606	529	1931	"	18	790	1931	"	235	1047	"	"	929
40	"	"	287	300	"	*PC*	144	530	1930	"	507	798	1930	"	801	1049	"	*PC*	177
48	"	"	221	305	"	*M*	635	532	"	"	785	811	1931	"	273	1059	1931	*M*	120
50	"	"	268	320	"	"	1021	534	"	"	483	816	"	"	115	1063	1930	"	798
60	"	*PC*	18	326	"	*PC*	99	536	"	"	510	821	1930	"	844	1067	1931	"	45
65	1931	*M*	202	328	"	*M*	679	537	"	"	555	837	"	"	998	1077	"	"	251
73	1930	"	678	334	"	*PC*	59	544	"	*PC*	170	840	"	"	699	1091	"	"	55
76	"	"	192	337	"	*M*	688	549	"	"	113	841	1931	"	236	1096	"	"	38
78	"	"	187	343	"	*PC*	56	553	1929	"	300	849	"	"	242	1097	1930	"	978
80	"	"	188	347	"	*M*	670	557	1930	"	28	858	"	"	177	1100	"	"	975
82	"	"	242	349	"	"	703	559	"	"	103	865	"	"	124	1106	1931	"	17
96	"	"	448	350	1931	"	42	564	"	"	54	869	1930	"	913	1113	"	"	73
97	1931	"	274	352	1930	"	599	568	1931	*M*	103	880	"	"	833	1120	1930	*PC*	185
99	1930	"	544	353	"	"	911	577	1930	*PC*	64	882	"	"	834	1127	"	"	226
103	"	"	559	355	"	*PC*	22	580	"	"	82	885	"	*PC*	234	1129	"	*M*	671
104	"	"	353	358	1931	*M*	94	582	1931	*M*	418	891	"	*M*	945	1152	1931	"	399
106	"	"	502	362	1930	"	693	587	1930	"	520	905*a*	"	"	980	1161	1930	*PC*	251
111	"	"	553	371	*Too old*			601	1931	"	207	905*b*	"	"	1002	1187	1931	*M*	192
118	"	*PC*	17	373	1930	*M*	618	613	1930	"	836	907	1931	"	181	1190	"	"	110
120	"	*M*	789	377	"	"	857	625	"	"	824	909	1930	"	973	1196	"	"	50
129	"	"	547	381	"	"	981	644	"	"	988	911	"	"	983	1198	"	"	137
133	"	"	676	394	"	*PC*	24	649	"	"	832	914	1931	"	241	1199	"	"	185
137	"	"	410	396	"	*M*	751	656	1931	"	69	917	1930	"	766	1209	1930	"	854
140	"	"	699	402	"	"	20	673	"	"	10	921	1931	"	65	1215	1931	"	227
149	"	*PC*	26	404	"	"	392	676	1930	"	954	925	1930	"	1009				
153	"	*M*	577	406	"	"	354	679	"	"	913	930	"	"	991	1217	"	"	97
156	"	"	659	408	"	"	356	681	"	"	972	935	"	*PC*	238	1228	"	"	200
160	"	"	538	409	"	"	1001	684	"	"	861	937	"	"	283	1232	"	"	113
163	"	"	624	410	"	"	505	686	"	"	863	939	1931	*M*	377	1235	"	"	206
172	"	"	430	413	"	"	705	689	"	"	869	955	"	"	71				
174	"	"	246	427	"	"	648	694	1931	"	247	958	1930	*PC*	249	1236	"	"	133
178	"	"	331	437	*Too old*			698	1930	"	859	961	"	"	253	1242	"	"	216
187	"	"	441	438	1930	*M*	727	702	1931	"	233	964	1931	*M*	37	1245	"	"	81
191	"	"	189	470	"	"	782	705	1930	"	881	966	"	"	58	1261	1930	*Notes*	27*c*
192	1929	"	744	475	"	"	963												
193	1930	*PC*	44	489	"	"	870	708	"	"	821	971	1930	"	987	1263	1931	*M*	276
195	"	*M*	748	493	"	"	765	712	"	"	795	979	"	"	995	1271	"	"	419

3 Madras Criminal Cases=All India Reporter

NOTE.—*The pages of cases not mentioned below are cases either considered not reportable or not sanctioned by the Hon'ble Judges.*

MCrC)	A. I. R.			MCrC)	A. I. R.			MCrC)	A. I. R.			MCrC)	A. I. R.			MCrC)	A. I. R.		
1	1930	*M*	246	92	1930	*M*	189	198	1930	*M*	507	266	1930	*M*	765	348	1931	*M*	247
18	"	"	443	95	"	"	857	202	"	"	510	275	"	"	867	356	1930	"	973
24	"	"	193	100	"	"	632	203	"	"	704	279	"	"	865	359	"	"	854
27	"	"	128	143	"	"	509	207	"	"	631	285	"	"	975	362	1931	"	241
34	"	"	331	156	"	"	441	208	"	"	632	289	"	"	929	366	1930	"	983
46	1929	*Notes*	31*e*	160	"	"	483	217	"	"	671	291	1931	"	177	368	"	"	873
55	1930	*M*	225	172	"	"	670	223	1931	"	42	308	"	"	235	370	1931	"	16
56	"	"	190	175	"	"	703	232	1930	"	870	310	1930	"	861	376	"	"	181
59	"	"	678	177	"	"	863	238	1931	"	233	313	"	"	1001	379	1930	"	1002
61	"	"	192	181	"	"	446	243	1930	"	705	316	"	"	971	380	"	"	980
63	"	"	448	185	"	"	508	247	"	"	869	317	"	"	972	381	1931	"	242
67	"	"	188	187	"	"	448	251	"	"	981	333	"	"	977	390	"	"	225
85	"	*PC*	57	188	"	"	505	259	"	"	769	340	"	"	859	395	"	"	236
90	"	*M*	430	193	"	"	785	261	"	"	766								

13 & 14 All India Criminal Reports=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* A. I. R. 1930 Allahabad.

31 Cr. L. J. & 121 to 128 I. C.=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* A. I. R. 1930 Lahore.

1930 Criminal Cases=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* A. I. R. 1930 Nagpur.

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1930 MADRAS SECTION, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1930 MADRAS.
Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1930 Madras=Other Journals

A.I.R.	Other Journals
1	121 *I C* 765
4	...
12	1929*M W N* 811
	123 *I C* 24
16	57 *M L J* 673
	30 *M L W* 697
	120 *I C* 561
	53 *Mad* 54
19	126 *I C* 634
20	57 *M L J* 718
	30 *M L W* 846
	53 *Mad* 155
	1930*M W N* 402
	124 *I C* 303
21	57 *M L J* 726
	30 *M L W* 807
	120 *I C* 371
	53 *Mad* 151
22	57 *M L J* 260
	30 *M L W* 357
	1929*M W N* 608
	122 *I C* 526
24	57 *M L J* 99
	30 *M L W* 188
	52 *Mad* 919
	121 *I C* 603
30	57 *M L J* 728
	30 *M L W* 810
	124 *I C* 290
	53 *Mad* 838
38	30 *M L W* 868
	124 *I C* 209
43	57 *M L J* 510
	30 *M L W* 289
	1929*M W N* 773
	52 *Mad* 972
	121 *I C* 601
45	57 *M L J* 357
	30 *M L W* 242
	1929*M W N* 599
	53 *Mad* 48
	122 *I C* 523
47	30 *M L W* 507
47	124 *I C* 208
48	52 *Mad* 787
	2 *M Cr C* 183
	57 *M L J* 228
	1929*M W N* 518
	30 *M L W* 201
	122 *I C* 171
50	32 *M L W* 788
51	30 *M L W* 799
	57 *M L J* 746
	53 *Mad* 188
	124 *I C* 497
55	52 *Mad* 764
	30 *M L W* 372
	57 *M L J* 71
	1929*M W N* 431
	121 *I C* 849
61	123 *I C* 351
65	57 *M L J* 789
	30 *M L W* 1045
	124 *I C* 301
67	57 *M L J* 668
	30 *M L W* 713
	1929*M W N* 739
	52 *Mad* 967
	120 *I C* 563
69	30 *M L W* 862
	57 *M L J* 712
	124 *I C* 298
72	119 *I C* 466
74	1929*M W N* 879
	57 *M L J* 723
	30 *M L W* 849
	53 *Mad* 147
	124 *I C* 223
75	30 *M L W* 386
	57 *M L J* 398
	52 *Mad* 952
	121 *I C* 621
78	57 *M L J* 609
	30 *M L W* 914
	123 *I C* 15
84	121 *I C* 18
97	30 *M L W* 536
	57 *M L J* 481
	120 *I C* 851
100	1929*M W N* 532
	123 *I C* 14
102	2 *M Cr C* 212
	1929*M W N* 796
	30 *M L W* 736
	57 *M L J* 754
	1930*Cr C* 9
	122 *I C* 786
	31 *Cr L J* 457
	14 *AICrR* 281
103	1929*M W N* 709
	2 *M Cr C* 291
	1930*Cr C* 17
	122 *I C* 788
	31 *Cr L J* 459
	14 *AICrR* 294
104SB	129 *I C* 654
105	30 *M L W* 551
	1929*M W N* 867
	120 *I C* 72
109	57 *M L J* 817
	30 *M L W* 1040
	124 *I C* 131
112 (1)	30 *M L W* 948
	1929*M W N* 910
	57 *M L J* 816
	124 *I C* 134
112 (2)	120 *I C* 576
113SB	58 *M L J* 10
	31 *M L W* 78
	122 *I C* 449
119SB	1930*M W N* 25
	31 *M L W* 215
	122 *I C* 349
121SB	58 *M L J* 68
	31 *M L W* 223
	124 *I C* 151
123SB	58 *M L J* 95
	31 *M L W* 173
123SB	1930*M W N* 14
	124 *I C* 11
124SB	58 *M L J* 46
	31 *M L W* 141
	1930*M W N* 20
	123 *I C* 801
	53 *Mad* 702
126SB	31 *M L W* 91
	58 *M L J* 23
	122 *I C* 339
127SB	57 *M L J* 854
	31 *M L W* 160
	1930*M W N* 23
	124 *I C* 205
128	30 *M L W* 721
	1929*M W N* 793
	1930*Cr C* 17
	3 *M Cr C* 27
	122 *I C* 788
	31 *Cr L J* 459
	14 *AICrR* 295
129	30 *M L W* 954
	1929*M W N* 911
	58 *M L J* 39
	53 *Mad* 223
	124 *I C* 220
132	57 *M L J* 756
	30 *M L W* 876
	53 *Mad* 309
	124 *I C* 502
136	57 *M L J* 822
	30 *M L W* 1036
	124 *I C* 134
138	1929*M W N* 917
	31 *M L W* 38
	122 *I C* 366
	53 *Mad* 670
141	123 *I C* 596
146	123 *I C* 600
149	57 *M L J* 459
	30 *M L W* 349
	123 *I C* 579

A. I. R. 1930 Madras=Other Journals—(*Contd.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
154	58 *M L J*	29	191	1930*Cr C*	191	242	1930*Cr C*	273	328	118 *I C*	769
	1929*M W N*	831		31 *Cr L J*	387		121 *I C*	833	329	118 *I C*	779
	31 *M L W*	97		122 *I C*	341		31 *Cr L J*	324	331**FB**	58 *M L J*	229
	124 *I C*	140		14 *AICrR*	120		53 *Mad*	320		31 *M L W*	243
158	57 *M L J*	781	192	1930*M W N*	76		13 *AICrR*	161		1930*Cr C*	323
	30 *M L W*	979		1930*Cr C*	192	246	1930*Cr C*	199		3 *M Cr C*	34
	53 *Mad*	395		31 *M L W*	384		58 *M L J*	111		1930*M W N*	178
	121 *I C*	605		3 *M Cr C*	61		31 *M L W*	71		53 *Mad*	173
159	1929*M W N*	651		31 *Cr L J*	986		3 *M Cr C*	1		31 *Cr L J*	618
	58 *M L J*	54		126 *I C*	112		1930*M W N*	174		124 *I C*	1
	31 *M L W*	150	193	1930*Cr C*	86		121 *I C*	763	337	1929*M W N*	664
	123 *I C*	603		1929*M W N*	896		31 *Cr L J*	329		122 *I C*	653
160	57 *M L J*	800		3 *M Cr C*	24		13 *AICrR*	472	339	120 *I C*	743
	30 *M L W*	1010		121 *I C*	125		53 *Mad*	414	342 (1)	1929*M W N*	809
	124 *I C*	282		31 *Cr L J*	203	248	1929*M W N*	779		124 *I C*	219
168	123 *I C*	358	194	1930*Cr C*	88		124 *I C*	158	342 (2)	119 *I C*	718
172	119 *I C*	596		1929*M W N*	696	251	30 *M L W*	966	343	120 *I C*	746
173	30 *M L W*	911		2 *M Cr C*	275		1929*M W N*	752	344	120 *I C*	379
	120 *I C*	880		126 *I C*	613		124 *I C*	277	349 (1)	123 *I C*	362
	58 *M L J*	349		31 *Cr L J*	1089	257	1929*M W N*	776	349 (2)	31 *M L W*	113
175	1929*M W N*	667	195	30 *M L W*	949		120 *I C*	375		58 *M L J*	698
	123 *I C*	35		58 *M L J*	118	258	30 *M L W*	851		124 *I C*	136
178	1929*M W N*	629		121 *I C*	216		53 *Mad*	653	353	58 *M L J*	207
	125 *I C*	66	197	122 *I C*	345		125 *I C*	85		31 *M L W*	207
181	53 *Mad*	202	200	52 *Mad*	866	264	127 *I C*	139		1930*M W N*	104
	123 *I C*	31		57 *M L J*	536	268	58 *M L J*	137		125 *I C*	95
	32 *M L W*	72		30 *M L W*	261		31 *M L W*	30	354	58 *M L J*	187
185	2 *M Cr C*	243		122 *I C*	360		1930*M W N*	50		31 *M L W*	315
	1929*M W N*	885	206	122 *I C*	164		123 *I C*	337		1930*M W N*	406
	31 *M L W*	241	209**FB**	58 *M L J*	260	272	126 *I C*	284		53 *Mad*	487
	1930*Cr C*	185		31 *M L W*	738	276	58 *M L J*	36		125 *I C*	255
	31 *Cr L J*	414		53 *Mad*	420		32 *M L W*	231	355	126 *I C*	110
	122 *I C*	463		126 *I C*	273		126 *I C*	283	356 (1)	31 *M L W*	75
	14 *AICrR*	165	216	58 *M L J*	104	278	52 *Mad*	648		58 *M L J*	170
186	1929*M W N*	898		122 *I C*	337		57 *M L J*	116		1930*M W N*	408
	2 *M Cr C*	252		31 *M L W*	849		29 *M L W*	649		122 *I C*	341
	1930*Cr C*	186	218	31 *M L W*	65		1929*M W N*	489		53 *Mad*	243
	31 *M L W*	386		1930*M W N*	16		122 *I C*	351	356 (2)	123 *I C*	199
	125 *I C*	253		58 *M L J*	210	287	58 *M L J*	127	361	122 *I C*	342
	31 *Cr L J*	827		122 *I C*	504		1930*M W N*	40	364	30 *M L W*	898
187	2 *M Cr C*	222		53 *Mad*	480		31 *M L W*	692		122 *I C*	37
	30 *M L W*	883	221	58 *M L J*	57		123 *I C*	812	371	117 *I C*	143
	57 *M L J*	763		1930*M W N*	48	292	52 *Mad*	945	372	117 *I C*	139
	1930*M W N*	78		31 *M L W*	194		57 *M L J*	448	376**FB**	53 *Mad*	248
	1930*Cr C*	187		122 *I C*	175		30 *M L W*	509		123 *I C*	203
	53 *Mad*	165	222	122 *I C*	35		1929*M W N*	714		58 *M L J*	510
	124 *I C*	501	224	126 *I C*	284		120 *I C*	739		31 *M L W*	282
	31 *Cr L J*	715	225 (1)	1930*Cr C*	120	295	31 *M L W*	24	381**FB**	31 *M L W*	294
188	31 *M L W*	236		1929*M W N*	893		1930*M W N*	199		58 *M L J*	521
	1930*M W N*	80		3 *M Cr C*	55		122 *I C*	460		53 *Mad*	262
	1930*Cr C*	188		122 *I C*	800		53 *Mad*	214		123 *I C*	606
	121 *I C*	862		31 *Cr L J*	460	298	126 *I C*	279	382**FB**	31 *M L W*	371
	3 *M Cr C*	67		14 *AICrR*	341	302	58 *M L J*	107		58 *M L J*	420
	31 *Cr L J*	347	225 (2)	126 *I C*	97		1930*M W N*	37		53 *Mad*	270
	14 *AICrR*	17	226	1929*M W N*	744		31 *M L W*	712		124 *I C*	55
189	1930*Cr C*	189		122 *I C*	455		123 *I C*	40	389**FB**	58 *M L J*	369
	1930*M W N*	191	231	121 *I C*	598	303	121 *I C*	845		31 *M L W*	365
	122 *I C*	497		32 *M L W*	216	305	31 *M L W*	44		53 *Mad*	288
	3 *M Cr C*	92	234	121 *I C*	846		123 *I C*	584		124 *I C*	61
	31 *Cr L J*	422	236	120 *I C*	737		53 *Mad*	805	392**FB**	31 *M L W*	428
	14 *AICrR*	246	239	1929*M W N*	828	317	1929*M W N*	360		58 *M L J*	494
190	1929*M W N*	883		124 *I C*	153		120 *I C*	882		1930*M W N*	404
	31 *M L W*	233	240	57 *M L J*	426	322	120 *I C*	887		53 *Mad*	266
	1930*Cr C*	190		1929*M W N*	605		30 *M L W*	557		57 *M L J*	404
	58 *M L J*	352		30 *M L W*	717	325	1929*M W N*	837		30 *M L W*	627
	3 *M Cr C*	56		120 *I C*	372		124 *I C*	193	393	126 *I C*	97
	123 *I C*	10		53 *Mad*	38		32 *M L W*	108		57 *M L J*	219
	31 *Cr L J*	461	242	58 *M L J*	148	326	52 *Mad*	856	405	118 *I C*	499
	14 *AICrR*	305		31 *M L W*	16		57 *M L J*	720			
191	1929*M W N*	504		1930*M W N*	82		30 *M L W*	251			
	2 *M Cr C*	190		2 *M Cr C*	277		121 *I C*	837			

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A.I.R.	Other Journals
405	30 *M L W* 574
410	1930*M W N* 137
	123 *I C* 604
	32 *M L W* 702
412	115 *I C* 348
413	57 *M L J* 780
	30 *M L W* 977
	122 *I C* 799
414	120 *I C* 863
418	1929*M W N* 873
	125 *I C* 71
421	114 *I C* 635
422	1929*M W N* 840
	124 *I C* 155
	32 *M L W* 111
425	120 *I C* 77
427	53 *Mad* 158
	57 *M L J* 783
	30 *M L W* 976
	1929*M W N* 878
	124 *I C* 304
428	53 *M L J* 435
	1929*M W N* 810
	31 *M L W* 720
	124 *I C* 276
429	119 *I C* 480
	1931*M W N* 103
430 (1)	1930*Cr C* 335
	58 *M L J* 193
	31 *M L W* 205
	1930*M W N* 172
	3 *M Cr C* 90
	31 *Cr L J* 639
	124 *I C* 139
	53 *Mad* 508
430 (2)	58 *M L J* 89
	30 *M L W* 960
	124 *I C* 273
434	125 *I C* 242
439	121 *I C* 153
441	31 *M L W* 202
	1930*M W N* 187
	3 *M Cr C* 156
	31 *Cr L J* 625
	124 *I C* 15
	53 *Mad* 439
	59 *M L J* 239
	1930*Cr C* 493
443	120 *I C* 69
	30 *Cr L J* 1160
	3 *M Cr C* 18
	1930*Cr C* 495
445	57 *M L J* 457
	30 *M L W* 468
	2 *M Cr C* 210
	1929*M W N* 596
	31 *Cr L J* 639
	124 *I C* 206
	1930*Cr C* 497
446	58 *M L J* 490
	31 *M L W* 542
	3 *M Cr C* 181
	53 *Mad* 585
	127 *I C* 290
	31 *Cr L J* 1193
	1930*Cr C* 498
	15 *A I Cr R* 157
448 (1)	3 *M Cr C* 187
	127 *I C* 656
	32 *Cr L J* 32
	1931*M W N* 120
448 (2)	1930*Cr C* 500
	1930*M W N* 96
	3 *M Cr C* 63
	32 *M L W* 215
	31 *Cr L J* 1198
	127 *I C* 304
	1930*Cr C* 500
	15 *A I Cr R* 156
449**SB**	58 *M L J* 581
	31 *M L W* 769
	53 *Mad* 510
	127 *I C* 131
457**SB**	58 *M L J* 602
	31 *M L W* 789
	1930*M W N* 777
	127 *I C* 225
458	31 *M L W* 339
	124 *I C* 144
	59 *M L J* 501
	125 *I C* 237
466	58 *M L J* 343
471	31 *M L W* 832
	125 *I C* 247
	31 *M L W* 387
473	59 *M L J* 22
	53 *Mad* 645
	126 *I C* 629
	122 *I C* 501
476	126 *I C* 597
479	59 *M L J* 531
	32 *M L W* 729
	1930*Cr C* 507
483	58 *M L J* 414
	31 *M L W* 524
	123 *I C* 809
	31 *Cr L J* 602
	1930*M W N* 534
	3 *M Cr C* 160
	53 *Mad* 688
	124 *I C* 53
485	32 *M L W* 691
	1930*M W N* 32
486	123 *I C* 806
	127 *I C* 142
489	31 *M L W* 487
490	123 *I C* 545
	53 *Mad* 491
	59 *M L J* 585
	53 *Mad* 297
496	31 *M L W* 476
	59 *M L J* 151
	31 *M L W* 210
	1930*M W N* 108
	124 *I C* 12
	59 *M L J* 117
502	58 *M L J* 547
	1930*M W N* 410
	3 *M Cr C* 188
	53 *Mad* 775
	127 *I C* 289
	31 *Cr L J* 1191
	1930*Cr C* 577
505	58 *M L J* 649
	31 *M L W* 837
	1930*M W N* 530
	3 *M Cr C* 198
	1930*Cr C* 579
	127 *I C* 238
	31 *Cr L J* 1198
	15 *A I Cr R* 160
507	3 *M Cr C* 185
508	127 *I C* 295
	31 *Cr L J* 1195
	1930*Cr C* 580
	15 *A I Cr R* 146
509	58 *M L J* 509
	1930*M W N* 352
	31 *M L W* 719
	3 *M Cr C* 113
	127 *I C* 296
	31 *Cr L J* 1196
	1930 *Cr C* 581
510 (1)	58 *M L J* 622
	31 *M L W* 754
	1930*M W N* 536
	3 *M Cr C* 202
	1930*Cr C* 582
	31 *Cr L J* 1196
	127 *I C* 297
510 (2)	58 *M L J* 571
	31 *M L W* 765
	124 *I C* 49
512	59 *M L J* 28
	32 *M L W* 79
	53 *Mad* 771
	126 *I C* 612
514**FB**	31 *M L W* 643
	58 *M L J* 675
	53 *Mad* 334
	126 *I C* 614
520	31 *M L W* 546
	58 *M L J* 658
	1930*M W N* 587
	126 *I C* 621
528	53 *Mad* 378
	59 *M L J* 102
	32 *M L W* 329
534	53 *Mad* 61
	58 *M L J* 468
	31 *M L W* 617
	127 *I C* 113
538	58 *M L J* 355
	1930*M W N* 160
	123 *I C* 194
	31 *M L W* 266
	53 *Mad* 581
	127 *I C* 126
539	31 *M L W* 70
540	123 *I C* 578
	53 *Mad* 714
	126 *I C* 730
541	58 *M L J* 189
544	31 *M L W* 229
	1930*M W N* 99
	124 *I C* 129
547	31 *M L W* 516
	1930*M W N* 129
	128 *I C* 512
549	31 *M L W* 498
	53 *Mad* 608
	128 *I C* 504
	59 *M L J* 974
	128 *I C* 171
554	58 *M L J* 562
555	31 *M L W* 592
	1930*M W N* 537
	128 *I C* 172
559	1930*M W N* 103
	129 *I C* 656
560	58 *M L J* 437
	31 *M L W* 312
	125 *I C* 254
561	58 *M L J* 341
	31 *M L W* 238
	53 *Mad* 117
	126 *I C* 593
563	31 *M L W* 526
	1930 *M W N* 111
	125 *I C* 227
567	123 *I C* 42
569	122 *I C* 47
570	31 *M L W* 520
	127 *I C* 228
	59 *M L J* 39
573	31 *M L W* 537
	58 *M L J* 542
	127 *I C* 226
575	127 *I C* 237
576	59 *M L J* 30
	31 *M L W* 269
	127 *I C* 298
577	1930*M W N* 153
	58 *M L J* 318
	123 *I C* 47
	31 *M L W* 262
	53 *Mad* 708
579	126 *I C* 486
582	31 *M L W* 396
	58 *M L J* 524
	125 *I C* 79
588	58 *M L J* 406
	1930*M W N* 208
	123 *I C* 577
	53 *Mad* 390
	31 *M L W* 473
590	32 *M L W* 160
	126 *I C* 492
593	127 *I C* 127
594	124 *I C* 51
597	58 *M L J* 497
	1930*M W N* 291
	31 *M L W* 826
	53 *Mad* 540
	127 *I C* 128
600	58 *M L J* 377
	1930*M W N* 140
	53 *Mad* 352
	31 *M L W* 271
	127 *I C* 120
606	58 *M L J* 653
	1930*M W N* 295
	31 *M L W* 840
	53 *Mad* 680
	127 *I C* 117
609	1930*M W N* 225
	31 *M L W* 455
	124 *I C* 593
	53 *Mad* 449
	59 *M L J* 956
618	31 *M L W* 587
	1930*M W N* 373
	59 *M L J* 33
	53 *Mad* 533
	127 *I C* 300
621	32 *M L W* 211
	125 *I C* 74
624	1930*M W N* 163
	125 *I C* 225
626 (1)	127 *I C* 240
626 (2)	58 *M L J* 337
	1930*M W N* 29
	124 *I C* 511
	31 *M L W* 438

A. I. R. 1930 Madras=Other Journals—(*Contd.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
629	58	*M L J* 410	679	125	*I C* 545	751	1930	*M W N* 396	795	127	*I C* 237
	1930	*M W N* 243	683	58	*M L J* 688		59	*M L J* 321	796	125	*I C* 68
	31	*M L W* 442		31	*M L W* 817		32	*M L W* 850		33	*M L W* 264
	124	*I C* 602		125	*I C* 549		129	*I C* 650	798	59	*M L J* 274
	53	*Mad* 398	688	1930	*M W N* 337	755**FB**	59	*M L J* 183		32	*M L W* 179
631	1930	*Cr C* 576		32	*M L W* 100		32	*M L W* 301		127	*I C* 609
	3	*M Cr C* 207		59	*M L J* 160		127	*I C* 231		1930	*M W N* 1063
	31	*Cr L J* 1197		125	*I C* 539	761**FB**	32	*M L W* 154	801**FB**	32	*M L W* 395
	127	*I C* 298		53	*Mad* 750		1930	*M W N* 714		1930	*M W N* 798
	15	*A I Cr R* 154	693	31	*M L W* 792		59	*M L J* 267		59	*M L J* 634
632(1)	1930	*Cr C* 536		1930	*M W N* 362		53	*Mad* 900		53	*Mad* 881
	124	*I C* 606		125	*I C* 533		127	*I C* 303		127	*I C* 624
	3	*M Cr C* 208		59	*M L J* 718	763**FB**	1930	*M W N* 717	808**FB**	1930	*M W N* 759
	31	*Cr L J* 720	699 (1)	31	*M L W* 831		32	*M L W* 165		32	*M L W* 287
632 (2)	58	*M L J* 397		58	*M L J* 651		59	*M L J* 220		59	*M L J* 403
	1930	*M W N* 496		1930	*M W N* 840		126	*I C* 595		53	*Mad* 904
	3	*M Cr C* 100		126	*I C* 111	764**FB**	1930	*M W N* 716		127	*I C* 611
	124	*I C* 506	699 (2)	123	*I C* 193		32	*M L W* 170	814	32	*M L W* 61
	31	*M L W* 451	701	58	*M L J* 703		59	*M L J* 265		127	*I C* 292
	31	*Cr L J* 712		1930	*M W N* 520		126	*I C* 596	817**FB**	1930	*M W N* 779
	53	*Mad* 590		31	*M L W* 845		54	*Mad* 21		32	*M L W* 836
	1930	*Cr C* 632		125	*I C* 554	765**FB**	1930	*M W N* 493		127	*I C* 805
635	31	*M L W* 675		53	*Mad* 761		59	*M L J* 308		59	*M L J* 932
	1930	*M W N* 305	703	1930	*Cr C* 760		32	*M L W* 381		54	*Mad* 81
	58	*Mad* 621		3	*M Cr C* 175		126	*I C* 495	820	125	*I C* 65
	126	*I C* 721		1930	*M W N* 349		31	*Cr L J* 1010	821	59	*M L J* 196
	59	*M L J* 859		31	*Cr L J* 984		3	*M Cr C* 266		1930	*M W N* 708
644	126	*I C* 733		126	*I C* 110		54	*Mad* 16		32	*M L W* 206
646	126	*I C* 735	704	1930	*Cr C* 761		1930	*Cr C* 961		127	*I C* 801
648	31	*M L W* 721		31	*M L W* 716	766**FB**	59	*M L J* 346	824	1930	*M W N* 625
	1930	*M W N* 427		3	*M Cr C* 203		32	*M L W* 269		59	*M L J* 485
	126	*I C* 634		125	*I C* 558		1930	*M W N* 917		32	*M L W* 416
	53	*Mad* 722		31	*Cr L J* 897		126	*I C* 490		127	*I C* 809
	59	*M L J* 650		59	*M L J* 520		3	*M Cr C* 261		54	*Mad* 132
654	31	*M L W* 153		14	*A I Cr R* 514		31	*Cr L J* 1008	832	59	*M L J* 194
	122	*I C* 507	705	1930	*Cr C* 652		53	*Mad* 873		1930	*M W N* 649
658	127	*I C* 143		1930	*M W N* 413		1930	*Cr C* 963		32	*M L W* 157
659	58	*M L J* 240		125	*I C* 557	769	1930	*Cr C* 895		128	*I C* 146
	1930	*M W N* 156		31	*Cr L J* 895		126	*I C* 594	833**FB**	1930	*M W N* 880
	31	*M L W* 446		3	*M Cr C* 243		3	*M Cr C* 259		58	*M L J* 469
	124	*I C* 508		14	*A I Cr R* 511		31	*Cr L J* 1085		32	*M L W* 433
662	126	*I C* 609	707	123	*I C* 39	770	125	*I C* 231		54	*Mad* 1
665	126	*I C* 604	708 (1)	125	*I C* 560	776	1928	*M W N* 576	834**FB**	1930	*M W N* 882
670	1930	*M W N* 347	708 (2)	126	*I C* 632		128	*I C* 707		32	*M L W* 454
	3	*M Cr C* 172	710	123	*I C* 341	779	53	*Mad* 237		59	*M L J* 686
	32	*M L W* 23	712	125	*I C* 559		59	*M L J* 17		128	*I C* 154
	126	*I C* 601	713	123	*I C* 810		32	*M L W* 4		54	*Mad* 12
	31	*Cr L J* 1086	714	58	*M L J* 613		126	*I C* 481	836	32	*M L W* 363
	1930	*Cr C* 755		31	*M L W* 757	782	1930	*M W N* 470		1930	*M W N* 613
671	32	*M L W* 17		130	*I C* 453		126	*I C* 483		128	*I C* 147
	3	*M Cr C* 217	719	123	*I C* 607	785 (1)	1930	*Cr C* 896		53	*Mad* 921
	1930	*Cr C* 754		32	*M L W* 647		58	*M L J* 579	844	1930	*M W N* 821
	126	*I C* 603	721	123	*I C* 7		31	*M L W* 755		128	*I C* 161
	1930	*M W N* 1129		53	*Mad* 475		1930	*M W N* 532		59	*M L J* 690
	31	*Cr L J* 1088		32	*M L W* 143		3	*M Cr C* 193		32	*M L W* 794
673	1930	*M W N* 240		59	*M L J* 316		127	*I C* 645	854	59	*M L J* 458
	125	*I C* 543	723	122	*I C* 516		32	*Cr L J* 27		32	*M L W* 534
674	58	*M L J* 575	727	31	*M L W* 655	785 (2)	53	*Mad* 233		3	*M Cr C* 359
	31	*M L W* 534		1930	*M W N* 438		58	*M L J* 98		128	*I C* 159
	125	*I C* 530		53	*Mad* 549		31	*M L W* 170		1930	*M W N* 1209
	53	*Mad* 767		59	*M L J* 358		123	*I C* 367		32	*Cr L J* 109
676	1930	*M W N* 133		127	*I C* 630	787	59	*M L J* 225		54	*Mad* 63
	125	*I C* 529	738	127	*I C* 641		32	*M L W* 148		1930	*Cr C* 1149
678	1930	*Cr C* 762	740	123	*I C* 45		53	*Mad* 796	856	59	*M L J* 232
	3	*M Cr C* 59	742	123	*I C* 197		127	*I C* 643		1930	*M W N* 767
	1930	*M W N* 73	744	59	*M L J* 461	789	1930	*M W N* 120		32	*M L W* 299
	125	*I C* 532		32	*M L W* 584		127	*I C* 646		128	*I C* 514
	31	*Cr L J* 851		127	*I C* 619		33	*M L W* 191	857	1930	*Cr C* 1033
	14	*A I Cr R* 445	748	1930	*M W N* 195	795	32	*M L W* 158		1930	*M W N* 377
679	1930	*M W N* 328		32	*M L W* 138		1930	*M W N* 712		3	*M Cr C* 95
	31	*M L W* 508		127	*I C* 617		59	*M L J* 684			

A. I. R. 1930 Madras=Other Journals.—(*Concld.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
857	53 *Mad*	937	874	128 *I C*	518	945	1930 *M W N*	891	981	129 *I C*	626
	127 *I C*	654	881	1930 *M W N*	705		129 *I C*	51		1930 *Cr C*	1197
	32 *M L W*	894		32 *M L W*	261		32 *M L W*	963	983	1930 *M W N*	911
	59 *M L J*	945		59 *M L J*	714		60 *M L J*	117		32 *M L W*	782
	32 *Cr L J*	30		53 *Mad*	790		54 *Mal*	112		3 *M Cr C*	366
859	1930 *Cr C*	1035		128 *I C*	451	954	1930 *M W N*	676		129 *I C*	79
	1930 *M W N*	698	883	32 *M L W*	233		32 *M L W*	439		1930 *Cr C*	1199
	32 *M L W*	320		59 *M L J*	558		59 *M L J*	907		32 *Cr L J*	226
	3 *M Cr C*	340		128 *I C*	561		129 *I C*	240	985	129 *I C*	45
	127 *I C*	652		54 *Mad*	27	956	59 *M L J*	596		59 *M L J*	928
	59 *M L J*	887	896	32 *M L W*	475		128 *I C*	689		32 *M L W*	901
	32 *Cr L J*	27		60 *M L J*	25		32 *M L W*	768	987	1930 *M W N*	971
861	1930 *Cr C*	1037		128 *I C*	851		1931 *M W N*	224		32 *M L W*	766
	1930 *M W N*	684		53 *Mad*	979	963	1930 *M W N*	475		129 *I C*	44
	33 *M L W*	49	911	1930 *M W N*	353		32 *M L W*	561		60 *M L J*	237
	3 *M Cr C*	310		32 *M L W*	200		59 *M L J*	755	988	129 *I C*	63
	32 *Cr L J*	107		59 *M L J*	752		128 *I C*	497		1930 *M W N*	644
	128 *I C*	145		53 *Mad*	802		54 *Mal*	92		60 *M L J*	79
863	1930 *Cr C*	1039		128 *I C*	449	971	1930 *M W N*	500		33 *M L W*	391
	32 *M L W*	203	913 (1)	1930 *M W N*	679		3 *M Cr C*	316	991	1930 *M W N*	930
	1930 *M W N*	686		32 *M L W*	438		129 *I C*	80		32 *M L W*	502
	3 *M Cr C*	177		59 *M L J*	524		33 *M L W*	107		128 *I C*	867
	127 *I C*	803		129 *I C*	35		1930 *Cr C*	1187		59 *M L J*	881
	59 *M L J*	836	913 (2)	1930 *M W N*	869		32 *Cr L J*	228	995	1930 *M W N*	979
	53 *Mad*	865	**FB**	32 *M L W*	449	972	129 *I C*	228		59 *M L J*	579
	32 *Cr L J*	40		59 *M L J*	629		1930 *M W N*	681		32 *M L W*	599
865	59 *M L J*	430		129 *I C*	33		53 *Mad*	861		128 *I C*	713
	32 *M L W*	175		54 *Mad*	5		32 *M L W*	220	998	1930 *M W N*	837
	1930 *M W N*	987		59 *M L J*	425		3 *M Cr C*	317		32 *M L W*	443
	3 *M Cr C*	279	915	32 *M L W*	544		59 *M L J*	939		59 *M L J*	525
	129 *I C*	68		128 *I C*	473		1930 *Cr C*	1188		128 *I C*	879
	32 *Cr L J*	215		128 *I C*	515	973	32 *Cr L J*	261	1000	32 *M L W*	172
	1930 *Cr C*	1121	918	32 *M L W*	608		1930 *M W N*	909		53 *Mad*	780
867	32 *M L W*	280		1930 *M W N*	524		3 *M Cr C*	356		129 *I C*	66
	1930 *M W N*	787	921	32 *M L W*	357		129 *I C*	77	1001	1930 *M W N*	409
	3 *M Cr C*	275		53 *Mad*	943		1930 *Cr C*	1189		32 *M L W*	152
	1930 *Cr C*	1123		128 *I C*	509	975	32 *Cr L J*	225		1930 *Cr C*	1055
	59 *M L J*	674		59 *M L J*	893		1930 *M W N*	1100		53 *Mad*	870
	129 *I C*	633		59 *M L J*	234		3 *M Cr C*	285		3 *M Cr C*	313
869	59 *M L J*	229	924	32 *M L W*	342		32 *M L W*	784		59 *M L J*	708
	32 *M L W*	273		128 *I C*	710		59 *M L J*	914		129 *I C*	628
	1930 *M W N*	689		32 *M L W*	435		129 *I C*	70	1002	1930 *M W N*	905
	3 *M Cr C*	247	927 **FB**	129 *I C*	233		32 *Cr L J*	217		3 *M Cr C*	379
	129 *I C*	72		1930 *Cr C*	1176		1930 *Cr C*	1191		1930 *Cr C*	1216
	32 *Cr L J*	219		32 *Cr L J*	266	977	1930 *M W N*	985	1003	59 *M L J*	778
	1930 *Cr C*	1125		59 *M L J*	319		3 *M Cr C*	333	**FB**	129 *I C*	39
870	32 *M L W*	389	929	32 *M L W*	283		129 *I C*	74		32 *M L W*	935
	1930 *M W N*	489		1930 *M W N*	1047		32 *Cr L J*	221	1004	59 *M L J*	548
	3 *M Cr C*	232		1930 *Cr C*	1141		1930 *Cr C*	1193		32 *M L W*	673
	129 *I C*	230		3 *M Cr C*	289	978	1930 *M W N*	1097		128 *I C*	870
	59 *M L J*	677		129 *I C*	37		32 *M L W*	789		53 *Mad*	968
	54 *Mad*	68		32 *Cr L J*	207		59 *M L J*	851	1009	1930 *M W N*	925
	1930 *Cr C*	1126		1930 *M W N*	994		129 *I C*	75		32 *M L W*	538
	32 *Cr L J*	263	930	32 *M L W*	862		32 *Cr L J*	223		128 *I C*	716
873	59 *M L J*	853		60 *M L J*	97		4 *M Cr C*	17		60 *M L J*	90
	1930 *Cr C*	1149		129 *I C*	469	980	1930 *Cr C*	1194		59 *M L J*	826
	32 *M L W*	743		59 *M L J*	111		1930 *M W N*	905	1012	32 *M L W*	950
	3 *M Cr C*	368	941	32 *M L W*	316		3 *M Cr C*	380		129 *I C*	40
	1930 *M W N*	1045		128 *I C*	523		129 *I C*	463		60 *M L J*	72
	128 *I C*	449		1930 *M W N*	505		1930 *Cr C*	1196	1017	1930 *M W N*	1021
	32 *Cr L J*	144	943	59 *M L J*	312	981	1930 *M W N*	381		32 *M L W*	843
	53 *Mad*	870		32 *M L W*	354		59 *M L J*	278		129 *I C*	47
874	59 *M L J*	513		53 *Mad*	784		32 *M L W*	265		1930 *M W N*	320
	53 *Mad*	826		128 *I C*	699		3 *M Cr C*	251	1021	129 *I C*	59
	32 *M L W*	745					53 *Mad*	1023			

Note—*Cases not bearing parallel references against them are not reported elsewhere.*

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Perumal Nadar *In re* (1928) 54 M. L. J. 595=27 M.L.W. 366=(1928) M.W.N. 271=A. I. R. 1928 Mad. 463=109 I. C. 651.	" in A. I. R. 1930 Mad. 376 (F.B.)
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LIST OF ABBREVIATIONS

A. I. Cr. R.	...	All India Criminal Reports.
All. or A.	...	Indian Law Reports, Allahabad Series.
A. L. J.	...	Allahabad Law Journal.
A. I. R. All.	...	All India Reporter, Allahabad.
Bom. or B.	...	Indian Law Reports, Bombay Series.
Bom. L. R.	...	Bombay Law Reporter.
A. I. R. Bom.	...	All India Reporter, Bombay.
Bur. L. T.	...	Burma Law Times.
Cal. or C.	...	Indian Law Reports, Calcutta Series.
C. L. J.	...	Calcutta Law Journal.
C. L. R.	...	Calcutta Law Reports.
Cr. C.	...	Criminal Cases.
C. W. N.	...	Calcutta Weekly Notes.
A. I. R. Cal.	...	All India Reporter, Calcutta.
Cr. L. J.	...	Criminal Law Journal.
I. A.	...	Law Reports, Indian Appeals.
I. C.	...	Indian Cases.
Lah. or L.	...	Indian Law Reports, Lahore Series.
A. I. R. Lah.	...	All India Reporter, Lahore.
Lah. L. J. or L. L. J.	...	Lahore Law Journal.
L. B. R.	...	Lower Burma Rulings.
A. I. R. L. B.	...	All India Reporter, Lower Burma.
L. R. A.	...	The Law Reporter, Allahabad.
Luck.	...	Indian Law Reports, Lucknow Series.
Mad. or M.	...	Indian Law Reports, Madras Series.
M. L. J.	...	Madras Law Journal.
Mad. Cr. C.	...	Madras Criminal Cases.
M. L. T.	...	Madras Law Times.
L. W. or M. L. W.	...	Madras Law Weekly.
M. W. N.	...	Madras Weekly Notes.
A. I. R. Mad.	...	All India Reporter, Madras.
N. L. J.	...	Nagpur Law Journal.
N. L. R.	...	Nagpur Law Reports.
A. I. R. Nag.	...	All India Reporter, Nagpur.
O. C.	...	Oudh Cases.
A. I. R. Oudh	...	All India Reporter, Oudh.
O. L. J.	...	Oudh Law Journal.
O. W. N.	...	Oudh Weekly Notes.
P. R.	...	Punjab Record.
P. L. R.	...	Punjab Law Reporter.
P. W. R.	...	Punjab Weekly Reporter.
Pat. or P.	...	Indian Law Reports, Patna Series.
P. H. C. C.	...	Patna High Court Cases (Supplt. to C. W. N.)
A. I. R. Pat.	...	All India Reporter, Patna.
A. I. R. P. C.	...	All India Reporter, Privy Council.
Pat. L. J.	...	Patna Law Journal.
Pat. L. T.	...	Patna Law Times.
Pat. L. W.	...	Patna Law Weekly.
Rang. or R.	...	Indian Law Reports, Rangoon Series.
A. I. R. Rang.	...	All India Reporter, Rangoon.
Sar.	...	Saraswati's P. C. Judgments.
S. L. R.	...	Sind Law Reporter.
Suther.	...	Sutherland's P. C. Judgments.
A. I. R. Sind	...	All India Reporter, Sind.
U. B. R.	...	Upper Burma Rulings.
A. I. R. U. B.	...	All India Reporter, Upper Burma
W. R.	...	Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	... Applied	Disc.	... Discussed.	F. B	... Full Bench.
Appr.	... Approved.	Diss. from	... Dissented from.	P. C.	... Privy Council.
Cons.	... Considered.	Expl.	... Explained	Ref.	... Referred to.
Dist.	... Distinguished.	Foll.	... Followed.	S. B.	... Special Bench.

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ALL INDIA REPORTER
1930
MADRAS HIGH COURT

* A. I. R. 1930 Madras 1

ANANTAKRISHNA AYYAR, J.

Putta Chelamiah and *another*—Appellants.

v.

Venkata Kumara Mahipati Suryarao Bahadur Garu and *another* — Respondents.

Second Appeal No. 1255 of 1925, Decided on 29th August 1929, against decree of Sub-Judge, Cocanada, in A. S. No. 182 of 1924.

(a) Registration Act, S. 17 (1) (b)—Relinquishment of ryoti land by tenant to his landlord need not be evidenced by registered deed.

A tenant, holding ryoti land, can relinquish any portion of it in favour of his landlord. Such an arrangement does not require to be evidenced by any writing, much less does it require registration for its validity. [P 2 C 2]

*** (b) Transfer of Property Act, S. 118—Exchange—To invoke aid of part performance in exchange, writing is not preliminary condition—Part performance.**

Writing is not a necessary preliminary condition before the doctrine of part performance could be invoked. That being so, the absence of any writing in connexion with a ryoti land exchange is not a valid objection. [P 3 C 1]

(c) Madras Estates Land Act, Ss. 164, 173 and 179—Ryot as such mentioned in respect of particular holding in Record-of-Rights need not institute suit under Ss. 173 and 179.

The scheme of Chap. 11 would seem to show that where a ryot is only mentioned as a ryot in respect of a particular holding in the Record-of-Rights, no suit need be instituted under Ss. 173 and 179, on pain of the party being unable to agitate that question further. [P 4 C 1]

(d) Madras Estates Land Act, S. 167 (3)—Entries are not conclusive but shall be evidence and their correctness shall be presumed.

Section 167 (3) does not declare that any entries in the Record-of-Rights mentioned therein shall be conclusive and that the correctness of the same should not be contested unless a suit is filed. It only says that the Record-of-Rights shall be evidence and its correctness shall bs presumed : *A. I. R.* 1927 *Cal.* 210 and *A. I. R.* 1925 *Cal.* 845, *Ref.* [P 4 C 1]

P. Somasundaram—for Appellants.

S. Srinivasa Iyengar and *S. Venkatesa Iyengar*—for Respondents.

Judgment.—In this case the plaintiff is the appellant before me. He instituted the original suit to recover possession of three acres and odd of land alleged to be included in his holding as a ryot under the defendant, the Maharajah of Pithapuram. His case is that the defendant encroached upon the suit three acres and odd, which were in the plaintiff's possession, for the purpose of constructing bungalows for the estate officials. The plaintiff alleged that the defendant promised to give him about 14 acres of another land called Bangaru Doddi but that the defendant did not do so, and consequently the present suit was instituted within 12 years from the date of trespass by the defendant. The plea of the defendant was that the plaintiff relinquished the suit lands in his favour and that in consideration thereof he (the defendant) gave the plaintiff an equal extent out of Bangaru Doddi land to be held as ryoti land and also agreed to give the plaintiff the remaining ten acres of Bangaru Doddi land as ordinary tenant to be in possession for the time being as the Maharajah's tenant, and that really there was an exchange between the plaintiff and the defendant, the plaintiff getting three acres of the Bangaru Doddi land and the defendant getting the three acres in suit out of the ryoti land in the possession of the plaintiff. The defendant also raised the plea that very costly buildings said to be

worth about a lakh of rupees have been raised on the property in suit, and it was because the plaintiff was evicted by a decree of Court in connexion with the ten acres of Bangaru Doddi land of which he was given possession as ordinary tenant that the present suit was instituted by him to spite the defendant. The first three issues raised in the suit were as follows :

"1. Whether the plaintiff has relinquished the suit holding as alleged ?

2. Whether the plaintiff is estopped from denying the defendant's title ?

3. Whether the defendant acquired a valid and binding title in the suit land ?"

The District Munsif held that the defendant's case was not proved, but having regard to the fact that the defendant had put up costly buildings on the plaintiff's site and the plaintiff was aware of that and allowed the construction to proceed, the equities of the case could be best worked out by directing the defendant to pay the plaintiff a sum of Rs. 1,590. Accordingly, he gave the plaintiff a decree for that amount, and dismissed his suit for possession of the land. Before I leave the Munsif's judgment, I think it proper to remark that though the above three issues were framed in the case and though a lot of evidence was adduced, the District Munsif disposed of the three issues in a single paragraph—para. 6—without discussing the evidence. After writing a few sentences, the District Munsif ends the paragraph as follows: "I find the first three issues against defendant." The judgment is very unsatisfactory. The District Munsif ought to have discussed the evidence in respect of each issue and recorded his finding thereon.

As could be expected, neither party was satisfied with such a decree. The defendant preferred an appeal against the decree directing him to pay Rs. 1,590 to the plaintiff. The plaintiff was not satisfied with the money ; he wanted his land. So there was an appeal by the defendant and a memorandum of objections filed by the plaintiff. The learned Subordinate Judge framed the first point for decision before him as follows :

"Whether the exchange relied on by the defendant (appellant) is true, valid and binding in law ?"

He came to the conclusion that there was an exchange of the suit land for the three acres and odd of Bangaru Doddi land. Having found that there was this exchange, he came to the conclusion that the plaintiff had no title to the suit land and reversed the decision of the first Court and dismissed the suit.

In this second appeal preferred by the plaintiff, his learned advocate first complained that the lower appellate Court was not right in discussing this question of exchange. He pointed out that issue 1 raised in the case is whether there was any relinquishment and not whether there was any exchange. With reference to this point, there is the written statement of the defendant printed at p. 1 of the pleadings—para. 4 of which says :

"What is known as Bangaru Doddi is acres 13-76 in extent. As the plaintiff wanted that he should be given another land separately inasmuch as he lost the land taken up for bungalows, the plaintiff was permanently given acres 3-18 of land out of Bangaru Doddi with a cist of Rs. 47 and odd. Pattas and muchilikas were exchanged in the said manner between the plaintiff and the defendants."

The substance of that plea is that the plaintiff gave the Maharajah three and odd acres of the suit ryoti land and the Maharajah gave plaintiff 3 and odd acres of the Bangaru Doddi land. In substance it is exchange. Though the word does not appear in the written statement, I think there can be little doubt that that was what the parties understood. Even in the judgment of the learned District Munsif, in para. 6 I have already adverted to, the first sentence is this :

"The exchange and surrender are not evidenced by any registered document."

Therefore I consider that the plea raised by the learned advocate for the appellant, namely, that no question of exchange was really raised but only a question of relinquishment, is not substantially correct.

Further, even if it is a question of relinquishment it does not really matter. The case of the plaintiff is that the suit land was his ryoti land, and it is therefore open to him to relinquish any portion of the ryoti land in favour of his landholder, the defendant. Such an arrangement does not require to be evidenced by any writing ; much less does it require registration for its validity. That being so, the fact that the word "exchange" was not used in the written statement does not really work to the prejudice of the defendant in this particular case.

On the merits, I think the circumstances mentioned by the lower appellate Court are very strong and I do not see any grounds on which I can interfere. In the first place, it points out that in the old muchilikas executed by the plaintiff the extent of the land held by the plaintiff in the suit locality is mentioned by him as 45 acres and odd. After this exchange or relinquishment of 1909, the subsequent muchilikas executed by the plaintiff mention the extent of his land as 41 acres and odd, the difference being accounted for by three acres and odd having been delivered over to the Maharajah, the Maharajah giving the plaintiff in exchange patta in respect of three acres and odd of the Bangaru Doddi land. The plaintiff executed a mortgage in respect of his other lands situated near the suit land. In that he specifically refers to the remaining land (mentioning the extent in his possession after deducting the three and odd acres taken by the zamindar for the purpose of building bungalows). Finally in his deposition also he admitted that when he was given pattas for the land, ordinary seri pattah was given in respect of the three acres and odd of Bangaru Doddi land and ordinary pattah as given to an ordinary tenant, and not pattah as given to a ryot, was given in respect of the remaining land. It is unnecessary for me to go into the details or into the reasons given by the lower appellate Court for upholding the defendant's contention. There is plenty of evidence on which the Subordinate Judge could have come to the conclusion he has come to and I think that his conclusion on the merits of the case must be accepted by me.

The further point that was raised by the learned advocate for the appellant was that if it is a case of exchange, the theory of the doctrine of part performance could not be invoked in the absence of some writing, though there need not be any writing registered. However, he himself quite properly admitted that according to the decisions of this Court, such writing is not a necessary preliminary condition before the doctrine of part performance could be invoked. That being so, I am bound by those decisions and the absence of any writing in connexion with this exchange is not a valid objection.

The last argument raised by the learned advocate for the appellant was this. There is the provision of the Estates Land Act, Chap. II, under which entries in Record-of-Rights prepared under the Act are conclusive and final unless suits be filed within the time limited by the provisions of the Act. The facts necessary to appreciate this argument are these. The exchange or the relinquishment in question in the present case took place in 1909 or in 1910. It is admitted that there was a Record-of-Rights prepared in connexion with this village of the defendant zamindar, and that the plaintiff is recorded as a ryot in respect of the suit three acres also along with the other 41 acres which he has got in this suit locality. It was therefore argued that the Record-of-Rights is final and the entries therein could not be called in question unless a suit had been filed within the time specified in Ss. 173 and 179 of the Act. I called upon the learned Advocate General to answer the appellant's case only with reference to this argument based upon the Record-of-Rights. To this the learned Advocate General argued that a distinction must be made between the Record-of-Rights contemplated by S. 165 and the settlement of rents.

The Record-of-Rights is a procedure under which the different rights that exist between the landholder and the tenant relating to the holding are recorded and any other rights lawfully incident to the holding are also recorded. All that is done in a summary sort of way and the record so prepared is published. It is after the publication of the Record-of-Rights, that is, the record of existing rights, that any question relating to the settlement of rents arises. With reference to the settlement of rents, enquiries are made and when the particular matters contemplated by S. 165 are setled, the prior Record-of-Rights would be modified by the insertion of the new rights ascertained between the parties relating to the rents. S. 173 only declares that any person aggrieved by an entry in a settlement record prepared under Ss. 168 to 171 and incorporated in a Record-of-Rights finally published under sub-S. (3), S. 170, or by an omission to settle a rent, may institute a suit in the civil Court which would have jurisdiction to entertain a suit for the

possession of the land to which the entry relates or in respect of which the omission was made. It should be noted that the reference is to the entries in the settlement record, and not the original Record-of-Rights. No doubt, the settlement record would be incorporated in the original Record-of-Rights, but it is only with reference to the settlement record that this particular contemplated suit is mentioned, with the penalty attached for the non-institution of the suit. As regards the argument based on S. 173, S. 179 says that no suit shall be brought in any civil Court in respect of any order directing the preparation of a Record-of-Rights under this chapter or in respect of the framing, publication, signing or attestation of such a record or any part of it, or, save as provided in S. 173, for the alteration of any entry in such a record of a rent settled under Ss. 168 to 172. Thus, if it is intended to call in question any order directing the preparation of a Record-of-Rights, a suit would have to be instituted. That is all with reference to the Record-of-Rights. The subsequent portion relates only to record of rents settled under the settlement of rents, which should be impugned by proper suit. That being so, the scheme of Chap. 11, Estates Land Act would seem to show that in cases like the present where a ryot is only mentioned as a ryot in respect of a particular holding in the Record-of-Rights, no suit need be instituted under Ss. 173 and 179, on pain of the party being unable to agitate that question further. Finally in S. 167 (3) which is the section that directly relates to the Record-of-Rights, the only provision made is this :

"Every entry in a Record-of-Rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until the contrary is proved."

This does not declare that any entries in the Record-of-Rights mentioned therein shall be conclusive and that the correctness of the same should not be contested unless a suit is filed. It only says that the Record-of-Rights shall be evidence and its correctness shall be presumed. In the particular case before me, the lower appellate Court has considered this to be presumptive evidence, and having regard to the other evidence, thought it proper to attach such importance to it as it thought fit.

The learned Advocate General quoted also one or two decisions under the Bengal Tenancy Act to support his contention. He stated that substantially the provisions of the Bengal Tenancy Act relating to the provisions under discussion are the same, as the provisions in the Madras Estates Land Act. The first case is that reported in *Kiran Chandra* v. *Srinath Chakravarthy* (1). I think that case supports the line of argument adopted by him before me : see also the case in *Beecharam* v. *Purna* (2), at p. 468 (of 41 C. L. J.) referred to by him.

I put the question to the learned advocate for the appellant whether he would not have to go to this extent if his contention be correct, namely, if in the present case his client had sold in 1911 by a registered document the particular land in suit to somebody for proper consideration but the vendee did not take proper steps to see that the Record-of-Rights was corrected by having his name inserted instead of the vendor's namely the plaintiff's, and if he files a suit for recovery of possession or the question of ownership arises in some other proceedings, whether according to his contention he would be prepared to say that unless the vendee filed a suit and had the Record-of-Rights rectified, the vendee could not enforce his rights as owner. Obviously, the learned advocate was under difficulty to answer this question. It seems he must go to that extent, and say that the vendee in the case put, would practically be in the same position as the Maharajah in the present case, if his contention is right.

For the reasons given above, I think the lower appellate Court was right in its conclusion and that the suit was properly dismissed. The second appeal is dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

(1) A. I. R. 1927 Cal. 210.
(2) A. I. R. 1925 Cal. 845=52 Cal. 894 (F.B.).

A. I. R. 1930 Madras 4

ANANTAKRISHNA AYYAR, J.

Natesa Pillai—Plaintiff—Appellant.

v.

Govindasami Pathan and *another*—Defendants—Respondents.

Second Appeal No. 10 of 1926, Decided on 27th August 1929, against decree of Sub-Judge, Tiruvarur, in Appeal Suit No. 1 of 1925.

(a) Civil P. C., S. 64—Judgment-creditor has no charge on mortgage amount by reason of his attachment—More than one creditor attaching same mortgage amount — Court cannot give to one of them charge at expense of other creditors.

A judgment-creditor has no charge on the mortgage amount by reason of his attachment; and a Court cannot properly give him such a charge at the expense of other creditors of the common judgment-debtor, who in execution of their decrees also attached the mortgage amounts, and had the same realized, or who applied for execution for their decrees before the fund in Court was allotted and earmarked to any particular decree-holder : 25 *Cal.* 179; *A. I. R.* 1914 *P. C.* 123 and *A. I. R.* 1923 *Mad.* 505, *Rel. on.* [P 8 C 1]

(b) Civil P. C., O. 40, R. 1—Receiver is not agent of judgment-creditor in execution of whose decree he is appointed—Moneys realized by receiver do not become money belonging to judgment-creditor—Civil P. C., S. 51.

It cannot be said that a receiver is the agent of a judgment-creditor in execution of whose decree he is appointed; nor can it be said that the moneys realized by the receiver become ipso facto moneys belonging to the judgment-creditor, and, as moneys paid to the credit of the judgment-creditor's suit the moment the receiver comes into possession of the same : 17 *Mad.* 501 and 20 *Mad.* 224 (*F.B.*), *Rel. on.* [P 8 C 2]

(c) Civil P. C., S. 51—Receiver appointed by Court is appointed for all persons interested—Moneys in hands of receiver cannot be spent without orders from Court.

A receiver appointed by the Court is appointed on behalf and for the benefit of all persons interested, as parties to the suit or proceeding. Moneys in the hands of the receiver belong to the Court which appointed him and are in custodia legis, and he cannot spend them except under the orders of the Court : *In re, Dickinson Ex parte Charrington & Co.*, 22 *Q. B. D.* 187 and *In re, Potts Ex parte Taylor*, (1893) 1 *Q. B.* 648 *Ref.* [P 9 C 1]

(d) Civil P. C., S. 51—Judgment-creditor's position is not improved by appointment of receiver in execution instead of attachment and sale.

A judgment-creditor's position is not in any way improved by the fact that the Court ordered execution of his decrees by appointment of a receiver, and not by attachment and sale of judgment-debtor's property : *A. I. R.* 1921 *Mad.* 218 (*F. B.*) and *A. I. R.* 1923 *Mad.* 505 (*F. B.*), *Rel. on.* [P 10 C 2]

(e) Civil P. C., O. 21, R. 52—Two or more judgment-creditors can attach same property —Property in custody of Court can be attached—Property in hands of receiver can be attached after getting permission of Court—Civil P. C., O. 40, R. 8.

The circumstance that one decree-holder has attached certain properties of the judgment-debtor is by itself not a ground for preventing another decree-holder of the same judgment-debtor from attaching the same property. Under O. 21, R. 52, property in the custody of any Court could be attached. Similarly property over which a receiver has been appointed could also be attached, assuming that the permission of the Court should be necessary before such attachment, in the same way as permission of the Court is necessary to file a suit against a receiver. [P 11 C 1]

(f) Civil P. C., S. 73—Property once attached need not be attached again—All attaching decree-holders are entitled to rateable distribution.

In a case where out of many decree-holders, each competent to execute his decree by attachment and sale of a particular property, one has attached it, it is not necessary that the other decree-holders should again attach the same property; and in such a case all the decree-holders are entitled to claim rateable distribution : 23 *All.* 106, *Foll.* [P 11 C 2]

(g) Civil P. C., S. 51—Receiver appointed in execution proceedings — Other decree-holders need not apply for appointment of receiver of same property.

When once a receiver has been appointed to realize properties in execution proceedings, the other decree-holders need not again apply for the appointment of a receiver over the same properties in execution of their decrees also. [P 11 C 2]

(h) Civil P. C., S. 73—Judgment-creditor applying for execution before Court passed orders under S. 73—He is entitled to rateable distribution with others.

Where it is admitted that the third judgment-creditor applied for execution before any order was passed transferring or appropriating the fund or any portion thereof to the decree obtained by the first judgment-creditor, the third judgment-creditor is entitled to rateable distribution along with the other two. [P 11 C 2]

K. Bhashyam Iyengar and *T. R. Srinivasan*—for Appellant.

N. S. Srinivasa Iyer and *K. V. Ramachandra Iyer*—for Respondents.

Judgment.—This second appeal raises a question of some importance under S. 73, Civil P. C.

The plaintiff is the appellant in the second appeal. Defendant 2, Govindasami obtained a money decree in O. S. No. 373 of 1914 on the file of the Tiruvarur District Munsif's Court and had the decree transferred to the District Munsif's Court, Tiruthuraipundi for execution by the attachment of a mortgage debt due to the judgment-debtor (Namasivayam Chetty) by Veerappa Thevan on a hypothecation deed. The mortgage-debt was attached, and Govindasami himself (Defendant 2) was appointed receiver to collect the attached debt. The terms of the order of appointment of the receiver are important : see Ex. B dated 29th April 1916 :

" I appoint the petitioner as receiver to collect the debt as prayed for. He should pay

the realized debt into Court and take out the realized sum after taking the further orders of the Court."

The receiver filed O. S. No. 259 of 1917 on the file of the Tiruthuraipundi District Munsif's Court to recover the money due on the mortgage bond, got a final decree on 8th August 1921 and took out execution of the decree by E. P. No. 445 of 1921 on 5th November 1921. The execution petition was, however, dismissed on 5th April 1922.

Defendant 1, Thandavaraya got a money decree against Namasivaya Chetty in O. S. No. 372 of 1914 (Tiruvarur District Munsif's Court), on 14th November 1914. He attached on 10th July 1922, the decree in O. S. No. 259 of 1917. After attachment he applied in the District Munsif's Court of Tiruthuraipundi by E. P. No. 301 of 1922 for execution of the decree in O. S. No. 259 of 1917. The full decree amount of O. S. No. 259 of 1917 was paid into the Tiruthuraipundi District Munsif's Court on 6th October 1922.

Natesa Pillai, the appellant in the second appeal, got a money decree against Namasivaya Chetty in O. S. No. 30 of 1916 on the file of the Tiruvarur District Munsif's Court and attached on 9th November 1922 (the amount in Court in O. S. No. 269 of 1917) by a precept from the Tiruvarur Court and got his decree transferred for execution to the Tiruthuraipundi District Munsif's Court on 12th December 1922. Natesa Pillai applied by E. A. No. 813 of 1922 to the District Munsif of Tiruthuraipundi for rateable share in the amount in Court, being the decree amount in suit O. S. No. 259 of 1917.

Accordingly the District Munsif of Tiruthuraipundi had to consider the rights of ;

(a) Govindasami, the decree-holder in O. S. 373 of 1914.

(b) the rights of Thandavaraya, the decree-holder in O. S. No. 372 of 1914, and

(c) the rights of Natesa Pillai, the decree-holder in O. S. No. 30 of 1916.

Govindasami claimed the whole of the amount in Court; whereas Thandavaraya claimed rateable distribution, as also Natesa Pillai. The District Munsif of Tiruthuraipundi passed an order (Ex. F) on 22nd December 1922 to the effect that the amount in Court should be distributed among Govindasami and Thandavaraya rateably, but that Natesa Pillai was not entitled to share in the same. This is what he said :

"The attachment in E. A. No. 813 of 1922 (Natesa Pillai's) has been made after the money was deposited in Court; E. A. No. 813 of 1922 is dismissed. From the amount realized, deduct the costs of the suit (O. S. 259 of 1917): and in the balance allow rateable distribution between Govindasami and Thandavaraya."

Natesa Pillai filed the present suit (O. S. No. 14 of 1923), on the file of the Tiruthuraipundi District Munsif's Court against Thandavaraya (defendant 1) and Govindasami (defendant 2), under S. 73, Civil P. C., to compel the defendants to refund a portion of the assets to the plaintiff, on the ground that all the three persons (plaintiff, defendant 1 and defendant 2) were entitled to rateable share in the amount of the decree in O. S. No. 259 of 1917 in Court, and that defendants 1 and 2 were not entitled to share the same to the exclusion of the plaintiff.

The District Munsif (who was the successor in office of the Munsif who passed orders on 22nd December 1922 Ex. F) held that all the three (plaintiff, defendant 1 and defendant 2) were entitled to share rateably the fund in Court.

Defendant 2 preferred an appeal against the District Munsif's decision and the learned Subordinate Judge of Tiruvarur reversed the District Munsif's decree and dismissed the suit of Natesa Pillai. His reasoning is contained in para. 5 of his judgment. He said :

"When money in the custody of a Court in one suit is attached in execution of a decree in another suit, it does not become assets in the latter suit within the meaning of S. 73, Civil P. C., unless and until it is ordered to be transferred to it from the former. There is no difficulty in applying this rule where the suit in which money is in deposit and the suit in which it is attached are distinct and separate and have no connexion with each other. But this is not such a case. In this case O. S. 259 of 1917, in which the money was in deposit in Court was a suit filed by defendant 2 in his capacity as the receiver appointed for the realization of the mortgage debt attached by him in execution of his own decree. It is contended for defendant 2, that O. S. 259 of 1917, though in form a regular suit, was in substance a continuation of the execution proceeding in his own decree; and no transfer of the amount deposited in that suit was, therefore, necessary to make it available for him towards his decree. The argument is,

in other words, that the money paid in O. S. No. 259 of 1917 was not merely a deposit made in that suit, but must also be considered to be a deposit made in execution of defendant 2's own decree in O. S. No. 373 of 1914, on the same date, and the principle of the decisions quoted by the District Munsif is accordingly inapplicable to this case. I am of opinion that this contention is valid and that the assets must be considered to have been received by the Court in O. S. No. 373 of 1914 also on the date on which they were paid and received in O. S. No. 259 of 1917, to the credit of the plaintiff therein, who was no other than the receiver or officer appointed by the Court for the purpose, in the former suit. Suppose in this case the mortgage debt had been paid to the receiver on demand without any suit. Could it then be contended that the date of the realisation of the assets was not the date on which the debt was so paid up to him on behalf of the Court? I think not. If so, I see no reason why the payment of it into Court to his credit in the suit filed by him for its recovery should place him in a worse position . . . . . In the above view the plaintiff was clearly not entitled to claim a rateable distribution as his execution petition and application for rateable distribution were put in long after the date of the deposit on 6th October 1922 of the amount in O. S. No. 259 of 1917."

From the decision of the learned Subordinate Judge dismissing his suit, Natesa Pillai, the plaintiff, has preferred this second appeal. Mr. K. Bhashyam, the learned advocate for the appellant, contended that the learned Subordinate Judge's decision was wrong on three main grounds.

(1) The learned Subordinate Judge has misunderstood the scope and effect of the order (Ex. F) appointing Govindaswami as receiver:

(2) The receiver's application for executing the decree in O. S. No. 259 of 1917, was dismissed on 5th April 1922. It was on the application made by Thandavaraya (defendant 1) in execution of his decree in O. S. No. 373 of 1914 that the decree in O. S. No. 259 of 1917 was attached on 10th July 1922. After attachment Thandavaraya applied for execution of the decree in O. S. No. 259 of 1917 and it was in consequence thereof that the decree amount in O. S. No. 259 of 1917 was paid into Court on 6th October 1922. Therefore the amounts were realized not by the receiver but by Thandavaraya; the effect of this has been ignored by the learned Subordinate Judge.

(3) The position of a receiver appointed by a Court and the effect thereof on the rights of the parties have been misunderstood by the learned Subordinate Judge. The receiver is only an officer of the Court and moneys realized by him are moneys in the hands of the Court and unless specifically allotted or carried over to any specific suit or party, could not be said to be moneys realized and earmarked for the benefit of any particular decree-holder.

I proceed to discuss each of these three points seriatim.

It is only an accident that Govindasami was appointed receiver to file O. S. No. 259 of 1917 and realize the mortgage amount. The terms of the order of appointment of Govindasami as a receiver show that the receiver was bound to hold all moneys realized by him according to the orders of the Court, and that without orders of the Court, he could not in any way deal with the moneys realized in O. S. No. 259 of 1917. The lower appellate Court seems to have attached too much importance to the circumstance that defendant 2 was appointed receiver in O. S. No. 373 of 1914. In one sense no doubt the amount of the mortgage was realized in execution of the decree of Govindasami (O. S. No. 373 of 1914) since it was in execution of that decree that the decree amount was attached and a receiver appointed to realize the mortgage money with a view to discharge the decree in O. S. No. 373 of 1914 but that would not enable Govindasami to claim the whole amount due under the mortgage decree if before the Court passed orders appropriating any portion of the said amount towards the decree in suit O. S. No. 373 of 1914, other decree-holders against the same judgment-debtor applied for execution of their decrees to the same Court. Attachment does not create any lien or charge in favour of the attaching decree-holder: see the remarks of the Privy Council in *Motilal* v. *Kanabuldin* (1). "Attachment only prevents alienation. It does not confer title." As remarked by the Privy Council in *Raghunatha Das* v. *Sundar Das* (2):

"an attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law.

(1) [1898] 25 Cal. 179=24 I. A. 170=7 Sar. 222 (P. C.).
(2) A. I. R. 1914 P. C. 129=42 Cal. 72=41 I. A. 251 (P. C.).

At p. 82 (of 12 *Cal.*) their Lordships observed :

"The judgment-creditors had no charge on the fund, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvent."

In the case before the Privy Council insolvency intervened and by operation of law the property vested in the Official Assignee. In the case before me, the property was attached and sold by other holders of decrees for money against the same judgment-debtor. If the judgment-creditor, defendant 2, had no charge on the mortgage amount by reason of his attachment, the Court could not properly give him such a charge at the expense of the other creditors of the common judgment-debtor, who in execution of their decrees also attached the mortgage amounts, and had the same realized or who applied for execution for their decrees before the fund in Court was allotted and earmarked to any particular decree-holder. In the words of Wallace, J., at p. 519 of *Nachiappa Chetty* v. *Subbier* (3) :

"It is well recognized law that an attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal right in the attaching creditor to have the property earmarked for the satisfaction of any decree he has obtained or may obtain."

It is also a distinguishing feature in the present case that the receiver who obtained the decree in O. S. No. 259 of 1917 applied for execution of that decree but his execution application was dismissed on 5th April 1922. It was in fact at the instance of Thandavaraya (defendant 1) and in execution of his decree in O.S. No .373 of 1914 that decree in O. S. No. 259 of 1917 was attached and execution carried out and completed with the result that the amount due in O. S. No. 259 of 1917 was paid into Court on 6th October 1922. The present case is consequently not a case where the mortgage amount was realized solely by the receiver appointed in execution of the decree in O. S. No. 373 of 1914. So far as defendant 1 is concerned, this is a material point of distinction, and so far as the plaintiff is also concerned it has a material bearing on the question whether his application for execution was made before the receipt of such assets by the Court. It must be noted here that defendant 1 does not oppose the plaintiff's right to rateable distribution.

The question elaborately discussed before me turned on the powers of receivers appointed by Court and the effect of such appointment on the rights and liabilities of parties interested in the property. The plaintiff's contention was that the receiver should be taken to be his (plaintiff's) agent and the receiver's suit O. S. No. 259 of 1917 should be taken to be really an execution application in the plaintiff's suit O. S. No. 373 of 1914 and that the moneys realised by the receiver should be taken to be moneys appertaining to the plaintiff's suit. The learned advocate for the plaintiff (respondent) relied on *Fink* v. *Maharaj Bahdoor Singh* (4); *Indra Chand* v. *Ghaneshyam Missir* (5); *Venkatayya Heggade* v. *Kuppanna* (6); *Madhar* v. *Rajani Kanta Roy* (7) and *Radha Kissore* v. *Aftab Chandra* (8). In a sense it is true that the receiver represents the interests of the decree-holder (defendant 2) in execution of whose decree he was appointed. It is also true that the proceedings in suit O. S. No. 259 of 1917 could be viewed as really execution proceedings taken to realize the decree debt in suit O. S. No. 373 of 1914. But the analogy seems to stop there. It could not be said that the receiver is the agent of defendant 2. Nor could it be said that the moneys realized by the receiver become ipso facto moneys belonging to defendant 2 and as moneys paid to the credit of defendant 2's suit the moment the receiver came into possession of the same. In this connexion the decision of Muthuswamy Iyer reported in *Orr* v. *Muthia Chetti* (9) and of the appellate Court from his decision, reported in *Muthiah Chetty* v. *Orr* (10), are specially helpful. It was there held that in cases in which a receiver appointed at the instance of the judgment-creditor misappropriates money collected by him the decree is not satisfied pro tanto; but the loss falls on the estate, or its owner, subject to

(3) A. I. R. 1923 Mad. 505=46 Mad. 506 (F.B.).

(4) [1899] 26 Cal. 772=4 C.W.N. 27.
(5) [1909] 9 C.L.J. 210=4 I. C. 52.
(6) [1913] 14 M.L.T. 533=21 I. C. 611=(1913) M.W.N. 1021.
(7) [1910] 14 C.W.N. 339=5 I. C. 708.
(8) [1881] 7 Cal. 61.
(9) [1894] 17 Mad. 501.
(10) [1897] 20 Mad. 224 (F.B.).

the receiver's liability. At p. 503, Muthuswamy Iyer, J., remarked as follows:

„The appellate Court considers that the receiver in the present case was the judgment-creditor's agent, because it was on his application that the appointment was made. The appointment is the act of the Court and once made in the interests of justice or ex debito justitiae. He is an officer or representative of the Court and subject to its orders. His possession is the possession of the Court by its receiver. The moneys in his hands are in custodia legis for the person who can make a title to them."

It has been held in England in similar cases that a receiver appointed by the Court is appointed on behalf and for the benefit of all persons interested, as parties to the suit or proceeding. Moneys in the hands of the receiver belong to the Court which appointed him and are in custodia legis, and he cannot spend them except under the orders of the Court. A Letters Patent Appeal was preferred against the judgment of Muthuswami Aiyar, J., and was heard by two learned Judges, Shepherd and Davies, JJ. Shepherd, J., agreed with Muthuswami Iyer, J., while Davies, J., was of a different opinion. The appeal was ultimately posted before three learned Judges; the appellant not having prosecuted the appeal further, the same was dismissed and the judgment of Muthuswami Iyer, J., was held to prevail. In the judgment of Shepherd, J., there are some passages which are useful to the present case. At p. 226, it is said that:

"the case is one which cannot be decided upon any theory of agency. A receiver appointed to collect moneys is not an agent of either party. He is an officer of the Court deputed to collect and hold the moneys collected by him in accordance with the orders of the Court. The party at whose instance a receiver is appointed has no greater or less control over his acts than the other parties to the litigation. What then is there in the provisions of the Code to justify us in holding that a judgment-creditor must be deemed to be satisfied by the mere fact of a receiver getting in moneys due to the judgment-debtor. The money which came to the receiver's hands was collected by him from persons who were indebted to the judgment-debtor. There was no payment by the judgment-debtor either out of Court to the judgment-creditor or into Court. The receiver who has collected moneys due to the judgment-debtor does not hold them for the judgment-creditor. He holds them for the Court in order that the Court may decide regarding them."

The decision in *In re, Dickinson Ex parte Charrington & Co.* (11), relied on by Shepherd, J., contains certain passages regarding the position of a receiver appointed by Court. Though the rights of a decree-holder in England who applied for equitable execution and had a receiver appointed for that purpose, or had writs issued to have judgment-debtor's property seized and sold are not the same in England and in India and though the decree-holder in England seems to possess comparatively higher rights as against other decree-holders of the same judgment-debtor, yet the views of the Court of Appeal as to the effect of the appointment of the receiver in such cases would be helpful here also. Lord Esher (M. R.) observed at p. 190 as follows:

"It is not pretended that the order appointing the receiver gave the appellants any mortgage or charge on the property of the debtor, but it is said that by means of the receiver they held a lien upon the property of the debtor which he received as a security for their debt. How can the possession of a receiver establish a lien in favour of the creditor at whose instance he was appointed? Does the receiver hold the goods so as to give the creditor possession of them? He holds the goods as agent for the Court, not for the creditor. There cannot, therefore, be a possessory lien of the creditor. Is there any other lien? In my opinion the receiver appointed under such an order does not hold the goods for the creditor at all; he holds them for the Court in order that it may decide the right to them."

Fry, L. J., remarked at p. 192:

"How does the order create any "charge" on the property? It only directs the person mentioned in it to receive the specified property without prejudice to certain rights; all further questions being reserved until the further order of the Court. It is equally plain to me that the order creates no lien on the debtor's property in favour of the receiver, and it certainly creates none in favour of the judgment-creditors, who have no possession of the property."

See also *In re, Potts Ex parte Taylor* (12). In England:

"enforcing judgment by appointment of receivers is not execution in its technical sense, but a substitute for it."

In England:

"equitable execution so called, is not strictly speaking a process of execution. It is rather a mode of relief granted to a judgment-creditor on the ground that either no remedy by execution at law is open to him, or is likely to be effective owing to the peculiar nature of the property of the judgment-debtor which it is sought to make available to answer the judgment. The process is based upon the old practice of the Court of Chancery to assist in enforcing a judgment for the recovery of money of a Court of ordinary jurisdiction by entertaining an application for the appointment of a

(11) [1889] 22 Q. B. D. 187=58 L. J. Q. B.1=6 Morrell 1=37 W. R. 130=60 L. T. 188.

(12) [1893] 1 Q. B. 648=62 L. J. Q. B. 392=10 Morrell 52=41 W. R. 337=69 L. T. 74.

receiver of such of the interests in property of the judgment-debtor as could not, owing to the nature thereof, be taken under a common law writ of execution": see Halsbury's Laws of England, Vol. 14, p. 115, S. 208, and p. 4, foot note "F."

But in India it is not so, and the practice is different. Under S. 52, Civil P.C., Court may order execution of decrees in various ways, of which appointment of receiver is one. Again in England, the rule of priority of writs prevails; whereas in India the rule of priority which prevailed under the Civil Procedure Code of 1859 has been subsequently altered by the legislature, and under S. 73 of the present Civil P.C., all decree-holders who have applied for execution of decrees of money against the same judgment-debtor are entitled to share rateably in the assets held by a Court provided applications for execution are made to the Court before the receipt of such assets.

This distinction will have to be kept in view when English cases are referred to on the question of execution.

Under S. 51 of the present Civil P. C. the Court may on the application of the decree-holder order execution of the decree by attachment and sale of any property of the judgment-debtor, or by appointing a receiver, or in such other manner as the nature of the relief granted may require. Does the Court by ordering execution by appointing a receiver confer on the decree-holder higher rights than what he would have if execution was ordered by attachment and sale of the judgment-debtor's property? In the case of execution by attachment and sale of the judgment-debtor's property, it has been held by a Full Bench of five learned Judges of this Court in the case reported in *Viswanadham Chetty* v. *Arunachalam Chetty* (13), that where the attaching Court and the custody Court are the same, there is a receipt of assets within the meaning of S. 73, Civil P. C., only when so much of the money standing to the credit of the judgment-debtor as is necessary to satisfy the decree-holder who has applied for execution, is ordered to be transferred to the credit of the first attaching creditor's suit. The judgment of the learned Sir John Wallis, C. J., contains a full discussion of the question. Krishnan, J. at p. 111, stated as follows:

"When the attaching Court and the custody Court are the same, it seems to me that an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into Court to the suit in which the attachment took place. It is only when this is done, the Court as attaching Court can properly be said to have received the assets and to hold the same within the meaning of S. 73; and decree-holders who have attached prior to that are entitled to rateable distribution."

Order 21, R. 52, Civil P. C., would clearly apply when the attaching Court and the custody Court are different. But the Full Bench has held that it applied also when the two Courts are the same The decision of a later Full Bench of three learned Judges reported in *Nachiappa Chettyar* v. *Subbier* (3) also adopts the same view: see pp. 513, 517 and 521 (of 46 *Mad.*) at p. 517, it is observed:

"According to the ruling in the Full Bench case, the money became assets held by the Court and available for payment out in execution only after the District Munsif passed the order for payment. (Per *Krishnan, J.*)."

Wallace, J., at p. 521 remarked as follows:

"The point of time of the conversion is the point of time at which the Court says: I, as attaching Court, take this property of the judgment-debtor lying in this Court as custody Court and make it property available for distribution in satisfaction of decree against him."

It seems to be clear therefore that if it were a case of attachment and sale, defendant 2 would have no superior or exclusive rights over the fund in question. Having regard to the position of a receiver appointed by the Court, as expounded in the cases quoted by me, it seems to me that defendant 2's position is not in any way improved by the fact that the Court ordered execution of his decrees by appointment of a receiver, and not by attachment and sale, of judgment-debtor's property. The learned advocate for defendant 2 has not satisfied me that by the mere appointment of a receiver in execution of defendant 2's decree, defendant 2 has in law secured a preferential or exclusive right to the moneys that may be realized by the receiver in circumstances like the present. If his contention be right, then other decree-holders could not proceed to attach the same property in execution of other money decrees obtained against the same judgment-debtor, and their remedies would be confined to the surplus, if any, in the receiver's hands. That contention is really inconsistent with

(13) A.I.R. 1921 Mad. 218=44 Mad. 100 (F.B.).

the views of Muthusamy Iyer and Shepherd, JJ., in the decision quoted by me. Further, could defendant 2 claim to continue the retention of the receiver in case the judgment-debtor (Namasivaya) became insolvent and the properties of the judgment-debtor vested in the Official Receiver?

The circumstances that the person who was appointed as receiver happened to be Govindasami, defendant 2, himself could not in law make any difference. If a stranger had been appointed as receiver to file O. S. No. 259 of 1917, and if he realized some moneys in execution of the decree in O. S. No. 259 of 1917, could it be said that any moneys paid or realized in O. S. No. 259 of 1917 should be deemed at that moment to have been paid or realized in O. S. No. 373 of 1914?

Under the order appointing Govindasami as receiver:

"he should pay the realized debt into Court and take out the realized sum after taking the further orders of the Court."

This shows clearly that before further orders are passed appropriating any sum towards the decree in O. S. No. 373 of 1914, moneys realized in O. S. No. 259 of 1917 do not ipso facto become moneys realized in O. S. No. 373 of 1914, or otherwise become exclusively moneys of the decree-holder in O. S. No. 373 of 1914.

The contention of defendant 2 that he is solely entitled to the fund in Court is unsustainable for another reason also. The circumstance that one decree-holder has attached certain properties of the judgment-debtor is by itself not a ground for preventing another decree-holder of the same judgment-debtor from attaching the same property. Under O. 21, R. 52, Civil P. C., property in the custody of any Court could be attached. Similarly property over which a receiver has been appointed could also be attached, assuming that the permission of the Court would be necessary before such attachment, in the same way as permission of the Court is necessary to file a suit against a receiver. The Court would not ordinarily refuse such permission, if such permission be necessary. Defendant 1 who attached the property in question after receiver had been appointed has been held to be entitled to rateable distribution. The plaintiff also could have attached the decree in O. S. No. 259 of 1917, in which case he would also have been held entitled to rateable distribution. But is separate attachment by each decree-holder in such circumstances necessary? As remarked by Strachy, C. J., in *Bithal Das* v. *Nand Kishore* (14):

"The object of the section is twofold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who attached and sold the property."

In such cases, it is not necessary that the other decree-holders should again attach the same properties.

For similar reasons, when once a receiver has been appointed to realize properties in execution proceedings, it seems to me that the other decree-holders need not again apply for the appointment of a receiver over the same properties in execution of their decrees also. If their applications for execution be pending in the same Court before the assets are recieved, then I think they are all entitled to rateable distribution.

For these reasons, I think that defendant 2's contention that he is entitled exclusively to the fund in Court is unsustainable. It is admitted that the plaintiff applied for execution before any order was passed transferring or appropriating the fund or any portion thereof to the decree in suit O. S. No. 373 of 1914 obtained by defendant 2. That being so the plaintiff is entitled to rateable distribution along with defendants 1 and 2. The second appeal is accordingly allowed, the decision of the lower appellate Court reversed and that of the 1st Court restored. Defendant 2 (respondent 1) in the second appeal should pay the plaintiff's costs in this and in the lower appellate Court. I pass no orders as to costs of defendant 1 (respondent 2), either here or in the lower appellate Court. The order as to costs of the suit made by the first Court will stand.

P.R.S./V.S. *Appeal allowed.*

(14) [1901] 23 All. 106.

A. I. R. 1930 Madras 12

ANANTAKRISHNA AYYAR, J.

Chengalraya Reddy and *others*—Defendants—Appellants.

v.

Kollapuri Reddi—Plaintiff—Respondent.

Second Appeal No. 637 of 1925. Decided on 15th August 1929, against decree of the Sub-Judge, Chittoor, in A. S. No. 9 of 1923.

(a) Civil P. C., S. 47—Questions relating to excess execution should not be raised by fresh suit.

Questions relating to excess execution, if raised by a person who was a party to the suit should not be raised by a fresh suit but should be decided in execution proceedings only: 5 *M. H. C.* 185 and 6 *M. H. C.* 293. *Rel. on.* [P 13 C 2]

(b) Civil P. C., S. 47 (2)—Suit may be treated as proceeding.

The circumstance that a plaint is filed after paying a higher amount of court-fee cannot according to the present Code be a ground for not treating the proceeding as an application under S. 47. [P 13 C 2; P 14 C 1]

(c) Civil P. C., S. 65—Court has no jurisdiction to sell property of person against whom decree is not made—Sale, if takes place, is ultra vires.

Where a person is not one against whom any decree has been passed or order capable of execution has been made, a Court has no jurisdiction to sell his property in execution of the decree. And if a sale takes place, the sale is ultra vires and void being in excess of Court's jurisdiction the jurisdiction of the Court being limited to execute the decree against a person against whom only the decree has been passed. [P 14 C 2]

(d) Civil P. C., S. 47—Persons party to suit, but no decree against them—Their rights infringed in execution proceedings—Even such persons must apply under S. 47.

The words of S. 47 are wider and under that section even persons against whom no decrees have been passed, but who are parties to the suit have to come under S. 47 if any of their rights be infringed in execution proceedings by the decree-holder. [P 14 C 2; P 15 C 1]

(e) Civil P. C., S. 65—Notice required by O. 21, R. 22 not given, sale becomes void—To set aside such sale, proceedings should be taken under S. 47—To set aside void sales in execution, limitation, not under Art. 166, but under Art. 181 applies—Limitation Act, Arts. 166 and 181.

Where notice required by O. 21, R. 22 is not given butthe sale or excess sale takes place such a sale is void.Being void the sale need not be set aside and as such sale need not be set aside the period of limitation (comparatively shorter) prescribed by Art. 166 would not apply, so that in cases where sales are held to be void, appropriate relief could be obtained by parties to the suit by proceedings under S. 47, the period of limitation being not the period prescribed for the setting aside of sales but general period of three years prescribed by Art. 181: *A. I. R.* 1924 *Mad.* 431 (*F. B.*); 7 *Foll. A. I. R.* 1924 *Mad.* 859, *Expl.* and *Dist.*; *A. I. R.* 1926 *Pat.* 397, *Expl.*; 43 *Mad.* 313, *Ref.* [P 16 C 1]

(f) Limitation Act, Art. 181—As soon as right of possession to land is disturbed, right to apply accrues under Art. 181.

The right to apply accrues to a person within meaning of Art. 181 as soon as he is aggrieved by disturbance to his possession of land; and so long as he is in possession it does not matter to him what orders of excess sales or excess deliveries are passed behind his back. [P 15 C 1, 2]

(g) Limitation Act, S. 18—Decree-holder ordered not to proceed against property of party defendant — Decree-holder obtaining permission later to sell the property—Sale taking place without notice—Land sold delivered symbolically—Party defendant coming to know of fraudulent acts when his possession was disturbed—In such cases fraud, though not alleged in plaint, may be inferred.

In spite of an order pased in his first execution application that the decree-holder was not entitled to proceed against the shares of the property allotted to a party defendant, the decree-holder again applied by a fresh execution application some time later for the same relief and for the sale of the whole of the property; and without giving any notice to the party defendant had the whole property sold in 1918, and himself became the purchaser; and again without any notice to him the decree-holder managed to get symbolical delivery behind his back. The party defendant came to know about the fraudulent act of the decree-holder only in 1919, when the decree-holder interfered with his possession.

Held: that in the circumstances though S. 18 has not been specifically referred to in the plaint, the case would really come under S. 18 and the period before 1919 could not be counted; such an inference could legitimately be drawn in the particular circumstances of this case, though originarily facts bringing a case under S. 18 have to be specifically pleaded. [P 16 C 1,2]

S. A. Seshagiri—for Appellants.

T. L. Venkatrama Iyer—for Respondent.

Judgment.—Certain immovable properties belonged to two brothers, Murgapillai and Adiyapada Pillai. On 30th February 1895 Muruga Pillai executed a mortgage hypothecating the properties in favour of the present defendant 1. On the foot of that mortgage the present defendant 1 instituted O. S. No. 755 of 1910 against both Muruga Pillai and Adiyapada Pillai. But the decree passed in that suit exonerated the share of Adiyapada Pillai. Subsequently Adiyapada Pillai filed a suit for partition against his brother Muruga Pillai to which suit

he made the present defendant 1 also as party defendant. That suit was O. S. No. 421 of 1915. The partition suit was compromised and a definite half share in the suit properties was allotted to Adiyapada Pillai, the suit being dismissed against the present defendant. The defendant 1, decree-holder in O. S. No. 755 of 1910, proceeded to execute his decree by bringing to sale the entire lands. Adiyapada Pillai naturally intervened and objected and claimed exoneration of his share, namely, the eastern half of S. No. 272 allotted to him by the final decree in the partition suit. Though the partition decree was passed on a compromise between the brothers only and though as far as the present defendant 1 was concerned the order was that the suit be dismissed as against him, yet the Court ordered that Muruga Pillai's western half alone should be sold, and that defendant 1 was not entitled to sell the share of Adiyapada Pillai in execution of the decree in Suit No. 755 of 1910. When such an order was passed by the Court defendant 1 decree-holder in O. S. No. 755 of 1910 dropped further proceedings in execution, and had his execution application dismissed on 12th April 1917. Subsequently it would seem that defendant 1 again applied by means of a fresh execution petition to have the entire lands sold in execution of his decree in O. S. No. 755 of 1910. The property was sold and he himself became the purchaser under Ex. 4, dated 8th January 1918. In execution of the sale certificate he applied for and obtained delivery of the land including the eastern half of the land : vide delivery receipt Ex. 5, dated 7th September 1918. It is seen with reference to this Ex. 5 that it was only a symbolic delivery and not delivery of actual possession after removing the person in possession.

Adiyapada Pillai sold his rights in the eastern portion of the suit lands to the present plaintiff under Ex. A dated 26th June 1919. The suit which gave rise to this second appeal was instituted by the plaintiff as the vendee from Adiyapda Pillai under Ex. A alleging that the defendant obstructed him in July 1919 when he went to take possession of the properties purchased by him.

The main plea raised by defendant 1 was that a separate suit does not lie and that all questions relating to excess delivery in execution of the decree in O. S. No. 755 of 1910 to which Adiyapada Pillai was a party should have been settled by proceedings taken under S. 47, Civil P. C. The learned District Munsif overruled that contention and went into the merits of the plaint allegations, holding that a separate suit lay in the circumstances of this case. On the merits he passed a decree in favour of the plaintiff. Defendant 1 preferred an appeal to the lower appellate Court along with his sons, the other defendants in the case. In the lower appellate Court the question was again raised that the present suit is not maintainable having regard to the provisions of S. 47, Civil P. C. The lower appellate Court upheld that contention of the defendant, and I think it was right on that point. S. 47, Civil P. C., is clear that all questions relating to execution discharge or satisfaction of a decree should be decided by proceedings under S. 47, Civil P. C., and not by a separate suit.

The question of excess delivery relates to execution. That has been held by this High Court even in a very early case reported in *Muttuvelu Pillai* v. *Vythilinga Pillai* (1) : see also in *Kattamma Nachiar* v. *Bothgurusami Thevar* (2) so that it is clear that questions relating to excess execution, if raised by a person who was a party to the suit, should not be raised by a fresh suit but should be decided in execution proceedings only. The lower appellate Court being clearly right in that view, the question arose before it whether the present suit should be treated under the circumstences as an application filed under S. 47. There were difficulties according to some of the decisions passed prior to the present Code, in so treating the same. To remove such difficulties, specific provision has been made in the present Code by S. 47, Cl. 2, where it is specifically enacted that the Court may subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fee. The circumstance that a plaint is filed after paying a higher amount of court-fee cannot according to

(1) 5 M. H. C. 185.
(2) 6 M. H. C. 293.

the present Code be a ground for not treating the proceeding as an application under S 47.

The only further question would be whether there is any question of limitation bar applicable to the plaintiff's case. The lower appellate Court held that the application was not barred by limitation, observing that Art. 181, Lim. Act, applied to the case and that the starting point of limitation should be taken to be, when the plaintiff was obstructed or disturbed in his possession. It went into the evidence and came to the finding that it was only in 1919 that the plaintiff or Adiyapada Pillai was disturbed in his possession and that the defendant had not been put in physical possession in execution of his sale certificate. The suit having been filed on 23rd November 1921 that is within the period of three years provided by Art. 181, Lim. Act, the lower appellate Court decided the question of limitation against the defendants, and thus in the end confirmed the decree of the first Court.

Against the decision of the lower appellate Court the defendants have preferred this second appeal.

Both the learned advocates who appear in the case are agreed that the question in dispute is one covered by S. 47, Civil P. C. I think that the lower appellate Court was right in having treated the plaint as a proceeding under S. 47 in the circumstances of this case. The only remaining question then is that of limitation. It was strenuously argued by the learned advocate for the appellant that the lower appellate Court was wrong in fixing the starting point of limitation in this case. He contended that the words of Art. 181, viz., "when the right to apply accrues" should be read without introducing into the article any further words or phrases. According to the learned advocate the right to apply accrued the moment the delivery was effected and delivery was effected under Ex. 5 in favour of his client the auction-purchaser, on 7th September 1918. The article does not say that the starting point is only from the date when the applicant had knowledge of his rights or when he was dispossessed. That being so, the learned advocate argued that this application because the plaint filed in this case should be taken to be application for the present purpose was barred by limitation. He drew my attention to the case reported in *Bihari Lall Mitter* v. *Tanuk Lal Mandar*, A. I. R. 1926 *Pat.* 397, and also to the decision of Jackson, J., in *Pallayya* v. *Bhimaraju* (3). On behalf of the respondent it was argued by his learned advocate that this question must be decided having regard to the accepted view viz., that excess sale in execution is void. If excess sale is void, he contended that excess delivery also is void as such; and that as it has been held that no suit need be filed to set aside excess sales, it follows that no application need be filed to set aside excess delivery and, it is only when the rights of Adiyapada Pillai or the plaintiff are in any way actually disturbed that their right to take any steps arises and that in this particular case having regard to the concurrent findings of both the lower Courts that the plaintiff's vendor was in possession till 1919 and that the defendant got physical possession only in 1919, the (plaint) application filed in 1921 could not be held to be barred.

It seems to me that in such cases we have to keep in mind what exactly is the nature and effect of such excess sales and such excess deliveries.

In the first place, the definition of the word 'judgment-debtor' according to Civil Procedure Code is :

"any person against whom a decree has been passed or an order capable of execution has been made."

Now in this case the plaintiff's vendor was not a person against whom any decree had been passed or order capable of execution had been made. Therefore the Court had no jurisdiction to sell his property in execution of the decree. The sale was thus ultra vires and void, being in excess of the Court's jurisdiction, the jurisdiction of the Court being limited to execute the decree against Muruga Pillai, against whom only the decree had been passed. It does not follow from what I have said that if in execution proceedings in connexion with a suit to which a person was a party anything happened which affected his rights, that he need not proceed under S. 47. The words of S. 47 are wider and under that section even persons against whom no

(3) A. I. R. 1924 Mad. 859.

decrees have been passed but who are parties to the suit, have to come under S. 47, if any of their rights be infringed in execution proceedings by the decree-holder. The procedure ordinarily available by way of suits is substituted by one of applying to the executing Court by means of a petition. This is the only effect of S. 47 of the Code. The legal rights of the parties have to be considered and adjusted upon.

But it does not also follow that such persons are judgment-debtors within the definition of the Civil Procedure Code.

Now *Rajagopala Ayyar* v. *Ramanuja Chariar* (4), is a decision of a Full Bench of this Court which held that when notice required by O. 21, R. 22, Civil P. C., was not given, but the sale took place, that such a sale was void. Being void the sale need not be set aside, and as such sale need not be set aside, the period of limitation (comparatively shorter), prescribed by Art. 166 would not apply, so that in cases where sales are held to be void, appropriate relief could be obtained by parties to the suit by proceeding under S. 47, the period of limitation being not the period prescribed for the setting aside of sales but general period of three years prescribed by Art. 181. If excess sale is void and no notice need be taken of the same by any parties to the suit, until their rights are actually infringed, I fail to see how excess execution could have any higher effect. In this particular case it is found that there was no notice to the plaintiff's vendor either in connexion with the second application for execution which resulted in the excess sale, or in connexion with the delivery evidenced by Ex. 5. Exhibit 5, I think evidences only a symbolic delivery, under O. 21, R. 96. The lower appellate Court says with reference to this that

"the delivery which defendant 1 obtained under Ex. 5 was a mere formal one evidently."

If I am right in my view about the effect of this excess delivery, the plaintiff's vendor need not have taken any steps simply because there was this excess delivery in execution. He was not bound to apply to have the order relating to excess delivery set aside. If he could ignore that order as he could have ignored the excess sale itself, what then is the real act by which he is aggrieved; in other words, when does the right to apply accrue to him within the meaning of Art. 181, Lim. Act. So long as he was in possession it did not matter to him what orders of excess sales or excess deliveries were passed behind his back. I think the lower appellate Court was right in its finding that Art. 181 applied and that the application was not barred.

I wish to notice the two cases that were cited to me by the learned advocate for the appellants. The first case reported in *A. I. R.* 1926 *Pat.* 397 was a case where an application was made professedly to set aside excess sale. The Court, as I understand the judgment, held that as the prayer was to set aside the sale, the application ought to have been made within the period prescribed Art. 168. I do not understand the learned Judges to lay down anything more than that. I do not think that the case affords any guidance to me with reference to the question that I have now to decide. The decision of Jackson, J., reported in *Pallayya* v. *Bhimarazu* (3), deals with Art. 181, Lim. Act. His Lordship came to the conclusion in that case that the application was not barred by Art. 181. His Lordship had before him an application for restitution made after the expiration of three years from the date, as I take it, of the sale. It was argued that the applicant was entitled to deduct the time prescribed by S. 18, Lim. Act, if a case of fraud was made out. His Lordship found on the facts that a case of fraud had been made out and that the applicant was entitled to deduct that period. Deducting that period it was found that the application before the Court was within three years, even if the starting point was taken to be the date of sale; and accordingly the application was not barred.

His Lordship had not to decide the exact point that I have to decide in this case viz., what the starting point of limitation in such a case would be. What the starting point in that case was having regard to the circumstances was evidently assumed and not disputed by the parties; and the only question that required the decision of the Court was whether the period covered by S. 18, Lim. Act, could be deducted; and his Lordship held—and if I may say so res-

(4) A. I. R. 1924 Mad. 431=47 Mad. 283 (F.B.).

pectfully—very properly that the petitioner was entitled to such a deduction. I do not see how this decision is against the view that I am now inclined to adopt as regards the starting point of limitation in the present case. Being thus of opinion that the starting point of limitation in the case before me was only when the plaintiff's vendor or the plaintiff was disturbed in his possession, I think the lower appellate Court was right in the view it took on the question of limitation. This view received support from the observations of the Full Bench of this Court in the case reported in *Rajagopala Ayyar* v. *Ramanuja Chariar* (4), where the decision in *Seshagiri Rao* v. *Srinivasa Rao* (5), by Seshagiri Iyer and Moore, JJ., was followed. The learned advocate for the appellant at one stage of his argument seemed to contend that in this case limitation began even from the date of the Court sale (Ex. 4 dated 8th January 1918) and not merely from the date of the delivery proceedings evidenced by Ex. 5. But as I have held that the sale in question is excess sale not authorized by the decree and is consequently void and that it need not be set aside, time will not begin to run from that event.

For the reasons I have given, if I am right in my view that excess sales are void and need not be set aside by persons who are not judgment-debtors, the circumstance that the sale took place in 1918 would not in any way prejudice the plaintiff-respondent in this particular case. Finally there is also the finding that in spite of the order passed in his first execution application that he was not entitled to proceed against the shares of the property allotted to Adiyapada Pillai, the decree-holder, the present appellant, again applied by a fresh execution application some time later for the same relief and for the sale of the whole of the property and that, without giving any notice to Adiyappa Pillai had the whole property sold and himself became the purchaser; and again without any notice to Adiyapada Pillai he managed to get symbolical delivery behind the back of the latter. Adiyapada Pillai and his vendee the present plaintiff (respondent) came to know about the fraudulent acts of the appellant only in 1919, when the appellant interfered with their possession; till then they were in possession and were paying revenue on the property. In the circumstances though S. 18, Lim. Act, has not been specifically referred to in the plaint, the case would really seem to come under that section and the period before 1919 could not be counted against the respondent. From the facts found in this case, such an inference could legitimately be drawn in the particular circumstances of this case and though ordinarily facts bringing a case under S. 18 have to be specifically pleaded. On all these grounds I dismiss the second appeal with costs.

P.R.S./V.S. *Appeal dismissed.*

(5) [1920] 43 Mad. 313=38 M. L. J. 62=56 I. C. 260=(1920) M. W. N. 127.

A. I. R. 1930 Madras 16

ANANTAKRISHNA AYYAR, J.

(*Onthath*) *Sabju Sahib*—Defendant—Appellant.

v.

Malabar District Board — Plaintiff—Respondent.

Second Appeal No. 614 of 1928, Decided on 15th August 1929, from decree of Dist. Judge, North Malabar, in Appeal Suit No. 88 of 1927.

(a) Malabar Compensation for Tenants' Improvements Act (1900), S. 3 (1)—"Cultivation" and "cultivate" are limited to "waste lands."

The natural construction of S. 3 (1) is to limit the words "cultivation" and "cultivate" to the case of "waste lands" mentioned in the last portion of the subsection. [P 18 C 1]

(b) Malabar Compensation for Tenants' Improvements Act (1900), S. 1 — Present Act secures to tenants better compensation for improvements.

The present Act (1 of 1900) has not by any express provision made the point, viz., whether the Act applies to the case of buildings in towns, in any way clearer, but the object of the present Act would seem to be to secure the tenants better (higher rate of) compensation for improvements in respect of which they would be entitled to compensation under the prior Act or by custom: *A. I. R.* 1927 *Mad.* 776 and *Mad. Second Appeal No.* 1445 *of* 1889, *Ref.* [P 18 C 2]

(c) Transfer of Property Act, S. 108—Roadside poramboke belonging to District Board—Lease of the land on condition that compensation should not be claimed for improvements—Contract is binding on lessee—Malabar Compensation for Tenants' Improvement Act is not applicable.

The suit land was a roadside poramboke belonging to the District Board. This land was leased to *S* by the District Board on condition that *S* should deliver back possession

of the plot without claiming any compensation for improvements of any sort that he might make on the property.

Held : that *S* could not claim compensation for the building erected on the land as the erection of substantial buildings was inconsistent with the terms of lease. [P 18 C 2]

Held further : that Malabar Compensation for Tenants' Improvements Act (1900) did not apply to the present case : *A. I. R.* 1927 *Mad.* 776, *Foll.* [P 18 C 2]

(d) Crown Grants Act, S. 3 — Crown Grants Act has no application to lease of roadside poramboke belonging to District Board—(*Obiter*).

Though it is true that the Government may have some rights in the underground soil of the public roads which vest in the Local Boards for certain purposes, yet the Crown Grants Act does not apply to a lease of road side poramboke belonging to the District Local Board. [P 19 C 1]

M. C. Sridharam—for Appellant.

V. P. Karunakaran Nambiar — for Respondent.

Judgment.—On 12th March 1923, the District Board of Malabar passed proceedings permitting the President of the District Board to lease a particular roadside poramboke vested in the District Board, for occupation by the present defendant. The proceedings made it a condition for allowing such temporary occupation that the appellant should pay a sum of Rs. 6 a year and that he should deliver back possession of the plot without claiming any compensation for improvements of any sort that he might make on the property. On such conditions the President, District Board, Malabar, leased to the defendant the roadside poramboke on 4th April 1923 as per Ex. A. Subsequently as it was resolved to take possession of the property, a notice to quit, Ex. B, was served upon the defendant on 7th May 1925 requiring him to quit the premises and deliver possession to the District Board. The defendant not having done so, the President, District Board, Malabar, has instituted the suit which has given rise to this second appeal to recover possession of the property. The main plea of the defendant was that he was entitled to be paid the value of the improvements effected by him on the property before surrendering possession, and he relied on the provisions of the Malabar Compensation for Tenants' Improvements Act. The District Munsif of Badagara who tried the suit was of opinion that the provisions of the Crown Grants Act 15 of 1895, applied to the case and accordingly came to the conclusion that the rights of the parties should be adjudicated according to the tenor of the document. The document being specific on the point that the defendant should not claim the value of any improvements that he might make on the property, the District Munsif came to the conclusion that the plaintiff was not bound to pay anything in respect of the improvements. The defendant preferred an appeal to the lower appellate Court and the learned District Judge of North Malabar differed from the District Munsif as regards the applicability of the Crown Grants Act to the case in question. He, however, was of opinion that Malabar Act 1 of 1900 did not apply to the present case because the present case related to a road margin in the heart of the Badagara Bazaar by the side of the principal public offices and at the junction of three roads, and he was accordingly of opinion that the land in question could not be said to be an agricultural holding, within the meaning of the Malabar Act. The learned District Judge also relied on a decision of this Court reported in *Chathukutty* v. *Kunhappan* (1), where the learned Judge Jackson, J., held that Malabar Act 1 of 1900 applies only to improvements effected to agricultural holdings and vacant kudiyiruppu building sites. The learned District Judge was of opinion that the roadside poramboke in question which was leased to the appellant could not be said to be an agricultural holding or a building site (kudiyiruppu) available for purposes of being built upon. It was roadside poramboke proper, and as the same was not required immediately for any purpose by the District Board, it was thought that it may be leased to the defendant temporarily but on the specific terms and conditions mentioned in the lease. The learned District Judge (Mr. A. V. Govinda Menon) observed as follows in para. 2 of his judgment :

"It would be a perversion of common sense to hold that when, as here, in an urban area like Badagara, a tenant agrees to occupy a road margin for a short term and agrees with the District Board (in which the road is vested) to go away whenever called upon, without claiming anything for any fixture, he might erect upon the site, such a contract comes within the mischief attempted to be struck at by the Improvements Act."

The defendant has preferred this

(1) A. I. R. 1927 Mad. 776=50 Mad. 813.

second appeal and on his behalf it was argued by his learned advocate that the decision of this Court referred to by me, viz., *Chathukuthy* v. *Kunhappan* (1), requires reconsideration. The learned advocate submitted that the policy of the Malabar Compensation for Tenants' Improvements Act was to encourage the making of improvements in respect of all kinds of properties in Malabar, and that there was nothing in any of the provisions of the Act which restricted the scope of the Act to agricultural lands or vacant kudiyiruppu building sites, as mentioned in that decision. The learned advocate accordingly submitted that that decision should be reconsidered as the question related to a matter of great importance in Malabar. On the other side, the learned advocate who appeared for the District Board drew my attention to the definition of tenant in S. 3, of the Act where reference is made to "cultivation" and to "cultivate". But I am inclined to think on a reading of sub-Cl. (1) ,S. 3, as a whole, that the natural construction is to limit those words to the case of "waste lands mentioned in the last portion of the sub-section.

Then it was argued that there were decisions under the prior Act of 1887 to the effect that the Act did not apply to the case of buildings in towns. It was pointed out that in the judgment of Muthuswami Iyer and Weir, JJ., in *Second Appeal No.* 1445 *of* 1889, a case from Calicut, their Lordships observed:

"The dwelling houses described in S. 3, Cl. 2, of the Act are grouped together with four buildings and the term improvement itself is defined in the Act as a work which adds to the value of a holding. In their ordinary sense the words appear to us to refer to dwelling houses appurtenant to a holding for agricultural purposes, and not to dwelling houses let within the limits of a town for purposes of residence only."

Again they say:

"The dwelling house for which compensation is claimed in this suit forms admittedly no part of of an agricultural holding. The house, it is stated, is situated in a favourite suburb of the town of Calicut. We are therefore of opinion that the Act does not apply, and S. 7 of the Act does not render inoperative the restrictive convenant set out in Ex. A."

Their Lordships accordingly held that Malabar Act 1 of 1887 did not apply to such a case, and they disallowed compensation in respect of the said building. The present Act 1 of 1900 has not by any express provision, made the point in any way clearer, but the object of the present Act would seem to be to secure to the tenants better (higher rate of) compensation for improvements in respect of which they would be entitled to compensation under the prior Act or by custom. At p. 345 of Malabar Law and Aliyasanthana Law of the late Sundara Iyar, J. edited by Mr. Sitarama Rao, the following passage occurs:

"It appears, however, that the customary rule as to payment of compensation applied only to agricultural tenancies: vide Logan's Manual Vol. II, Appendix III (cxc)."

Though the question was discussed before me, no new and further materials have been placed before me to induce me to say that the decision in *Chathu Kutty* v. *Kunhappan* (1) requires reconsideration. On the other hand, though is was observed at p. 814 (of 50 *Mad.*) that "curiously enough," the question appears to be res integra, it now appears that a Bench of this Court in effect decided a similar point in 1890 in *Second Appeal No.* 1445 *of* 1889 from South Malabar. It also appears from the .speech of the Hon'ble S. Subramania Iyer in his final observations on this bill that the question was raised when the bill was being considered. He said:

"The Palaghat Sarvajana Sabha entertains a doubt as to whether the definition of the word "tenant" would not include lessees of warehouses and mercantile shops. It may be pointed out that the scope of the Bill does not admit of such an interpretation, and that the Transfer of Property Act provides for leases other than leases for agricultural purposes: Fort St. George Gazette, Supplement dated 2nd November 1886.

I therefore think that absolutely no grounds have been made out why I should not follow the decision of this Court reported in *Chathukutty* v. *Kunhappan* (1). As I said, the finding in this case is that the suit land is a roadside poramboke and as it was not thought necessary to keep it as such by the District Board at that time, it was suggested that the same may be handed over to the defendant on the particular terms and conditions mentioned in Ex. A for temporary occupation. Further, the erection of substantial buildings, would, I think, in the present case, be inconsistent with the purpose for which the land was let: see definition of "improvement" in

S. 3 (3) of the Act. Nor could there be any custom applicable to lease of porambokes like the one before me.

In this view it is not necessary for me to express an opinion on the question whether the Crown Grants Act would apply to such a case. Prima facie there are serious obstacles in the way of accepting the contention on this point. Though it is true that the Government may have some rights in the underground soil of public roads which according to the Act vest in the Local Boards for certain purposes, it does not, in my opinion, follow, that the Local Board or the President is thereby an agent of the Government when it or he deals with such properties. On the other hand a reading of Ss. 160 and 199 of the Madras Local Boards Act leads to the conclusion that such roads, as roads and for communication purposes, vest in the Local Boards which are entitled to deal with the same in the way authorized by law under S. 160 (3). The President of the Local Board may, with the permission of the Board, grant leases of roadside poramboke according to the rules framed by the Government under S. 199 (d). Local Boards may acquire property and lease the same subject to rules made by the Government. Though the Local Boards are bound by rules so framed by Government, they are so bound not because the Government happen to be the owner of the sub-soil but because the rules when framed become part and parcel of the Local Boards Act. I therefore think, as at present advised, that this case cannot be brought under the Crown Grants Act. But as I said, having come to the conclusion that the Malabar Compensation for Tenants' Imrovements Act does not apply, it does not matter for the purpose of this case whether the Crown Grants Act applies or not.

I think the District Judge was right, and the second appeal is dismissed with costs. I allow the appellant three months' time for removal of the buildings.

P.R.S./V.S. *Appeal dismissed,*

A. I. R. 1930 Madras 19

WALLER AND CORNISH, JJ.

(*Kakara*) *Tatamma*—Appellant.

v.

Marina Veerraju—Respondent.

Appeal No. 368 of 1928, Decided on 9th August 1929, against order of Dist. Court, East Godavery, D/- 17th July 1928.

(a) Guardians and Wards Act, Ss. 10 and 25—Conditional order of appointment as guardian of property is of no effect.

Where a District Judge appointed the father guardian of the property of a ward and directed the respondent to restore the child to her father, remarking that no order as regards the guardianship of her person was necessary.

Held : that the conditional order of appointment as guardian of the property is of no effect. The District Judge was not correct in saying that no order as regards the guardianship of the person was "necessary", *A. I. R.* 1927 *Mad.* 36 and *A. I. R.* 1925 *Mad.* 1085, *Rel. on*; *A. I. R.* 1925 *Mad.* 398, *not Foll.* [P 19 C 2]

(b) Guardians and Wards Act, S. 25—Constructive custody should be imported in S. 25.

Even where the minor has never been in the custody of the guardian, in order to make the Act workable, a fiction must be imported into S. 25, whereby it is deemed that the child has been constructively in the guardian's custody and has left it. [P 20 C 1]

C. Rama Rao—for Appellant.

P. V. Vallabhacharyulu—for Respondent.

Waller, J.—This is an appeal against an order appointing a guardian under the Guardian and Wards Act. A father applied under S. 10 of the Act to be appointed guardian of his minor daughter's person and property and under S. 25 for an order directing the respondent to deliver her into his custody. The District Judge appointed him guardian of the property and directed the respondent to restore the child to her father, remarking that no order as regards the guardianship of her person was necessary.

The conditional order of appointment as guardian of the property is of no effect: *In re, Venkatesa Perumal* (1), and must be set aside. The District Judge is not correct in saying that no order as regards the guardianship of the person was "necessary." No such order could have been passed. On this point, we agree in the view taken by Ramesam and Jackson, JJ., in *Lakshma Reddi* v,

(1) A. I. R. 1927 Mad. 36=49 Mad. 809 (F.B.).

Vira Reddi (2) and not in that taken by Venkatasubba Rao, J., in *Raghavaiya* v. *Lakshmiah* (3). Mr. Rama Rao contends that no application lies under S. 25 of the Act in a case where the minor has never been in the custody of the guardian. That is, of course, the plain meaning of the section, but we must follow the rulings of this Court which lay down that, in order to make the Act workable, a fiction must be imported into the section, whereby it is deemed that the child has been constructively in the guardian's custody and has left it.

On the merits, we consider that there should be a further enquiry. The allegation is that the father more or less deserted his wife and endeavoured to marry again, while she was still alive. That allegation has not been investigated. If it is true, it will be for the Court below to consider whether it is for the welfare of the child to return to the custody of a father, who had no particular affection for her mother and has now married again. In effect, if she returns to her father, she will have to be looked after by a stepmother, who may have children of her own and neglect her. The order is set aside. The District Judge will re-entertain the application and dispose of it in the light of the above remarks. There will be no order as to costs.

P.R.S./V.S. *Order set aside.*

(2) A. I. R. 1925 Mad. 1085.
(3) A. I. R. 1925 Mad. 398.

A. I. R. 1930 Madras 20

CURGENVEN, J.

Ranga Raju and *another*—Defendants—Petitioners.

v.

Ethirajammal — Plaintiff — Respondent.

Civil Revn. Petn. No. 107 of 1929, Decided on 23rd September 1929, against order of Dist. Court, Chingleput, D/- 27th November 1928.

Court-fees Act, Sch. 2, Art. 11 (a)—Order directing final decree be passed in mortgage suit—Court-fee for appeal over such order need not be ad valorem.

An appeal against an order, directing after contest, that a final decree shall be passed in a mortgage suit, should not be treated as an appeal against the final decree in that suit for the purpose of court-fee, and, therefore, an ad valorem court-fee need not be paid for such appeal : 35 *All.* 476, *Dist* ; 42 *Mad.* 52, *Expl.* [P 21 C 1]

K. P. Ramakrishna Iyer and *N. Ramchandra Iyer*—for Petitioners.

T. G. Aravamudhan—for Respondent.

Judgment.—This civil revision petition was presented in the following circumstances. The plaintiff, now respondent, obtained a preliminary mortgage decree against the petitioner, and applied in M. P. No. 279 of 1927 to have a final decree passed. The defendants were given notice and alleged that the decree debt had been adjusted. This issue was tried by the Subordinate Judge of Chingleput and found against, so that he directed that a final decree should be drawn up. The petitioners took this order on appeal to the District Court, stamping it as though for a miscellaneous appeal. The learned District Judge took up the matter of the sufficiency of the court-fee and passed an order in which he says that the appeal was clearly against the final decree in the mortgage suit and accordingly that an ad valorem court-fee should be paid. The petitioners now object to the terms of this order.

The question thus is whether an appeal against an order directing after contest that a final decree shall be passed in a mortgage suit should be treated as an appeal against the final decree in that suit. Not much guidance can be obtained from reported cases. The learned District Judge has referred to *Bajrangi Lal* v. *Mahabir Kunwar* (1), but all that that lays down is that an appeal from a final decree in a mortgage suit passed under O. 34, R. 5, Civil P. C., requires an ad valorem court-fee, a proposition which need not be disputed. In *Subbalakshmi Ammal* v. *Ramalinga Chetty* (2), Spencer and Krishnan, JJ., had to deal with an order dismissing an application for a final decree in a suit for sale on a mortgage from the point of view of its appealability and there indeed they did hold that the effect of the order was to dismiss the suit thereby being technically a decree and appealable. I do not, however, find that case of much assistance here, because although

(1) [1913] 35 All. 476=21 I. C. 498=11 A.L.J. 801.
(2) [1918] 42 Mad. 52=35 M. L. J. 552=8 M. L. W. 526=48 I.C. 298=(1918) M.W.N 792.

the effect of the order here no doubt would be that a final decree must be passed, it can hardly be said that this appeal is tantamount to an appeal from that decree. We have only to consider what the permissible grounds in each case would be. In this appeal against the order, the grounds must necessarily be limited to adducing cause why the final decree should not be passed; whereas once the decree is passed and an appeal is preferred against it, grounds such as those would not avail the appellant, but he must attack the merits of the decree. I think it is quite clear, therefore, that the scope of an appeal against the order would be different from that against the decree and further that the judgment-debtor has a right of appeal against both. To charge him ad valorem fees in this appeal would mean, if he appealed against the decree, he would have to pay them twice over, which I do not think can be correct. I must accordingly allow the petition and decide that the appeal preferred to the District Judge was properly stamped and direct him to restore it to file and dispose of it according to law. Petitioners will get their costs in this petition.

P.R.S./V.S. *Petition allowed.*

A. I. R. 1930 Madras 21

SUNDARAM CHETTY, J.

Sri Saladi Nagabushanam—Plaintiff—Appellant.

v.

Vardhinidi Venkanna and *another*—Defendants—Respondents.

Second Appeals Nos. 1671 and 1672 of 1927, Decided on 13th September 1929, against decrees of Dist. Court, West Godaveri, Ellore, in Appeal Suits Nos. 41 and 40 of 1927.

(a) Madras Elementary Education Act (1920), S. 36—Education tax under S. 34 should be treated as addition to land cess—Education tax is not ipso facto land cess for all purposes.

A rule framed under S. 36 ran thus: "Tax levied by a local authority under S. 23 . . . . . shall be treated as an addition to the tax levied . . . . . under the law for the time being in force. . . . . ."

Held: that the education tax under S. 34 should be treated as an addition to the land cess and is recoverable along with the said land cess as an integral part of it. That being so, the rule did not declare that the education tax was ipso facto land cess or should be deemed to be land cess for all purposes. [P 22 C1]

(b) Madras Elementary Education Act (1920), S. 34 — No statutory provision to enable landholder to collect education tax from tenant—Landholder's claim should be based upon the contract.

With respect to education tax leviable under S. 34, there is no statutory provision to enable the landholder to collect any portion of it from the tenant. The landholder's claim therefore, to recover education tax from his tenants, should be based upon a contract. [P 22 C 1]

B. Satyanarayana—for Appellant.

V. Govindarajachari — for Respondents.

Judgment.—The plaintiff is the appellant in both these appeals. The two suits filed by him are for the recovery of rent and cess from the ryots (defendants). The only question in dispute in these second appeals is whether the plaintiff is entitled to recover one-half of the education cess which the Government has levied and recovered from him. It would appear from the judgment of the lower appellate Court, it was conceded on behalf of the plaintiff that he is not entitled to recover land cess from the defendants. The defendants have set up a contract or agreement by which the plaintiff's predecessors-in-title agreed not to collect land cess from them. That agreement was no doubt prior to the passing of Act 8 of 1920, which is the Madras Elementary Education Act. Under S. 34 of this Act, the education tax can be levied in the area which is not within a municipality, not exceeding 25 per cent of the taxation leviable in that area, under all or any of the following heads, namely, land cess, tax on companies, professional tax, and house tax. This section does not specify from whom such a tax can be levied. In S. 34, it is stated that the assessment and realization of taxes leviable under S. 36 shall be in accordance with the procedure prescribed. That procedure appears to have been prescribed under a rule which was framed under S. 36. The rule is to this effect, namely,

"Tax levied by a local authority under S. 34 of the Act under any head of taxation specified therein, shall be treated as an addition to the tax levied under the heads by the local authority under the law for the time being in force governing it, and shall be assessed and recovered along with the said tax as an integral part of it."

The question at issue has to be decided upon a proper interpretation of this rule. It must be borne in mind that this rule is one framed under S. 36 which

only relates to the procedure prescribed for assessment and realization of the tax. The scope of this rule, therefore, is confined to the procedure to be adopted for the levy and recovery of this tax and cannot be extended further. It says that the education tax can be recovered along with the taxes already in force, for instance, land cess. This education tax should be treated as an addition to the land cess and is recoverable along with the said land cess as an integral part of it. That being so, it seems to me that this rule does not declare that the education tax is ipso facto land cess or shall be deemed to be land cess for all purposes. If an amount is due to the Government under the Land Improvement Loans Act, that amount is recoverable as an arrear of revenue. It is only the procedure prescribed for the recovery of arrears of revenue that should also be adopted for the recovery of those dues.

It has been held that by reason of the identical procedure for their recovery, such dues do not become arrears of revenue for all purposes. Similarly, by reason of the aforesaid rule framed under S. 36 of the Act, it cannot be urged that the education tax has been declared by statute to be land cess itself. In this view, it has to be seen whether the plaintiff has got any right to recover from the tenant a portion of the education tax levied from him, In the case of land cess, there is the express provision in S. 88, Madras Local Boards Act 14 of 1920, in proviso 2 which enables a landholder to recover from his tenant one-half of the land cess payable by him in respect of the land occupied by the tenant. But for this proviso, the landholder will have no right to recover any portion of it from the tenant, unless under a special contract entered into with him.

With respect to land cess, there is a statutory right given to the landholder to recover one-half of it from the tenant but as to educational tax leviable under Act 8 of 1920 there is no statutory provision to enable the landholder to collect any portion of it from the tenant. The plaintiff's claim to recover one-half of the education tax from the defendants should be based either upon a contract or upon a statutory liability. Neither of them exists in this case. It is, therefore, clear, that the plaintiff's claim with respect to education cess is unsustainable.

Even if it should be held that by reason of the rule framed under S. 36 of the Act referred to above, the education tax must be deemed to be land cess itself or a portion of it, the plaintiff would still be prevented from recovering any portion thereof from the defendants by reason of the agreement which disentitles him to recover the land cess from the defendants. The contract seems to be that no land cess should be recovered from the defendants. If it be so, I must hold that there was no reservation to the effect that that contract should be confined only to the amount which was then levied as land cess. Unless such a reservation is satisfactorily established, it must be presumed that whatever amount was levied under the head of land cess was waived under that contract. In the view I have taken above, it is not quite necessary to deal with the contract on the basis that education cess is land cess itself. I have, however, dealt with this aspect, as it was also the subject of arguments before me. In any view, the plaintiff would not be entitled to recover any portion of the education tax from the defendants. In the result, the second appeals are dismissed with costs.

P.R.S./V.S. *Appeals dismissed.*

A. I. R. 1930 Madras 22

ANANTAKRISHNA AYYAR J.

Maharajah of Pittapuram—Plaintiff—Appellant.

v.

Chelikani Venkatarayanim Garu—Defendant—Respondent.

S. R. Nos. 18337 to 18340 of 1928, Decided on 18th July 1929, from decrees of Dist. Judge, East Godaveri, in Appeals Nos. 261, 263, 262, and 264 of 1925.

(a) Court-fees Act, Sch. 2, Cl. 17 (b)—Decree declaring distraint partly valid—Memoranda of objection raising only question of exact amount of rent due—Subject matter is capable of being estimated at money value and so ad valorem fees are necessary—Case does not come within Cl. 17.

A decree declaring a distraint partly valid was passed and the question raised in the memorandum of objection filed was as regards the exact amount of rent due and none that went to the root of the whole matter and rendered the whole distraint invalid.

Held: that the case does not come within Cl. 17 (b) and that it being possible to estimate

at money value the subject matter in dispute in these memoranda of objections, ad valorem fees were necessary and not fixed fees of Rs. 15 : 13 *C. W. N.* 815, *Rel. on.* [P 24 C 1, 2]

(b) Madras Estates Land Act, S. 53, Cl. 2 —Distraint is valid to extent of amount legally due.

A distraint can be upheld to the extent of the amount legally due to the landlord though the landlord purported to effect the distraint in respect of a larger amount : 38 *Mad.* 1140 ; 20 *M. L. J.* 821 and 23 *Mad.* 268, *Foll.*

[P 23 C 2]

P. Satyanarayana Rao—for Respondent.

Government Pleader—for the Crown.

Judgment.—The question that has been referred to me is : what is the court-fee payable in respect of the memorandum of objections in second appeals Nos. 141 to 144 of 1928. The original suits were instituted by ryots under S. 95, Madras Estates Land Act. In the plaint there are distinct allegations to the effect that proper notice was not served on the ryots and that the amount of rent due was wrongly stated in the demand. The first Court dismissed the suits filed by the ryots ; but on appeal by the ryots, the lower appellate Court came to the conclusion that the amount of rent due was not Rs. 4,000 and odd but only Rs. 2,000 odd. Accordingly, the lower appellate Court reversed the decrees passed by the first Court dismissing the suits, and in modification of the said decrees declared that the distraint made by the landlord was not wholly void but was valid only to the extent of Rs. 2,000 odd, the amount of rent found by it. The landlord has preferred these Second Appeals Nos. 141 to 144 of 1928. The ryots, who are the respondents, have filed memoranda of objections in each of these second appeals ; and the question that has been referred to me is, as I have already stated, what is the proper amount of court-fee payable in respect of these memoranda of objections.

In order to find out what exactly is the amount of court-fee payable in respect of a document, one has to see, first of all, what the exact nature of the document is. I have read through these memoranda of objections, and I am not able to find any ground which goes to impugne the distraint proceedings in toto; on the other hand what I find is that each one of the grounds taken in the memoranda only attacks the finding of the lower appellate Court as to the exact amount due to the landlord. Thus my decision is confined to a case where it is not the whole of the distraint that is sought to be set aside by virtue of some plea which goes to the root of the whole matter ; in the present cases the objection taken by the ryots to the decree of the lower appellate Court is confined, as I understand the same, to the question of the amount of rent due. Therefore the question that I have got to ask myself is this: is the subject matter of these memoranda of objections capable of being estimated in money value within the meaning of Cl. 17 (b), Sch. 2, Court-fees Act. Before I consider this question, it may perhaps be convenient that I should refer to one or two sections of the Estates Land Act which deal with the question as to how far distraint proceedings could be held to be partly valid and partly invalid. S. 53 (2) enacts that:

"a pattah tendered by a landholder which in the opinion of the Collector is partially but not entirely correct shall nevertheless be enforceable to the extent to which it is found to be correct."

Reference was made by the learned Government Pleader, to S. 104, Estates Land Act in this connexion. The learned advocate who appeared for the ryots argued that Cl. (2), S. 53, would apply only to suits for acceptance of pattahs and muchilikas and the section could not apply to suits such as those I have now to deal with, namely, suits brought under S. 95 to set aside distraint proceedings. I find on a reference to the case of *Raghunatha Rao* v. *Vellamoonji Gounden* (1), that this very question came up for consideration before two learned Judges of this Court, Oldfield and Seshagiri Iyer, JJ., and both of them came to the conclusion that the application of the section was not confined to pattah suits, as is now contended for by the learned advocate on behalf of the ryots. I need not go into the details of the reasoning of the learned Judges, for the said decision is binding upon me. It was held in that case that a distraint could be upheld to the extent of the amount legally due to the landlord though the landlord purported to effect the distraint in respect of a larger amount. This is a decision under the present Estates Land Act, and consequently is a direct authority on the construction of the section

(1) [1915] 38 Mad. 1140=27 M. L. J. 597=25 I. C. 941=1 M. L. W. 934.

in question. I may just quote one sentence from the judgment of Seshagiri Ayyar, J., at p. 1143 of the report "it would serve," his Lordship says :

"no purpose therefore to enact in Cl. (2), S. 53, that the landlord can enforce his claim for rent in a revenue Court in so far as the pattah correctly states it. If the decisions prior to the Estates Land Act can furnish any assistance, I feel no doubt that they would support this conclusion of mine. Prior to the passing of the new Act, the predominant view was that a distraint for an excess amount should not be avoided altogether."

Before the Estates Land Act no doubt there was some difference of opinion on this particular point but as remarked by Seshagiri Ayyar, J., the predominant view was that a distraint would be valid to the extent of the rent properly due. In *Venkatakrishna Pillai* v. *Muthualu Reddi* (2), Sir Arnold White, C. J. and Krishnan, J., say as follows:

"It is argued that the attachment is bad as it was for a larger amount than what the District Judge held to be due. It has been held by this Court in recent cases that the attachment is good for the amount actually due. A case of sale stands on a different footing from a case of attachment. The case before us is only one of distraint, not of sale."

The learned Judges held that the distraint was valid to the extent of the proper amount of rent due. A similar view was also taken in *Bhupatirazu* v. *Ramasami* (3), where the distraint was made in respect of a sum of Rs. 44-6-0, whereas the amount due was only Rs. 22-3-0, just half the amount claimed by the landholder ; and the Court held that the distraint was valid to the extent of Rs. 22-3-0 found by the Court to be properly due.

Having regard to the predominant view that prevailed in Madras prior to the enactment of the Estates Land Act, and having regard to the decision in *Raghunatha Rao* v. *Vellamoonji Goundan* (1) on S. 53 of the present Act, there could be no doubt on the question that it is open to Courts to declare a distraint valid in part and invalid in part. The decree of the lower appellate Court, in the cases before me, as I have mentioned already, declared the distraint to be valid to the extent of Rs. 2,000 odd. It is against such a decree these memoranda of objections have been filed, and as the memoranda raise on question that goes to the root of the whole matter and render the whole distraint invalid, and since the grounds raise only question as regards the exact amount of rent due, I think that the present is a case which does not come within Cl. 17 (b), Sch. 2, Court-fees Act. The conclusion I have come to is that it is possible to estimate at a money value the subject matter in dispute in these memoranda of objections. On the side of the Crown my attention was also drawn to Cl. 8, S. 7 of the Act where the legislature deals with suits to set aside attachment of lands as capable of being so valued. The case in *Bunwari Lal* v. *Sheo Sankar Missar* (4), was also quoted as throwing light on the question as to what exactly is the meaning to be attached to the words "capable of being estimated in money value," occuring in Cl. 17 (b), Court-fees Act.

For the reasons I have mentioned, I have come to the conclusion that the memoranda of objections in the cases before me are capable of being estimated in money value, and consequently the court-fee payable in respect of the same is not the fixed fee of Rs. 15 but an ad-valorem fee on the value of each of these memoranda. The learned advocate for the ryots will be called upon to specify the value of these memoranda and pay ad valorem fee thereon, within a month.

P.R.S./P.R. *Order accordingly.*

(1) [1910] 20 M. L. J. 821=6 I. C. 209=(1910) M. W. N. 227.
(2) [1900] 23 Mad. 268.
(4) [1909] 13 C. W. N. 815=1 I. C. 670.

A. I. R. 1930 Madras 24

COUTTS-TROTTER, C. J., AND ANANTAKRISHNA AYYAR, J.

Official Assignee of Madras—Appellant.

v.

(*Devakottah Nagarathar Sri*) *Minakshi Vidyasalai Paripalana Sangam*—Respondent.

Original Side Appeal No. 82 of 1927, Decided on 15th March 1929, from judgment of Waller, J., D/- 20th September 1927.

Trusts Act S. 66—Trustee wrongfully mixing trust property with his own—His estate becoming insolvent and hence unable to pay debts as they fell due—Co-trustees are entitled to preferential charge over his outstanding debts.

If a trustee mixes up trust property with his own without the consent and knowledge of his co-trustees and there are no tangible assets which he can be said to have purchased, the beneficiaries are entitled to a charge over the whole fund. [P 28 C 1]

The trustees managing a school had handed over a part of the trust property to a co-trustee, who wrongfully utilized it for his own business which coming to a standstill, his estate became insolvent, and he could not pay the debts as they fell due though he had large outstanding debts due to him.

Held: that the co-trustees were not relegated to the position of unsecured creditors but were entitled to a preferential charge over the outstanding debts: *In re, Hallet & Co. Ex Parte Blane*, (1894) 2 *Q. B.* 237, *Dist.*; *Pennell* v. *Deffell* 4 *De G.M.G.* 372, *Foll.*; *In re, Hallett's* case, 13 *Ch. Dn.* 696 and *Sinclair* v. *Brougham*, (1914) *A. C.* 398, *Ref.* and *Appr.* 28 *M. L. J.* 403, *Rel. on.* [P 26 C 1, 2]

S. Doraiswami Iyer and *V. Varadaraja Mudaliar*—for Appellant.

V. V. Srinivasa Iyengar, *N. Rajagopal Iyengar* and *S. G. Sadagopa Mudaliar*—for Respondent.

Coutts-Trotter, C. J.—I have so little confidence in my own ability to decide correctly a case involving wide principles of equity, that I am relieved to find that the amount here at stake is sufficient to enable an appeal to be taken to a higher tribunal. I approach this case with much more than the diffidence expressed by Lord Sumner in *Sinclair* v. *Brougham* (1), and feel myself under the ban expressed by Thesigar, L. J., in *Hallett's* case *Knatchbull* v. *Hallett* (2), as to the unlikelihood of common law Judges even of the eminence of Lord Bramwell being able to understand any but the simplest and most firmly estab lished of equity doctrines.

My duty is simply to set out the facts which are practically undisputed, and to apply to those facts the principles I conceive to be laid down by the decided cases as best as I can.

Mr. Ramanathan Chetty was a Nattukottai Chetty carrying on the usual business of a banker and money lender. He was also a member of a body who conducted the affairs of an endowed School at Devakotta. A large sum of money was in the hands of the trustees on behalf of the School and they entrusted to Ramanatha's custody a part of it amounting to some Rs. 40,000. In respect of that he was clearly in a fiduciary position. He put that sum into his own business without the knowledge or consent of his co-trustees; his business came to a standstill, and he was adjudicated an insolvent on 20th July 1925. The estate was insolvent in the sense that it could not meet its debts as they fell due, but it had very considerable assets outstanding in the form of book debts, and those assets will doubtless in time be realized. The sole question before us is whether the bankrupt's co-trustees are relegated to the position of ordinary creditors in the insolvency, or are entitled to say that they stand on a higher footing and are entitled to a charge on that whole estate in priority to other creditors on the basis of following their moneys which have been misappropriated to the fund in which they must be supposed to have been sunk.

I have most carefully perused the cases that the diligence of counsel has placed before us; and I wish to express my indebtedness for the assistance they have given us. The guiding principles, as I conceive them to be, are laid down in two great judgments, that of Jessel M. R. *In re, Hallett* (2), and that of Lord Haldane in *Sinclair* v, *Brougham* (1). I do not propose to examine the early common law cases, though they have been cited to us, because, as Jessel, M. R. points out, the Judges were then dominated by the idea that money being unidentifiable, it could in no case be followed, a doctrine eliminated by "modern equity," to use his own language. I take these propositions to be indisputable; and in stating them I use throughout for brevity the term 'trustee' to cover all cases of persons who stand in a fiduciary position and 'cesti que trust' to cover the cases of all those towards whom the persons I have called 'trustees' stand in that position.

That if the trustee keeps the sums entrusted to him entirely separate from his own moneys, as by putting them in cash in a bag, to use Sir G. Jessel's instance, or by putting them into a separate account at a Bank, the cesti que trust can follow them.

That if the trustee can be shown to have converted the trust money into a specific thing such as a piece of land, or a definite parcel of goods remaining in his possession, the cesti que trust can take that land or those goods as representing his money or claim a lien on them for the money expended on the purchase. Then comes the more common case where the trustee has mixed up the

(1) [1914] A. C. 398=83 L. J. Ch. 465=30 T. L. R. 315=58 S. J. 302=111 L. T. 1.
(2) [1880] 13 Ch. D. 696=49 L. J. Ch. 415=28 W. R. 732=42 L. T. 421.

trust money with his own. I think here it is clearly that.

If the trustee has bought land or goods out of moneys which are partly his own and partly those of the cesti que trust the cesti que trust can claim a charge on the property for the amount of his funds which was expended in the purchase. That is not always easy of ascertainment, and the working rule appears to be that if the trust moneys have disappeared and no residue is left, the cesti que trust will be entitled to a charge on the whole until it is ascertained what portion of the purchase moneys was contributed by the trustee out of his own funds and not out of the trust money, the onus being cast on the trustee to prove what portion came from his own funds. When that is ascertained, the cesti que trust will only have a lien on the property for the amount ascertained to be due to the misuse of the trust moneys.

Then arises the case where the trust moneys have not only been mixed with the trustee's moneys, but where there is no tangible asset which could be alleged to have been acquired with the trust funds wholly or partially. This is the case before us, because here what the trustee did was to put the trust moneys in his hands into his own business, and subject them to all the fluctuations of that business and it is clear that the business was so unsuccessful that the actual funds in the hands of the Official Assignee as at this date realized amount to nothing. It was strenuously argued by Mr. Doraiswami Aiyar that in such circumstances the Court could not give a preferential charge over prospective as distinct from actually tangible assets of the business. That argument ultimately seems to me to imply that a trustee has only to put trust moneys into a business and then and there the cesti que trust is debarred from invoking the equitable doctrine, and sinks to the position of an unsecured and unpreferred creditor of the estate. That view seems to me to have been negatived so long ago as 1853 by the judgment of Turner ,L. J. in *Pennell* v. *Deffell* (3). At pp. 388 and 389 the learned Lord, Justice takes the very cause we have to consider as a clear illustration of a case to which the equitable doctrine would apply.

(3) 4 De. G. M. & G. 372.

We were much pressed with the case of *In re, Hallett & Co. Ex parte, Blane* (4). After a careful consideration of that case, I think it decides no more than this; that a paper adjustment cannot be treated as a passing of moneys of the cesti que trust into the hands of the trustee. On p. 242 the point is first and emphatically taken by Davey, L. J. Mr. Muir Mackenzie in argument had said:

"The £1600 was in fact received by Hallett & Co."

Davey L. J. then said:

"No: all that happened was that they got a credit for that amount."

I read the judgments which follow as proceeding on those lines viz., that while you can follow money, you cannot follow a mere book adjustment.

I think that the learned Judge came to the right conclusion and that this appeal should be dismissed with costs, payable by the Official Assignee out of the Estate. Certificate for two counsels. Official Assignee to take his costs out of the estate.

Anantakrishna Ayyar, J.—M. A. R. N. Ramanathan Chettiar, a Nattukottai Chetty carrying on money lending transaction under the firm name of M. A. R. N. Ramanathan Chettiar, was a member of the committee of the Nagarathar Sri Meenkshi Vidyasala Paripalana Sangam and also the treasurer of the Sangam. The Sangam is compendiously called "Nagarathar School, Devakottai". In his capacity as treasurer, Ramanathan Chettiar collected various sums subscribed for the school which the Sangam was maintaining. He paid these sums into his own business, and in 1925 the firm was adjudicated insolvent. At that time there stood to the credit of of the trust in his firm's books a sum of over Rs. 40,000. The Committee of the Nagarathar School, Devakotta, claimed that the said amount should be paid in full by the Official Assignee in preference to the other debts due to other ordinary creditors of the firm. . The Official Assignee passed an order on 25th May 1927 to the effect that the relationship between the Nagarathar School, Devakotta and the insolvent was that of a debtor and creditor and no more. The Official Assignee went further and held that:

(4) [1894] 2 Q. B. 237=63 L. J. Q. B. 573=42 W. R. 305=1 Manson 25=70 L. T. 361.

"even assaming for the purpose that the insolvent was in a fiduciary relationship and that he acted improperly in investing the moneys of the school in his firm, the same could not be identified or earmarked. When the firm was adjudicated insolvent there was no cash and no part of the assets could be followed by the beneficiary."

The Official Assignee accordingly held that the school authorities were in no better position than the other unsecured creditors of the insolvent and that they could not claim any preferential payment.

The school authorities appealed to the learned Judge sitting in insolvency against the order of the Official Assignee. The learned Judge Waller, J. allowed the appeal and gave the school authorities a first charge for the full amount of their claim, on the realization of the debts due to the firm of the insolvent.

The Official Assignee has preferred this appeal against the order of the learned Judge and contends that the school authorities are not entitled to rank higher than the ordinary unsecured creditors of the insolvent.

Before discussing the question of law raised by Mr. S. Doraiswami Iyer the learned counsel for the appellant, I think it is better just to refer to the finding of fact arrived at by the learned Judge. In the course of the judgment the learned Judge has recorded the following admission made before him by the counsel who appeared for the Official Assignee:

"Mr. S. Doraiswami Iyer for the Official Assignee concedes that he is unable to support the view that the relation between the insolvent and the trust was one of debtor and creditor. He admits that Ramanathan Chetty was a trustee and received the trust funds as a trustee and mixed it with the funds of his own business."

As a trustee of the Nagarathar School, the insolvent was entirely in the wrong in utilising the trust funds in connexion with his own business. As the learned Judge remarks:

"there can be no question as to the wrongful nature of Ramanathan Chetty's action, for the mingling itself was wrongful."

The question then is whether the beneficiary (the school) is entitled to a first charge on the trade assets of Ramanathan Chetty's firm. S. 66, Trusts Act (2 of 1882) enacts as follows:

"Where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."

The learned counsel for the appellant contends that the beneficiary is entitled to a charge for the trust money only if he can trace it to a specific fund. The trust funds have been admittedly utilized by the insolvent in connexion with his money lending business. It is not now possible to say which particular asset due to the firm represents the trust moneys. In these circumstances it is argued for the Official Assignee that the beneficiary is entitled only to rank as an ordinary creditor along with the other creditors of the insolvent. In support of his contention the learned counsel strongly relied on *In re, Hallett & Company, ex parte Blane* (4). The following passage on p. 244 in the judgment of Lord Justice Lopes was relied upon:

"If trust money can be traced it is liable to be followed by the trustee and will not pass to the trustee in bankruptcy: but if it has been mixed up with other money so as not to be distinguishable, it cannot be followed."

This case, however, has been understood by text-writers as authority for the proposition that in the case of moneys there must be in fact a payment, since "the doctrine of following" depends upon identification of the subject matter; and where money not actually received was credited to an account, the doctrine was held inapplicable: Godefroi on Trust and Trustees, Edn. 4, pp. 564 and 565. In Lewin on Trusts, Edn. 12, p. 1155 it is stated as follows:

"In order, however, that the rule as to following trust money should apply, there must be something specific which is capable of being identified as that into which the money has been converted, and where a transaction has been carried out by a set off in account so that no cheque, note, coin or credit has ever passed or existed in specicie, the doctrine is inapplicable."

Turning to the judgment delivered *In re, Hallett & Co's* case (4) we find that Lord Esher (Master of Rolls) says at p. 244.

"Hallet & Company did not in truth receive any money; they entered into a transaction with Hewitt and Company, the result of which was that no money passed . . . . Hallett and Company did not in fact receive any money or tender of money or anything tangible which it would be possible to follow or to lay hands upon—all that can be shown is a settlement of account; and a settlement of account cannot be followed."

Similarly Lopes, L. J. says:

"So far as regards the following of this sum of £ 1,600 the attempt fails at the first stage, for that particular £ 1,600 was never received by Hallett & Company; no money had passed; there had been a mere settlement with Hewitt & Company. Then again this specific sum

never passed on to Cocks & Company; and the second stage fails too."

Similarly at p. 245 Davey, L. J. also makes similar remarks:

"This money was not received by them (Hallett & Company) in any sense which is material to the present purpose. Nothing was received by them in specie, notes, cheques or coin; there was no credit existing in specie; nothing which the cesti que trust could follow and say that the property had been converted into."

Therfore, the case *In re, Hallett & Co's* case (4) could be distinguished on the ground that in that case it was found that the very first step that the beneficiary should prove in such cases, namely, that the trustee received moneys of the beneficiary was not proved. On the other hand authority seems to be fairly clear that where a trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him: S. 66, Trusts Act, Halsbury s Laws of England, Vol. 28, p. 207, Ss. 415 and 416. It was admitted that where trust money is wrongfully laid out in the purchase of specific real or personal property, the beneficiary can elect to have a charge upon it for the amount of the trust money: see authorities referred to in para. 415 of Halsbury's Laws of England Vol. 28. If therefore the trustee in this case had purchased a going concern of another, with the trust funds, then the beneficiary would have an option either to take the purchased property or elect to have a charge upon it for the amount of the trust money. If instead of purchasing a going concern, the trustee wrongfully utilises the trust money for starting a business, or for carrying on a business of his own, then it would seem that the beneficiary is entitled equally to elect to have a charge upon the assets of the business for the amount of the trust money.

It was, however, contended by the learned counsel for the appellant that the doctrine of following trust property is not applied, and could not in the nature of things apply when the trust funds are wrongfully applied by the trustee in a trade or business. If the doctrine is not confined in its application to cases of mingling of trust moneys with the trustee's own money where there is a mingled fund available if the doctrine also applies to cases where with the money of the beneficiary the trustee wrongfully buys other property, and if the beneficiary could in such cases claim to have a charge on such property to the extent of the trust money utilised wrongfully by the trustee, I am not clear why the doctrine should not apply when the trustee instead of utilising the trust money for the purchase of property utilizes it in a trade or business of his own. Having regard to the findings in the present case and to the admission made on the Official Assignee's behalf, as recorded by the learned Judge, there is no difficulty as regards facts in the present case; for as already mentioned, it was admitted before the learned Judge on behalf of the Official Assignee that

"Ramanathan Chetty was a trustee and received the trust fund as a trustee and mixed it with the funds of his own business."

The learned counsel for the respondent cited to us the case of *Pennel* v. *Defell* (3) at p. 558 (of 43 *E. R.*) Lord Justice Turner. observed as follows:

"It is, I apprehend, an undoubted principle of this Court that between cesti que trust and trustee, & all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust, and from this principle I do not understand the Master of the Rolls to have in any degree dissented. Several cases illustrating the principle were cited in the argument, but perhaps it cannot be better illustrated than by referring to a case of familiar, almost daily, occurrence, the case of trust moneys employed in trade. An executor of a deceased partner continues his capital in the trade with concurrence of the surviving partners, and carries on the trade withh them. The very capital itself may consist only of the balance which at the death of the partner was due to him on the result of the partnership account. That capital may have no existence but in the stock in trade and debts of the partnership. The stock in trade and debts may undergo a continual course of change and fluctuation, and yet this Court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital, so continually altered and changed. We have here, I think, the most perfect instance of the extent to which the doctrine of "following trust property" has been carried by the Court, an instance, too, wdich exemplifies the difficulties with which the Court has felt bound to grapple for the purpose of carrying out that doctrine for nothing can be more difficult, nothing more inconvenient, than to follow out such a case to its results."

We were also referred to *In re, Hallett's estate* (2), to the judgment of Jessel

(Master of the Rolls) at p. 707 Et Sequa ; the decision of the House of Lords in *Sinclair* v *Brougham* (1) was also referred to and several passages from the speeches of the learned Lords who took part in that case were read to us. For example at p. 438, Lord Dunedin's speech, the following passage occurs.

"Now there are certain situations, of which Hallett's case is an example, where the one sharing party has a right to say to the other, it is not in your mouth to say that the assets are not all mine to the extent of my full claim. I do not think this is one of those positions. Neither party is here in any fiduciary position to the other."

Similarly,, passages at p. 418 in the speech of the Lord Chancellor (Viscount Haldane) were also read to us.

I think that some of the passages occurring in the above case could be construed as laying down the principle contended for by the respondent, though it may be said that the point for decision before the House was quite a different one, and that the learned Lords were not considering the exact point now before the Court.

In Perry on Trusts, Edn. 6, Vol. 2, para. 828, p. 1364, it is said that :

"to entitle the trust creditor to preference, it must at least appear that the funds remaining for distribution contain the proceeds of the trust."

Again in para. 838, it is mentioned that :

"if the executor of a deceased partner is also the surviving partner and he continues the deceased partner's capital without authority in the business, and changes the property many times over, the Court follows the trust fund through all these changes and gives the beneficiaries of the deceased partner's estate the capital and all its proceeds or gains in the business in which it has been employed."

The only Indian case, I am aware of, which is somewhat similar to the present case, is that reported in *Mulrazu Lakshmi* v. *Official Assignee of Madras* (5) decided by Sadasiva Iyer and Napier, JJ :

"Where a jeweller who was entrusted by the claimant with sovereigns and gold to be made into a jewel for him converted the same into cash and subsequently became bankrupt, and after the Official Assignee took charge of his estate, the owner of the sovereigns and gold put forward a claim that he was entitled to a preferential treatment and to get out of the estate the full value of the sovereigns and gold entrusted by him to the bankrupt,"

(5) [1915] 28 M. L. J. 403=2 M. L. W. 312 29 I. C. 37=(1915) M. W. N. 262.

the Court held that transaction between the claimant and the jeweller amounted to a bailment and that the jeweller became in consequence a trustee for the claimant in respect of the sovereigns and gold entrusted to him. But as there was no evidence, in that case that the sovereigns and gold formed a portion of the estate taken possession of by the Official Assignee and as there was nothing to identify the same, the Court held that the claimant was not entitled to the benefit of the doctrine of tracing and quasi change, and therefore to any, preferential payment. Sadasiva Iyer, J., at p. 41, says :

"If in this case I could have found my way to decide that the assets taken possession of by the Official Assignee did include, or must have included, the gold or the value of the gold contained in the sovereigns and the bar given by the petitioner to the insolvent, I would be inclined to apply the doctrine of tracing and the doctrine of quasi charge even to the full limits indicated by Lord Dunedin in his judgment in the recent House of Lords case but I do not see my way to differ from the findings of Bakewell, J., that the petitioner has failed to show that the gold or the price of that gold was invested in or formed part of any of the assets taken possession of by the Official Assignee."

Again the learned Judge adds :

"On the finding then that none of the assets found with the insolvent is proved, directly or even by a remote fact from which a reasonable inference could be drawn, to have contained any portion of the petitioner's gold or could have been acquired with the use of the proceeds of that gold, I must and do confirm the order of the learned Judge."

The principle would seem to be that a wrong-doer cannot be permitted to take advantage of his own wrong and that no wrongful act of the trustee could prejudice the right of the beneficiaries, in cases like the present.

I am therefore of opinion that the learned Judge was right in holding that the principle of following trust property applies to the facts and circumstances of the present case. I would therefore dismiss the appeal with costs. Costs to be realized from the estate. Certificate for two counsel. The Official Assignee is entitled to take his costs from out of the estate.

P.R.S./P.R. *Order accordingly.*

* A. I. R. 1930 Madras 30

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Kemgam Swamy and *others*—Counter-Petitioners—Appellants.

v.

Vaddadi Subbamma and *others*—Petitioners—Respondents.

Appeal No. 432 of 1927, Decided on 25th August 1929, from order of Sub-Judge, Vizagapatam, D/- 13th October 1927, in E. P. No. 36 of 1927.

(a) Civil P. C., O. 20, R. 12—Order passed by Court in contravention of O. 20, R. 12, is not nullity owing to total want of jurisdiction—It is mere irregular exercise of jurisdiction—Executing Court cannot go behind the decree—Execution—Decree binding.

If the Court fails to conform to the provisions of O. 20, R. 12, it is impossible to hold that the defect is one of inherent incompetency. If it passes an order in contravention of that provision, it is not a nullity owing to total want of jurisdiction. That the Court is competent to award mesne profits cannot be doubted, but in exercising that undoubted jurisdiction, it adopts a wrong procedure. Thus, it is a case of mere irregular exercise of jurisdiction ; and from this it follows that the executing Court cannot go behind the decree to which it is bound to give effect in execution : *A. I. R.* 1929 *Bom.* 217, *Rel. on.* ; 37 *I. C.* 997, *Doubted.* [P 31 C 1]

(b) Civil P. C., O. 20, R. 12—Application for enquiry into mesne profits made by execution petition—Court can treat it as application in suit—Civil P. C., S. 47 (2).

Where through an error in the decree an application for an enquiry into mesne profits is made by an execution petition, and no further point is involved such as limitation, it is clearly open to the Court to allow a mistake of this kind to be repaired and treat the petition as an application in the suit : *A. I. R.* 1924 *Mad.* 473, *Ref.* [P 31 C 2]

*** (c) Civil P. C., O. 20, R. 12—Power to grant future mesne profits vests in Court—Unqualified decree must be construed to have granted past and subsequent profits.**

Whether the plaint contains or not a claim to future profits, the power to grant them vests in the Court. Subsequent profits as the very term implies are profits accruing subsequent to the institution of the suit. There is no cause of action as regards such profits at the time of the filing of the plaint. It is by virtue of a special provision that such profits can be claimed or awarded. In short, the decree, when it awards mesne profits without qualifying words, must be construed to have granted past as well as subsequent profits : 8 *Cal.* 178 (*P. C.*); 43 *Cal.* 650 ; 12 *W. R.* 75 and *A.I.R.* 1927 *Cal.* 182 ; *Rel. on.* : 2 *I.A.* 219 (*P. C.*), *Expl.* [P 32 C 2]

(d) Civil P. C., O. 20, R. 12—Court ordering that mesne profits be determined in execution proceedings — Court should be held to intend to award mesne profits and decree-holder is entitled to claim them.

Where a decree says "it is further ordered that mesne profits be determined by a separate enquiry in execution proceedings", though there are no express words awarding mesne profits to the decree-holder, to make the decree consistent with itself it must be held that the Court intended to award mesne profits and that the decree-holder is entitled to claim them if there are no other objections in his way for doing so. [P 33 C 1]

T. Rangachariar, *V. Govindarajachari* and *B. V. Ramanarasu*—for Appellants.

G. Lakshmanna and *Y. Suryanarayana*—for Respondents.

Venkatasubba Rao, J.—The point arises in execution : Is the plaintiff entitled to mesne profits under the decree ? The learned Subordinate Judge has upheld the plaintiff's claim and the correctness of his order is called in question in this appeal.

A few facts may be stated. The plaintiff, who was a minor at the date of the suit claimed her deceased husband's properties from the defendants, who were alleged to have been in unlawful possession. Her husband died in 1913 and the suit was filed in 1919. Judgment was delivered for the plaintiff on 10th February 1922, directing delivery of possession of certain immovable properties. The judgment contains a further direction which is now material. It runs thus :

"The mesne profits will be determined by a separate enquiry in execution proceedings".

An appeal A. S. No. 220 of 1922 was taken to the High Court and in 1925 the judgment of the trial Court was confirmed subject to a slight modification, which I need not notice.

The plaintiff applied to the lower Court (on 6th April 1927) by way of execution of the decree, for mesne profits past and future ; in other words, she filed an execution petition claiming those profits. The learned Subordinate Judge, as I have said, has made an order, dated 13th October 1927 in her favour. The appellants attack that order on five distinct grounds, and I shall proceed to deal with each of them.

It is first contended that there is no effective decree in respect of mesne profits capable of execution but the direction to which I have referred awards profits by necessary implication. The order directing enquiry into mesne profits necessarily involves an award of

those profits ; for, why should there be an enquiry unless the profits were assumed to have been awarded ? The decree must be construed in a reasonable sense and as Mr. Lakshmanna for respondent 1 points out, should a different view be taken, the direction in the decree would be entirely futile. This is a result that every Court must avoid, if possible.

It is next contended that under the Code of Civil Procedure, it was in excess of the Court's powers to direct an enquiry into profits in execution proceedings. On this point, the present Code, departing from the previous one, clearly lays down that mesne profits should be awarded by the decree itself, implying, that the enquiry should not be postponed to the stage of execution. But unfortunately, Courts in the mofussil frequently frame their decrees, as if the old Procedure Code is still in force in this respect and this repeatedly leads to trouble. While deploring this practice, we must still ask ourselves, is it a question of complete want of competency, or, of erroneous exercise of jurisdiction ? The distinction between absence of jurisdiction and irregular exercise of jurisdiction has been frequently pointed out. If the Court fails to conform to the provisions of O. 20, R. 12, it is impossible to hold that the defect is one of inherent incompetency. I agree with *Lakshmibhai* v. *Rabji Bikhaji* (1), and hold that if a Court passes an order in contravention of that provision, it is not a nullity owing to total want of jurisdiction. That the Court is competent to award mesne profits cannot be doubted, but in exercising that undoubted jurisdiction, it adopts a wrong procedure. Thus, it is a case of mere irregular exercise of jurisdiction ; and from this it follows that the executing Court cannot go behind the decree to which it is bound to give effect in execution. If *Ganga Prasad Dutt* v. *Hemangin Debi* (2), takes a different view(which I doubt), I respectfully dissent from it.

The third objection of the appellants relates to the form of the proceeding They contend that, notwithstanding the error in the decree, the application for an enquiry into mesne profits should have been made in the suit itself. As the plaintiff filed instead, an execution petition, it is urged that it is incompetent. This contention receives support from *Ramchandra Raja* v. *Bhujanga Row* (3). But as on the facts of this case no further point is involved such as limitation, it is clearly open to the Court to allow a mistake of this kind to be repaired and treat the petition as an application in the suit This is the view of the learned Subordinate Judge, and I unhesitatingly accept it. Moreover, as he points out, when the parties came to Court on a previous occasion, the defendants objected that the plaintiff should seek relief by filing an execution petition. Apart from the inconsistency involved in their position, I am satisfied that the present contention must be rejected.

The fourth objection, namely, that the application is barred by res judicata, is equally untenable. The facts that bear on this point may be briefly stated. There was a previous petition filed by the plaintiff for an enquiry into mesne profits and for the passing of a final decree (E. A. 1120 of 1926). This is precisely what is contemplated by O. 20, R. 12 of the present Code. Such a petition presupposes that the request is made in the suit itself and not in execution. But the decree having followed the old Code, the plaintiff's application, though, as I have said, must be deemed to have been made in the suit, was wrongly described as one in execution ; that is, it was called an "E. A." (Execution Application). To this, objection was taken by the judgment-debtors, namely, that the heading should have been not "E. A." but "E. P". R. 3, Civil Rules of Practice says thus :

1. Execution Petition means a petition to the Court for the execution of any decree or order.

2. Execution application means an application to the Court made in a pending execution petition.

The form adopted by the plaintiff is that prescribed by R. 149, which deals with execution applications. The chief feature, on the other hand, of an execution petition, as is well known, is the tabular form referred to in O. 21, R. 11, Civil P. C. The objection that was urged, as I have pointed out, was that the heading should have been " E. P "

(1) A. I. R. 1921 Bom. 217.
(2) [1917] 37 I. C. 997.
(3) A. I. R. 1924 Mad. 473.

and not "E. A." An objection more plausible might have been taken, namely, that the plaintiff's request conformed to the present Code, whereas the decree was framed under the repealed provision But it must be noted that this seemingly valid objection was not the one taken. But the objection raised was upheld by the Court and the following order dated 22nd March 1927 was made :

"As admitted by the decree-holder's vakil an E. P. is necessary and this petition is not maintainable. The petition is rejected."

The above order becomes intelligible when it is remembered that "E. P." is used in it, as distinguished from "E.A.". Every one concerned missed the substance of the thing and it is now said that this order operates as res judicata. The previous order decided nothing, beyond stating what the form of the petition was to be. As I have pointed out in dealing with objection 3, the order itself was misconceived, for what the plaintiff was competent to file, was not an E. P. but a petition in the suit itself. Be that as it may, I fail to see how the previous order can possibly bar the present application. There was no decision in any sense on the merits and in such circumstances, as held in the case already referred to *Ramchandra Raju* v. *Bhujanga Row* (3) the rule of res judicata cannot apply.

The fifth objection of the appellants now remains to be dealt with. Mr. Rangachariar on their behalf contends that in any event the plaintiff cannot, under the decree as it stands, obtain mesne profits subsequent to the suit. There is some force in what Mr Lakshmanna suggests that this objection is a clear afterthought ; for, certain previous proceedings show that the defendant equally with the plaintiff, understood the decree as granting both past and future profits. But still the question is, what is the true construction of that decree ? In the plaint, the claim was confined to past mesne profits and the relief was valued with reference to such profits only. The lower Court refers inter alia to the fact, that the plaint contains a prayer in general terms, "that the Court may grant such other reliefs as it deems fit and reasonable." On this circumstance, I do not propose to rely. The decree, however, relates to mesne profits generally. The question is, what is the rule applicable to the construction of such a decree ?

The leading case on the point is the decision of the Privy Council in *Fakharuddin Mohamed* v. *Official Trustee of Bengal* (4). In clear and unequivocal terms their Lordships declare:

"that possession with wasilat (mesne profits) means wasilat up to the time of possession being delivered."

The reasoning adopted is this. Whether the plaint contains or not a claim to future profits, the power to grant them vests in the Court. Subsequent profits as the very term implies are profits accruing subsequent to the institution of the suit. There is no cause of action as regards such profits at the time of the filing of the plaint. It is by virtue of a special provision that such profits can be claimed or awarded: see *Bhupendra Kumar* v. *Poorna Chandra* (5) at p. 655 This is an exception to the general rule that the relief granted is confined to rights accruing before the date of the suit. The legislature has expressly enabled the Courts to grant such relief with the beneficent object of preventing unnecessary litigation. Therefore, the Court must, while passing the decree (unless a contrary intention is manifest), be deemed to have exercised its powers to the full, for, otherwise its decree fails to give effect to what is plainly the intention of the legislature. Their Lordships observe:

"Wasilat by law is demandable up to the time of possession; and the question is whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. According to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document which undoutedly might have been clearer—is that the Court, with a view to carrying out the object of the legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession."

(4) [1882] 8 Cal. 178=8 I. A. 197=4 Sar. 270 (P.C.).

(5) [1916] 43 Cal. 650=13 C. L. J. 132=8 I.C. 34=15 C. W. N. 506.

Their Lordships next cite two cases and to one of them I shall refer. In *Dhurn Narain* v. *Bundhoo Ram* (6) in the plaint, mesne profits were claimed only to the date of the institution of the suit. The decree passed was "one for possession of land with wasilat." The question arose in execution, just as in the present case: is the plaintiff entitled to subsequent mesne profits? Jackson, J., with whom Markby, J. concurred, stated the law thus:

"When the Court in its decree ordered that the plaintiff should receive mesne profits, I think it must be held to have meant that he should receive such mesne profits down to the date of the delivery of possession."

In short, the decree, when it awards mesne profits without qualifying words, must be construed to have granted past as well as subsequent profits. The case relied on by Mr. Rangachariar, *Sadasiva Pillai* v. *Ramalinga Pillai* (7) does not militate against this view, for, what it lays down is, that if future profits are not awarded by the decree, the Court cannot grant them in execution. This is not a case bearing on the construction of decrees relating to mesne profits. As a matter of fact, this was one of the cases relied on for the appellant in the course of the argument in the case already cited: *Fakharuddin Mohamed* v. *Official Trustee of Bengal* (4). Their Lordships explain that case by observing that there the decree was silent on the subject of wasilat and it could not therefore be added in the course of the execution: see p. 207 (*of* 8 *I. A.*). That ruling throws no light on the construction of the decree which says, "possession with wasilat," which, upon a reasonable construction, means "wasilat up to the time of possession being delivered." Mr. Rangachari has been at pains to distinguish this case *Fakharuddin Mohamed* v. *Official Trustee of Bengal* (4) on the ground that the decree was construed with reference to the particular plaint before the Court. In that case, as in this, mesne profits were claimed, only up to the date of the suit. Similarly, there, as here, in valuing the relief, only past profits were taken into consideration. But the suit was described as brought to obtain possession of the zamindari "the mesne profits thereof," that is, mesne profits generally. Their Lordships in the earlier part of their judgment observe that the plaint is capable of being construed as containing a comprehensive claim for mesne profits. Their Lordships recognize that this is too slender a ground for resting their judgment on and they therefore begin their discussion on the subject, with the significant words: "But be that as it may:" see p. 206 (*of* 8 *I. A.*). The view I am taking receives support from *Promodenath Roy* v. *Secy. of State* (8), especially the judgment of Cuming, J., in that case. (For the learned Judges' observations on this point: see *A. I. R.* 1927 *Cal.* 182 at pp. 183 and 184. The report in 53 *Cal.* 992 does not contain the relevant passages.)

Mr. Rangachari next contends that unless there is an express prayer for subsequent profits, they cannot be awarded under O. 20, R. 12, by the decree. He argues that this result follows from the wording of the present section, which, it is said, is different from that of the repealed provisions. I cannot accede to this contention. Such difference as exists in the language is due solely to the fact that the subject matter of two sections in the previous Code (Ss. 211 and 212 of the Code of 1882 and Ss. 196 and 197 of the Code of 1859) was condensed into the limits of one section in the present Code. Moreover, even as a matter of strict construction, a suit for past mesne profits is surely a suit for mesne profits (under O. 20, R. 12); for the words "mesne profits" include past profits. I am, therefore, clearly of the opinion that the lower Court's conclusion is right.

The result is the appeal is dismissed with costs and the memorandum of objections is also dismissed, but I make no order as to costs.

Madhavan Nair, J.— This appeal arises out of execution proceedings. The decree-holder respondent instituted O. S. No. 28 of 1919 in the Sub-Court, Vizagapatam, for possession of properties with mesne profits. In the plaint—see para. 3 (h)—she claimed specifically past profits from 1914 to 1919. The plaint was silent regarding future mesne profits. In the schedule relating to the valuation of the suit for purposes of court-fee and

(6) 12 W. R. 75.
(7) [1874] 2 I. A. 219=24 W. R. 193=15 B. L. R. 333=3 Sar. 519 (P.C.).
(8) A. I. R. 1927 Cal. 182=53 Cal. 992.

jurisdiction the amount of past profits for the years 1914 to 1918 was included as one of the items. The Subordinate Judge passed a decree in the plaintiff's favour. The relevant portion of the decree is as follows:

"This Court doth order and decree that the plaintiff do recover possession of the suit properties described in Schs. A and B except items 9, 14, 16 and 19 of the plaint A schedule hereto attached. . . . . It is further ordered that the mesne profits be determined by a separate enquiry in execution proceedings."

On appeal (A. S. No. 220 of 1922) this decree was affirmed with a slight modification by the High Court on 31st July 1925. It was found that the plaintiff was entitled to recover a portion of item 16 also. The judgment of the High Court referring to this modification is as follows:

"The decree of the lower Court will therefore be amended by reading for "item 16," "the portion of item 16 covered by Ex. 19." The lower Court directed that mesne profits should be determined separately in execution. As regards this No. 16 it will be for consideration when mesne profits are determined whether the plaintiff should be given mesne profits from this date or from the date of the decree or from any other date, seeing that she neglected to make this application earlier."

The application out of which this appeal arises was made by the decree-holder for the ascertainment of past and future mesne profits. The lower Court passed an order in her favour. In appeal Mr. Rangachariar contends that the respondent is not entitled to claim any amount by way of mesne profits as no decree for profits, either past or future, has been passed in her favour and that if there is such a decree, it gives her only past and not future mesne profits. He also contends that the entire claim is barred by res judicata and that this petition is not maintainable.

Before I deal with these contentions and the respondent's reply to them, I shall dispose of one of the subsidiary contentions of the respondent which is a very simple one and which is based upon the construction of the High Court's decree. This contention is that the High Court's decree, which is the one sought to be executed, makes special provision with regard to future mesne profits. This contention is based on the observations made by the learned Judges regarding mesne profits so far as it relates to item 16 with reference to which the decree was slightly modified. These observations, even if they are made applicable to all the decreed items of property, as has been wrongly done by the amended decree, while as a matter of fact they refer only to item 16, do not in my opinion award any mesne profits to the decree-holder which have not been awarded by the original decree. The learned Judges do not decide this question whether the decree-holder is entitled to get future mesne profits, but they simply state.

"when mesne profits are determined it will be a question for consideration whether the plaintiff would be entitled to future mesne profits."

That leaves the matter exactly where it was according to the terms of the decree passed by the Subordinate Judge, and which they confirm by their judgment so far as it relates to the present question. In discussing the point whether the decree-holder is entitled to the past and future mesne profits claimed by her I shall, therefore, confine my attention to the terms of the original decree as it has with regard to mesne profits not been amended by the decree passed by the High Court.

Now coming to the main argument, the appellant's first contention, as I have already observed, is that no decree has been passed by the lower Court for profits, either past or future. His argument is twofold; firstly, that there are no words containing any direction or order in the decree awarding mesne profits, and secondly that even if there be any such direction it is contained in a portion of the decree which the Court had no jurisdiction to pass and, which must, therefore, be treated as of no effect whatever. The decree says :

"It is further ordered that mesne profits be determined by a separate enquiry in execution proceedings."

If it was the intention of the Court to award mesne profits by this direction, I cannot see the necessity for directing any enquiry as regards mesne profits at all. In my opinion it must be presumed from this provision that the Court intended to award mesne profits to the decree-holder. Though there are no express words awarding mesne profits to the decree-holder, to make the decree consistent with itself, we must hold that the Court intended to award mesne profits and that the decree-holder is entitled to claim them if there are no other objections in her way for doing so.

The next argument is that even if we read an implied direction awarding mesne profits in this portion of the decree, it cannot be given any effect as the Subordinate Judge has no jurisdiction to make a decree directing the determination of mesne profits in execution proceedings. This argument has been occasioned by the fact that the Subordinate Judge has in making the provision for mesne profits followed the procedure laid down in the old Code of Civil Procedure. Under the old Code, Ss. 211 and 212, mesne profits were assessed in the execution department; while under the terms of O. 20, R. 12, of the present Code mesne profits are assessed by an enquiry in the suit itself, and when they are determined a final decree will be passed in respect of them. Though the Subordinate Judge's order is not in conformity with the provisions of O. 20, R. 12, of the present Code, it cannot be said that for that reason that portion of the decree directing an enquiry into the mesne profits is absolutely null and void. In support of this part of his argument, Mr. Rangachari relies upon the following observation of Fletcher, J , in *Gangā Prasad Dutt* v. *Ram Hemangin Debi* (2) :

"It was in excess of the powers of the Court to suggest that mesne profits would be ascertained in any manner other than that prescribed by the law. The method in which mesne profits are ascertained under the present Civil Procedure Code is not by an enquiry in execution but by an application in the suit itself."

If by this observation it is meant that decretal orders passed by Judges, no doubt erroneously under the present Code, directing an enquiry into mesne profits in the execution department, are to be treated as absolutely null and void, I respectfully differ from the opinion of the learned Judge. The present Code no doubt does not justify the order passed by the lower Court, but it does not follow that the order is, therefore, necessarily void. In my opinion the order of the Subordinate Judge in this respect,though irregular, is not without jurisdiction and, therefore, can be given effect to. This view is supported by the recent decision in *Lakshmibhai* v. *Rabji Bhikaji* (1). In that case also the Subordinate Judge instead of passing an order under O. 20, R. 12, ordered the mesne profits to be determined in execution. The learned Judges held that the decree, though irregular was binding between the parties. They observed :

"In the present case we do not think that there was any want of jurisdiction in the Court passing an order in contravention of O. 20, R. 12, but that it was merely an erroneous or irregular exercise of jurisdiction."

In this view, which I am prepared to accept, I must hold that in the present case the Subordinate Judge has passed an executable decree as regards mesne profits in favour of the respondent.

The next question is whether this decree awards to the decree-holder only past mesne profits as contended for by Mr. Rangachariar or future mesne profits as well as contended for by Mr. Lakshmanna. The question is not quite free from difficulty, but after giving my best consideration to it I have come to the conclusion that the respondent's plea should be upheld. It is true that the plaintiff in her plaint did not ask for future mesne profits. In para. 3, as already pointed out, she asked for mesne profits for the year 1914 to 1919 and the valuation in the schedule specified this amount alone as one of the items for computing the court-fee. Our attention has been specially drawn to these aspects of the claim to show that the order of the learned Judge should not be construed as giving a relief to the plaintiff which she did not ask for in her plaint. We are asked to say in view of the pleadings that the mesne profits with respect to which an enquiry has been ordered should be confined to the past mesne profits alone for which the demand was made in the plaint. This contention, however plausible, cannot be accepted in view of the decision of the Privy Council, in *Fakharuddin Mohamed Ashan* v. *Official Trustee Bengal* (4), which is the main case relied on by the respondent. In that case: "the plaintiff was declared entitled to possession of the land mentioned in the kabinnama, with wasilat from the commencement of Sarabun 1267; the wasilat to be ascertained by local enquiry."

Though no doubt the plaint was open to the construction that the plaintiff intended to claim future mesne profits as well, their Lordships of the Privy Council make it clear by their observations that they were prepared to uphold the order awarding future mesne profits exclusively on considerations of law which may be applied generally to all cases

Their Lordships after expressing the opinion that the plaint is at all events open to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, "although, for the purpose of valuation only, so much was valued as was then due," proceed to state as follows :

"*But be that as it may* (the italics are mine) they are of opinion, that under S. 196, Act 8 of 1859 it was in the power of the Court, if it thought fit, to make a decree which should give the plaintiff wasilat up to the date of obtaining possession."

Then after quoting S. 196 of the Code of 1859 their Lordships state :

"Wasilat, by law, is demandable up to the time of possession; and the question is whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. According to this interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document which undoubtedly might have been clearer, is that the Court, with a view to carrying out the object of the legislature namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession."

Their Lordships close the discussion by saying that this view was supported by two cases reported in *Dhurn Narain Singh* v. *Bhundhoo Rakh* (6) and *Bunsee Singh* v. *Mirza Nazuf Ali Beg* (9). If we apply the test laid down in this judgment to the present case, I think it must be held that as the plaintiff is entitled under the present law also to claim mesne profits up to the time of possession, the more reasonable construction of the decree should be that the Court, in awarding her mesne profits, intended to award her such profits as are claimable up to the time of possession. It is contended that their Lordships of the Privy Council awarded future mesne profits because the plaint was open to that construction. But the expression, " be that as it may " occurring in their Lordships' judgment expressed above having regard to the context clearly shows that the judgment is based upon the law that as mesne profits are claimable up to the time of delivery of possession the decree should be construed as giving the plaintiff future mesne profits though he has not asked for it. In this connexion it may be noted that in one of the two cases referred to by their Lordships, namely, *Dhurn Narain* v. *Bundhoo Ram* (6), the plaint, as will appear from the judgment, was not open to the construction that future mesne profits were claimed in it. In that case the decree was one for possession of land with wasilat (mesne profits). The decree-holder applied for possession and for wasilat from the period of dispossession down to the time of delivery of possession. The judgment-debtor complained : "that the plaintiff was not entitled under the decree to anything more than wasilat down to the date of the institution of the suit *as stated in the plaint*, (the italics are mine), see the judgment of Jackson, J."

This complaint was overruled and wasilat having regard to S. 196, Civil P. C., of 1859 was awarded up to the delivery of possession. Jackson, J., stated thus : "when the Court in its decree orders that the plaintiff should receive mesne profits, I think it must be held to have meant that he should receive such mesne profits down to the date of delivery of possession."

In passing, I may note that having regard to the point under discussion the case before us is almost identical with the case in *Dhurn Narain* v. *Bundhoo Ram* (6). The decision of the Privy Council, as explained above, was followed in *Pramnatharatha Roy* v. *Secy. of State* (8). In that case the terms of the decree were :

"The plaintiffs will be declared entitled to a five annas share of the disputed property and they do get possession of the same, the amount of mesne profits to be ascertained in execution"

and though it was urged that the plaintiffs did not claim to recover future mesne profits in their plaint, the learned Judge held that they were entitled to future mesne profits also. It will appear from the judgment of Cuming, J., (more fully reported in 99 *I. C.* 428, *A. I. R.* 1927 *Cal.* 182), with which Page, J., concurred that "future mesne profits," were awarded on a construction of the decree on the principles indicated in *Fakharuddin Mahomed* v. *Official Trustee of Bengal* (4), though in the course of the judgment reference is made to the fact that at the commencement of the plaint in the suit it was stated to be a suit for

(9) 22 W. R. 323.

declaration of title and for recovery of possession of immovable property and mesne profits. The contention that the decree-holder should not be given future mesne profits because in the plaint he has asked only for past mesne profits and has not included any claim for future mesne profits should not be allowed to prevail because mesne profits antecedent to the suit and mesne profits pendente lite stand on very different grounds. As observed by Mookerjee, J., in *Bhupendra Kumar Chakravarthy* v. *Purna Chandra Bose* (5) at p. 655 :

"As regards the latter, there is no cause of action at the time of the commencement of the suit, and it is only by means of statutory provisions framed with the obvious purpose of shortening litigation, that they can be awarded in the suit even though they accrued subsequent to the institution of the suit. The mesne profits antecedent to the suit have, on the other hand, accrued before the commencement of the suit and although, therefore, the amount may not be stated with absolute certainty, the amount can be mentioned with some approach to approximation."

From this, it will follow that the plaintiff should not be punished for not including in his plaint, a cause of action which had not arisen at the time of the suit and so it is wisely provided by statutory provision 'with the obvious purpose of shortening litigation,' that the future mesne profits may be awarded in the suit though they were not asked for in the plaint. A decree, though framed generally for mesne profits, should therefore be reasonably construed as awarding future mesne profits as well if there is nothing in the decree standing in the way of such a construction. The decree-holder should therefore be given future mesne profits, as mesne profits are demandable up to the time of execution unless, as I have already pointed out, the decree clearly indicates that future mesne profits have not been awarded to the decree-holder. Mr. Rangachariar contends that the use of the definite article 'the' before 'mesne profits' appearing in that part of the decree directing enquiry into mesne profits shows clearly that the enquiry is to be as regards the mesne profits that were asked for, that is, "the past mesne profits," and nothing more.

This argument is objectionable as it lays an unnecessary emphasis on the word "the" and runs counter to the principle of construction, that I have said, should be adopted. It is further contended that the Privy Council decision should not be applied to this case because under O. 20, R. 12, present Code, future mesne profits are not claimable in law in a suit for "past mesne profits." It is conceded that in a suit for "past mesne profits," under Ss. 211 and 212 of the old Code, future mesne profits may be awarded. The provisions in the old Code relating to mesne profits have been recast and they are now contained in O. 20, R. 12, and S. 2, Cl. 12. The words "mesne profits" in O. 20, R. 12, will include past profits. The language used in the rule does not endorse the view suggested by the appellant and no authority has been cited by the learned advocate in support of his proposition. I must, therefore, hold on the authority of the Privy Council decision in *Fakharuddin Mahomed* v. *Official Trustee of Bengal* (4) that the lower Court was right in allowing execution of the decree for future mesne profits as well. This conclusion is not opposed to the decision in *Sadasiva Pillai* v. *Ramalinga Pillai* (7), for the decree in that case (see page 226 para. 1) was :

"silent as to the mesne profits which has accrued since the institution of the suit,"

whereas in the present case the decree refers to mesne profits generally.

The next argument advanced for the appellant is that the present application is barred by res judicata on account of the order passed in E. A. No. 1120 of 1926. That was an application filed by the decree-holder for the determination of mesne and subsequent profits in respect of the suit properties from the defendants and to pass a decree accordingly. The application was dismissed by the following order :

"As admitted by the decree-holder's vakil, an E. P. is necessary and the petition is not maintainable. The petition is rejected with costs."

It is argued that the present application asking for the same relief is, therefore, barred by this order. There was a good deal of discussion at the Bar as regards the distinction between an E. P. (execution petition) and an E. A. (execution application): see Rr. 3 and 149, Civil Rules of Practice for the distinction and what was really meant by the admission of the decree-holder's vakil in the prior petition was that :

"an E. P. is necessary and the petition is not maintainable."

In the view that I take of the appellant's argument it is not necessary to discuss this question as I think the plea of res judicata should not be allowed to prevail inasmuch as the prior application was not disposed of by the Court on the merits : see *Ramachandra Raju* v. *Bhujanga Row* (3). as is obvious from the order itself.

One more argument advanced on behalf of the appellants remains to be noticed and that is, that the present application headed "in Execution Petition," that is, an E. P. should not have been accepted by the Court, as Courts have no jurisdiction to entertain what are termed "execution applications" for ascertainment of mesne profits under O. 20, R. 12 : see *Ramachandra Raju* v. *Bhujanga Row* (3) at *p.* 48 of 46 *M. L. J.* I must say that the argument comes with very bad grace from the appellant, for it was on the objection raised by him that the decree-holder consented to file the "execution petition" (see the order in E. A. 1120 of 1926 quoted above). However that may be, the present petition though headed "Execution Petition" is obviously, having regard to its contents, an application in the suit itself for the determination of past and future profits as required under O. 20, R. 12, Civil P. C. As regards the form of the application, therefore, there can be no objection. No other bar to the entertainment of the application has been pleaded in connexion with this argument. I think the lower Court was right in treating the application as an application in the suit for the ascertainment of mesne profits.

Mr. Lakshmanna on behalf of the decree-holder relied on the conduct of the parties as shown by certain proceedings in Court and also on the order passed by the High Court for stay of the execution of the lower Court's decree pending the appeal and the papers connected therewith to show in what manner the decree, so far, as the question of mesne profits was concerned, was interpreted by the parties. I do not think that these considerations are already relevant for the disposal of this appeal. In the result, I agree that the appeal should be dismissed with costs. The memorandum of objections is also dismissed, but without costs.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 38

ODGERS AND WALLACE, JJ.

(*Lagudura*) *Vasudera Ayyar*—Plaintiff—Appellant.

v.

(*Lagudura*) *Sundararaja Ayyar* and *others*—Defendants—Respondents.

Appeal No. 315 of 1927, Decided on 12th February 1929, against order of Second Addl. Sub-Judge, Madura, D/- 13th July 1927.

(a) Civil P. C., Sch. 2, Para. 14 (c)—Mere use of word jeshta bhagam does not make award illegal.

Though jeshta bhagam is obsolete and illegal, the mere use of the word does not make an award illegal when the Court is satisfied that the extra amount is given to the eldest son for services rendered : 30 *M. L. J.* 382; 8 *L. W.* 400 and *A. I. R.* 1922 *Mad.* 150, *Rel. on.* [P 41 C 2]

(b) Civil P. C., Sch. 2, Para. 14 (c)—Error of law explained.

An error of law only exists when in an award there is stated some illegal proposition which is the basis of the award and which is erroneous : *A. I. R.* 1923 *P. C.* 66, *Foll.* [P 41 C 2]

(c) Civil P. C., O. 32, R. 5—Father having no adverse interests fully representing minors, in arbitration—Minor's rights not neglected—Minors are bound by the award.

Two minors in an arbitration were fully represented by their father whose interest was not adverse to theirs. They got as much as the major brothers. There was no negligence of father in connexion with minor's right who suffered no deprivation.

Held : the minors were bound by the award passed : 16 *All.* 231 and 27 *Bom.* 287, *Ref.* [P 42 C 1]

T. L. Venkatarama Iyer—for Appellant.

K. V. Krishnaswami Iyer and *N. Kunjithapadam Iyer*—for Respondents.

Odgers, J.—This is an appeal against the order of the Second Additional Subordinate Judge of Madura holding that a certain award is invalid. Defendant 1 had five sons, one by his first wife and four by his second. The father had begun life in a small way with family property apparently worth only Rs. 300 or 400 but he made a considerable fortune in Sunnadi dye. He had originally two sons by his first wife but his eldest son, Ramasami, died at the age of 18 and according to the plaintiff from about 1913 his family had been in comfortable circumstances and in 1922 there was an attempt at partition in the family. This partition did not get further than a partition of moveables. Consequently, on 16th September 1923 the family made a reference to five arbitrators to divide

the family property, Ex. V. Three of the arbitrators were relations and two of them P. W. 1 and D. W. 2 were intimate friends of the family with a knowledge of all its circumstances. The reference is very short and runs as follows :

"As we have named you as arbitrators to effect a partition amongst us and executed this muchilika to you, we execute this muchilika agreeing to be bound by whatever award you may pass in respect of our partition after seeing our properties and hearing what we have to state (vakumulam)."

The reference though dated 6th June 1923, was not signed till the 16th September 1923. It is signed by the father, defendant 1, for himself and on behalf of the two minor sons by the second wife, by the plaintiff who was then the only surviving son by the first wife and by the two major sons of the second wife. It may be noted that the last signatory, Ramayyan, had been given away in adoption to another family but was by agreement to obtain a share in his natural family. In September 1924 the award, Ex. G, was given and in December 1924 there was a petition by the plaintiff to pass a decree in terms of the award. The vakumulam took the form of written statements put in by the parties and Ex. 1 dated 25th September 1923 is the statement put in by the father signed by himself alone. In this document after agreeing to abide by any award the arbitrators may pass in accordance with the muchilika the father asks shortly : (1) that he and his wife should be allowed to live in the ancestral house for their lives and that it may be taken in shares by the sons after their deaths; (2) Rs. 7,000 for pilgrimage expenses; (3) Rs. 10,000 for charities and he adds: "I pray for orders to reserve the total sum of Rs. 17,000 for my doing charities and going on pilgrimages as I like;" (4) the income from Rs. 30,000 for his expenses and those of his daughters and 30 kalams of paddy, the Rs. 30,000 to be taken in equal shares by the sons after his and his wife's deaths ; (5) Rs. 10,000 worth of land, jewels etc., as stridhanam to each of the daughters; (6) Rs. 5,000 worth of jewels for the wife to be taken in equal shares after her death by the sons and daughters; (7) all the remaining property to be taken in equal shares by the five sons. The statement filed by the plaintiff Ex. B dated 24th September 1923 points out that he assisted his father to attain success in his business after the death of his brother, Ramaswami and that the sons of the second wife never did any work. He therefore asks the panchayatdars to grant him half share in the properties he sets out and "an elder brother's (excess) share above them according to the partition effected amongst our ancestors." The statement filed by defendant 2 on 23rd September 1923, Ex. A asks that the five brothers should take the properties in five equal shares and adds : "I am not willing to give any (excess) as elder brother's share to my elder brother, Vasudeva Ayyar;" but he requests the panchayatdars to do him a favour which is in their discretion. In other words, he wants more than his one-fifth share. He also requests that all the immovables be divided into five shares. Ex. C is the statement of defendant 3, that is, the adopted son, dated 25th September 1923. He merely asks for an extra share to cover the expenses that he has to incur in performing the shradda etc., in his adopted family.

Now, the arbitrators had submitted to them a detailed list of properties owned by the family in Exs. D and E. Ex. F is the list of property owned by the family in Kodikulam with suggested shares for the five sons and the two daughters. So, Ex. D shows an agreed valuation of the houses and Ex. F an agreed valuation of lands. The arbitrators seem to have adopted the suggested division in every way except that they substituted the daughters for the father in respect of the Kodikulam property. Now, as stated, the arbitrators issued an award which was begun on 10th April but as a matter of fact not issued till September in which they allowed Rs. 18,000 for the residence and maintenance of the father, provision for the daughters which does not concern us and marriages, and Rs. 11,000 jeshtabhagam to Vasudeva Ayyar and they divided the property into five shares as requested. In the recitals they say they examined the parties, that they gave evidence and statements as to what should be done as to the Jeshtabhagam that Vasudeva should get and that the remaining property should be divided into five shares. The panchayatdars state that they received those statements and perused the ac-

counts and lists etc., and found that the property amounted to a total valuation of Rs. 1,75,000.

On this the Subordinate Judge found that the award was defective in the folowing particulars :

(1) that the father was not given a full share but only a life-estate: (2) that the plaintiff was awarded Jeshtabhagam which is obsolete and illegal; and (3) that the award was produced not by the joint deliberations of the five arbitrators but by one of the arbitrators, Subbayyar, who is one of the three relation arbitrators not examined, in conjunction with the writer of the award, Hari Govinda Ayyar.

As to the first point it is said that this is an illegality on the face of the record because defendant 1 has been deprived of his proper share without his consent. The summary given above and the father's (defendant 1's) statement before the arbitrators, Ex. 1, clearly show that he did not ask for a share. What he wanted was cash, residence in the house and a life-interest in Rs. 30,000 to put it shortly. Everything but Rs. 17,000 was to go to his sons in equal shares; viz., the immovables and Rs. 30,000 after the death of himself and the death of his wife. What he says in his evidence as D. W. 1, is that he wanted the balance i. e., after the sums allotted to him for pilgrimage, charities, etc., to be divided among his sons. He says : "I wanted a division giving each his share and retaining something for myself." It is now said that Ex. 1 says that the property was defendant 1's self-acquisition. There is no doubt that he started with a family nucleus though small and there is no evidence that he ever threw his self-acquisition into the hotchpot and then purported to reserve something out of it for himself. The contention is based on the expression in Ex. 1: "You know also what I have acquired by taking great pains." And in his evidence he says :

"I acquired the whole of my property. As my sons did not agree among themselves, I wanted to effect a partition."

It appears to me that those words alone cannot be said to point to a consciousness on the part of defendant 1 that his property was his own to do what he liked with it and was not joint family property. He made apparently no objection in 1922 when the moveables were divided and as we see he was a party on his own behalf and on behalf of the minors to the reference to arbitration. I think therefore there is nothing in that point.

To take the third point next. Nothing has been said against the three members of the panchayat who are related to the family. All the arbitrators are said to have known the family for thirty years. The objection is not put forward in the written statement of defendant 1 who says in para. 10 that the award is the production of three arbitrators only who acting solely as the agents of the plaintiff, that is the eldest son, produced a document of their own choice for the signature of Nagendra Ayyar and Parasurama Ayyar, i. e., the two other arbitrators. He comments on the fact that the document was commenced to be written on 10th April 1924 and was not completed till September 1924. That is explained by saying that the 10th April happened to be a lucky day and that as very often happens the first few lines of a document are written at an auspicious time leaving the rest to follow. In fact, we do not hear anything of this objection till the re-examination of Nagendra Ayyar, D. W. 2, who now appears as a witness against the plaintiff. This witness says that he did not read the document before he signed it nor did the other arbitrators and he also says that he did not know how to effect a partition and had no intention of taking part in the arbitration. He further says that :

" I told Timma Subba Ayyar to privately and secretly make a division and get Hari Govinda Ayyar to note it down and bring the result to me without informing any of the parties. "

This is a man worth two lakhs of rupees who received all the statements and apparently saw the parties and everything that was done in the arbitration happened at his house. We have been taken through the deposition very carefully and I can only say that the impression left on my mind by the evidence of this witness is an extremely bad one and if it comes to deciding between the evidence of this witness and P. W. 1 the only other arbitrator who gave evidence I have no hesitation whatever in accepting the statement of P. W. 1 in preference to the

other. He (P. W. 1) says the arbitrators met seven or eight times, the parties were not anxious that any further enquiry should be made after the statements and the lists and accounts had been put in. Defendant 1 never complained to the witness that Subba Ayyar and the plaintiff and Hari Govinda Ayyar, the writer, were secretly writing the award. This theory that the award was got up behind the backs of the other arbitrators by Subba Ayyar and the writer seems to be a pure afterthought and there seems nothing in the evidence that is worthy of credit to support the suggestion.

The second question as to Jeshtabhagam is perhaps more difficult. We have been referred to cases like *Rajangam Ayyar* v. *Rajangam Ayyar* (1), which says that jeshtabhagam is obsolete and illegal; *Venkata Reddi* v. *Kuppa Reddi* (2), which says that jeshtabhagam is obsolete; *Yerukula* v. *Yerukula* (3) which says it is illegal and should be omitted from the decree that had been passed in that case. So, the objection is based partly on the fact that it is obsolete and illegal and partly on the fact that it again shows an error of law on the face of the award. It must be admitted that the word appears in the preamble to the award and also in the statement, Ex. B, put in by the plaintiff. It will be remembered that he asks not only half-share but for jeshtabhagam as well and I think it is undoubted that he asks for this on account of the fact which he sets out at some length that he has been of use to his family in building up the family business. It is said, on the other hand, that the award of Rs. 11,000 is "for the jeshtabhagam of Vasudeva Ayyar" and that is the word used and not for any service. It is rather an extraordinary fact that, although this practice is said to be obsolete and illegal, we have in the course of this case been referred to recent proceedings in four or five districts of this presidency as far apart as Tinnevelly and Ganjam where this expression at least is still in use. Mayne says that the jeshtabhagam of the eldest son is either 1/10 or 1/20. It will be seen that the arbitrators have awarded Rs. 11,000 extra which is about 44 per cent in the present case. This does not seem to be any proportion known to the Hindu Law and I think there is no doubt that as a claim merely on the ground that one is the eldest son it is illegal. The question is whether the use of the word jeshtabhagam must be held to make the award of Rs. 11,000 illegal when we are satisfied that that extra amount was given for services rendered. A very similar case C. R. P. 794 of 21 came before a Bench of this Court (Krishnan and Waller, JJ.) in November 1923. That was an arbitration and it was suggested in that case that the arbitrator had followed the obsolete rule of Hindu Law giving the eldest brother an extra share as jeshtabhagam and that therefore, under S. 14 (c), Sch. 2, Civil P. C., the award was illegal. The learned Judges point out that if the arbitrator was applying the rule he would have given a half share to the eldest son and not merely Rs. 3,000 and odd would have been given in consideration of having looked after his brothers for many years and educated them. The learned Judges declined to interfere. It seems to me that this is a case of a very similar nature and that although as there the word jeshtabhagam is used the reason why extra allowance was given rests on very good and reasonable grounds, namely, the assistance rendered by the eldest son. It cannot therefore, be said that this is an error of law, for an error of law, only exists when in an award there is stated some legal proposition which is the basis of the award and which is erroneous: *Chamsay Bhara & Co.* v. *Jivaraj Balloo Spinning and Weaving Co.* (4).

There is a further matter to be considered and that is this: Are the minors bound by the award? Defendants 4 and 5 were separately represented before us and by the award they get about Rs. 25,000. They naturally do not want the father's share increased so that they do not join in the objection that defendant 1 the father, ought to have had an 1/6th share. The question

(1) [1920] 39 M. L. J. 382=57 I. C. 18=12 M. L. W. 435.
(2) [1918] 8 M. L. W. 400=47 I. C. 716=(1918) M. W. N. 680.
(3) A. I. R. 1922 Mad. 150=45 Mad. 648.
(4) A. I. R. 1929 P. C. 66=47 Bom. 578=50 I. A. 324 (P. C.).

really turns again on whether the minors are bound by this award called jeshtabhagam. It is said that they were not validly or legally represented at the arbitration. There is no doubt that the father referred the matter to arbitration on their behalf. Ex. 5. but he did not sign Ex. 1 on behalf of the minors. It is further said that he was not competent to represent them as his interest was in conflict with theirs. It is to be noticed that the statement Ex. 5 was signed on 16th September 1923 and it was not till the 25th of that month that the father put in his written statement. On the father's written statement he undoubtedly demanded both absolutely and as life interest a larger amount than he was entitled to. The arbitrators have as a matter of fact awarded him a life interest in a less amount than he would have been entitled to as a sharer. It has been recently held by a Full Bench of this Court in *Venkata Someshwaro Rao* v. *Lakshmanaswami* (5) that it is a question of fact in every case as to whether the guardian's interests are adverse or not.

It cannot anyhow be held that the action or non-action of the guardian renders the matter in question void ab initio. Here the father asked for an equal share for the minors with his other sons. There is really no adverse interest because the father as shown expressly disclaimed his right to a share. Though Ex. 1 was not signed on behalf the minors Exs. D and E, the property lists, were and it is not proved that there was 'any negligence on the part of the father in respect of the minors' rights. *Jagan Nath* v. *Mannu Lal* (6), holds that it is competent for the father of a joint Hindu family in his capacity as manager to refer the partition of the joint family to arbitration. In that case minors were involved. So also the manager of a joint Hindu family 'even if he be not the father : *Balaji* v. *Nana* (7). I am therefore unable to see why the minors should not be bound by this award. They have certainly suffered no deprivation and their only real complaint is against the award of jeshtabhagam which is in my opinion justified for the reasons I have stated. It was also faintly suggested that the arbitrators were bound to take evidence and that the minors were prejudiced because evidence was not taken on their behalf. Throughout the statement put in by the adult members of the family there seems to me to be nothing in any way prejudicial to the minors, save the claims made for some additional consideration which, save in the case of defendant 1, were not considered by the arbitrators. I can see no unfairness to the minors and no prejudice to them. Their interests seem to have been looked after by the family as well as by the arbitrators who as a matter of fact, did very little more than adopt the suggestions put before them in the lists and accounts rendered by the family.

With the best consideration I can give to the case I think the learned Subordinate Judge is wrong in sustaining any of these objections to the award and I think that the award is legal and proper and that a decree should be passed in accordance with it. The miscellaneous appeal must accordingly be allowed with costs here and in the Court below.

Wallace, J.—I agree throughout in the conclusions of my learned brother. I only to wish to add a few sentences on the matter of the jeshtabhagam award and its validity as against the minor members of the family.

It is quite clear from Exs. A and B that the matter of a jeshtabhagam award was included in the matters 'referred to arbitration, and from Ex. G that the arbitrators definitely considered the propriety of it and awarded for it what they thought proper. The award was, in my opinion, a unanimous and considered judgment, for I quite agree with my learned brother that D. W. 2's attempts now to discredit it discredit nothing and no one but himself. His present glib confession that he went into the arbitration with no intention of doing his duty, that he deliberately abstained from doing it, and that nevertheless it was he 'who engineered the whole award privately and secretly without the knowledge of the parties or most of his fellow arbitrators is obviously false and inspired by an unscrupulous desire to help the defendants.

(5) A. I. R. 1929 Mad. 213 (F. B.).
(6) [1894] 16 All. 231=(1894) A. W. N. 60.
(7) [1903] 27 Bom. 287=5 Bom. L. R. 95.

The whole body of arbitrators was intimately acquainted with the family and its history, and a unanimous decision by such a body cannot be upset on the grounds urged by the lower Court. There is no ground in the evidence for concluding that the arbitrators awarded the jeshtabagam because they held that the law compelled them to award it. The award of that was therefore not based on any error of law apparent on the face of the record.

As to the minors, they were sufficiently represented by their father and guardian, unless their interests have in fact suffered by such representation, and it is impossible to hold that opinion when they have been awarded exactly the same as their major brothers, (defendants 2 and 3), who presented their case fully, and who were fully heard by the arbitrators. The minors are unable to maintain that their case differs in any respect from that of defendants 2 and 3. I am unable therefore to hold that the award is in any way bad in law, and agree that a decree should be passed in accordance therewith. I agree in the order as to costs.

P.R.S./P.R. *Order accordingly.*

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ANANTAKRISHNA AYYAR, J.

Vaithilinga Aiyaswami Aiyar—Plaintiff—Appellant.

v.

Dist. Board, Tanjore — Defendant—Respondent.

Second Appeal No. 586 of 1929, Decided on 16th July 1929.

(a) Court-fees Act, Sch. 2, Art. 17 (b)—Suit under S. 112, Madras Estates Land Act dismissed—Raiyat's appeal should be stamped under Art. 17 subject matter being one which could not be estimated in money.

Under S. 112, Madras Estates Land Act, the raiyat brought a suit contesting the lanlord's right to sell the holding, one of the reasons being that there was no proper notice. The suit was dismissed. On appeal;

***Held*: that as the case was one where it was not possible to estimate at a money value the subject matter in dispute, the court-fees payable on the memo. of appeal was Rs. 15: 18 *C. W. N.* 815 ; 12 *M. L. J.* 87 ; 12 *M. L. J.* 88 ; 31 *Mad.* 89 ; 8 *Cal.* 515 ; 43 *Mad.* 396 ; 20 *M. L. J.* 121 and *A. I. R.* 1928 *Mad.* 929, *Cons.* [P 45 C, 1 2]**

(b) Interpretation of Statutes — Taxing statutes.

In a taxing statute unless the matter is made reasonably clear, the parties are entitled to bring their cases under the less onerous of the Act if otherwise they can do so. [P 45 C 1]

K. Bhashyam Ayyangar — for Appellant.

Government Pleader—for the Crown.

Judgment.—The question that has been referred to me is, what is the amount of court-fee payable in respect of a memorandum of second appeal preferred by a ryot in a suit filed by him under S. 112, Estates Land Act. Under this section, whenever a landholder expresses his intention to avail himself of the powers given to him under the Estates Land Act to sell the holding, he is bound to give through the Collector a written notice to the ryot. That section also provides that, if he (the ryot) does not pay the amount or file a suit within 30 days before the Collector contesting the right of sale, the said holding or any part thereof specified in the notice will be sold. In this particular case, the ryot contested the landholder's right to sell his holding under S. 112. One of the reasons given by the ryot was that there was no proper notice. There were other objections also raised by the ryot. The suit was dismissed by both the lower Courts. The ryot, when he preferred the second appeal to this Court affixed a court-fee stamp of the value of Rs. 10 to the second appeal memorandum. The office took objection to the amount of court-fee that was payable, and as the Taxing Officer felt some doubt as to the exact amount of court-fee payable in respect of the memorandum of second appeal, the matter was referred to the learned Chief Justice and under orders of the Chief Justice the matter has been placed before me for adjudication as regards the exact amount of court-fee payable.

The learned advocate who appeared for the appellant, Mr. K. Bhashyam Ayyangar, contended that the present case is covered by Cl. 17 (b). Sch. 2, Court-fees Act, 7 of 1870, as amended by the Madras Act 5 of 1922 :

"plaint or memorandum of appeal where it is not possible to estimate at a money value the subject matter in dispute and which is not otherwise provided for....."

Under the notification issued by the Government, **No. 1245,** dated 15th April 1926—The Government were pleased

"to reduce to Rs. 15 the fees chargeable under Sch. 2 on memorandum of second appeal in a suit of the class mentioned in Art. 17-B and instituted in a revenue Court."

If this Article were to apply, then the

proper court-fee payable in respect of the memorandum of second appeal before me would be Rs. 15. On the other hand, the learned Government Pleader contends that it could not be said that it is not possible to estimate at a money value the subject matter in dispute in the present case: *Banwari Lal* v. *Daga Shankar* (1), and then he pointed out that, though under S. 5, Estates Land Act, in respect of rent due to the landholder a charge on the holding is created by the Act, that charge is enforceable either by way of suit filed before the revenue Court or by the landholder taking summary proceedings to realize the rent. If the landholder should elect to proceed, as he has done in the present case, by way of sale of the holding, then under S. 112 the ryot is given the right to file a suit before the Collector contesting the right of sale of the holding. The question then narrows itself to this : what exactly is the meaning to be attached to the expression: "where it is not possible to estimate at a money value the subject matter in dispute," in Cl. 17 (b). In one sense no doubt it is possible to estimate, in however unsatisfactory a manner, the subject matter in the present case, because as pointed out by the learned Government Pleader the question may have to be decided in this case as to what is the amount of rent payable by the ryot to the landholder in respect of which the landholder has taken proceedings by way of sale. But at the same time it is imppossible to shut one's eyes to the fact that no question regarding the amount due might ariso in some of the suits filed under this provision of law. For example, when the ryot disputes the landholder's right on the ground that no legal notice had been served upon him under S. 112, the question that will have to be decided is whether such notice was served on the ryot or not. In such a case the liability of the ryot to pay rent, whatever it is, remains and it is not disputed that the landholder could by means of a suit before the revenue Court recover the same by obtaining a decree and proceedings to execute the same, or he could start fresh proceedings after giving due notice under S. 112, if he is otherwise in order. Learned Judges have had to consider the exact scope of the clause : "it is not possible to estimate at a money value the subject matter," occuring in old Art. 17 (6) corresponding to the present Art. 17 (b), and difference of opinion necessorily arose having regard to the nature of the expression used in that clause. With reference to a plaint filed under S. 77, Registration Act, Benson and Bhashyam Ayyangar, JJ., held in *Pydal Nambiar* v. *Kannan Nambiar* (2) that the subject matter was manifestly capable of valuation, and the learned Judges directed that ad valorem court-fee should be levied. In the case reported in the very next page of the same volume *Savarimuthi Pillai* v. *Alagiam Pillai* (3), Davies and Moore, JJ., held that it was impossible to give any valuation, in the ordinary sense, in respect of such suits ; and they held that the case came under the old Art. 17 (6) corresponding to the present Art. 17 (b). It is not surprising in this state of circumstances, that the matter came before a Full Bench of this High Court, and in *Ramu Aiyar* v. *Sankara Aiyar* (4), the Full Bench following the decision of Garth, C. J., in *Jantoo* v. *Radha Canto Doss* (5), held that in view of the wording of the Act the proper view would be to say that it is not possible to estimate at a money value the subject matter in such suits.

Another class of cases, which in my view, would also throw some light on the meaning of the expression I have now to consider arose in connexion with suit for partition by co-tenants alleging possession in the plaintiffs and other co-tenants, and making the other co-tenants defendants. The question arose whether the subject matter of such plaints could be estimated in money value and what was the proper court-fee to be paid in respect of the same. After some difference of opinion it was held in *Gill* v. *Varadaraghavayyan* (6), by Wallis, C. J. and Sadasiva Aiyar, J., that in the ordinary acceptation of the expression such claims were not capable of money valuation within the meaning of Art. 17. Finally the Court had to consider the meaning of this expression with reference to an appeal preferred from a decision passed by the Forest

(1) [1909] 13 C. W. N. 815=1 I. C. 670.

(2) [1902] 12 M. L. J. 87.
(3) [1902] 12 M. L. J. 88.
(4) [1908] 31 Mad. 89=17 M. L. J. 573 (F.B.).
(5) [1882] 8 Cal. 515.
(6) [1920] 43 Mad. 306=38 M. L. J. 92=11 M. L. W. 174=55 I. C. 517=(1920) M. W. N. 124.

Settlement Officer from whose decision under S. 10, Forest Act, an appeal lay to the District Judge. The question arose as to the exact court-fee payable in respect of the memorandum of appeal presented in such circumstances to the District Judge. The High Court held that the Forest Officer could not be said to be a civil Court or a revenue Court within Clause 1, Art. 17, and that the proper Article to be applied is the old Art. 17 (6), which corresponds to the present Art. 17 (b). In the case before me, the plaintiff-ryots raised (among others) the question that the notice under S. 112 was not valid, since it was not signed by the defendant, the landholder, but by two others, who, it was alleged, had no right to issue such notice ; objection was also raised that the notice was not properly served. These pleas though overruled by the lower Courts, have been taken in the memorandum of second appeal also. Having regard to the decisions of this Court, where the Court had to consider the meaning that has to be attached to the expression in question, I think that I should, following the reasons adopted by this Court in the three classes of cases mentioned by me, decide that it is not possible to estimate at a money value the subject matter in dispute in the present case. In a taxing statute, unless the matter is made reasonably clear, the parties are entitled to bring their cases under the less onerous provision of the Act if otherwise they could do so : *Sekharan* v. *Eacharan* (7), *Pathumma Umma* v. *Aliyammakkanath Moideen* (8). But in the present case I am not satisfied that the intention of the Act was to bring such a case as the one before me, within the ad veloram court-fee provision. No question could arise with reference to plaints filed under S. 112, because (though in the present case I understand that a court-fee of Re. 1 has been paid on the plaint) under Cl. 35 of the Notification issued by the Government, the Government have been pleased to remit the fees chargeable in respect of plaints in suits instituted before the Collector under S. 112, among others, of the Estates Land Act. The question could arise only with reference to the court-fee payable in respect of appeals and second appeals ; for the reasons I have given above, I have come to the conclusion that the present case before me is not a case where it is possible to estimate at a money value the subject matter in dispute, and that being so, the present case is covered by Art. 17 (b), Sch. 2 to the Act.

According to the recent notification referred to by me, namely, Notification No. 1245 dated 15th April 1926, the amount of court-fee payable on second appeals preferred from decisions of revenue Courts is Rs. 15. The appellant has paid a fee of Rs. 10 and he has accordingly to pay the difference of Rs. 5. I give three weeks' time for such payment.

P.R.S./P.R. *Order accordingly.*

(7) [1910] 20 M. L. J. 121=3 I. C. 459=6 M. L. T. 245.

(8) A. I. R. 1928 Mad. 929.

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* A. I. R. 1930 Madras 45

ANANTAKIRSHNA AYYAR, J.

(*Koppaka*) *Brahmanandam* — Appellant.

v.

Secy. of State—Respondent.

S. R. No. 17672 of 1928, Decided on 19th April 1929, from decree of Sub-Judge, Ellore, in C. C. No. 15 of 1926.

*** Court-fees Act, S. 8—Appellant insisting on 15 per cent on market value in case of success—He must pay court-fees on total amount including 15 per cent.**

Where a person being dissatisfied with the amount of compensation awarded to him under S. 18, Land Acquisition Act, wants to appeal, insisting in case of his success that not only the excess market value but also 15 per cent. of the same should be decreed in his favour, he must pay court-fees not only on the excess market value but also on 15 per cent thereon: 16 *Mad.* 369, *Dist.* [P 47 C 2]

V. Viyyanna—for Appellant.

Govt. Pleader—for Respondent.

Judgment.—The question that has been referred to me is whether an appellant whose lands were acquired under the Land Acquisition Act (1 of 1894), but who, being dissatisfied with the amount of compensation awarded to him by the Court on a reference made to it under S. 18 of the Act, appeals to the High Court, is bound to include in the valuation of his appeal the amount of 15 per cent of the excess market value, and pay court-fee thereon, or whether he is entitled to value his appeal only at the excess market value claimed by him and pay court-fee on that amount only, while insisting in case of success

in the appeal that he should be decreed not only the excess market value claimed by him but also 15 per cent on the same.

The answer to this question turns on the proper construction to be placed on S. 8, Court-fees Act. S. 8 runs in these terms:

"The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant."

It was argued on behalf of the appellant that under S. 23, sub-S. (1), Land Acquisition Act, the amount of compensation to be awarded is determined by the considerations mentioned in Cls. 1 to 11 of the section and that in construing S. 8, Court-fees Act, the expression "the amount awarded" should be taken to cover only the amount awarded having regard to the considerations mentioned in Cls. 1 to 6 only of S. 23 and that the expression, "amount claimed" in S. 8 should also receive a similar construction, I am unable to accede to that contention. Under the Land Acquisition Act, it is the amount of compensation that should be allowed for the land that has to be determined; and in determining the amount of compensation the Court has to take into consideration not only the provisions of Cls. 1 to 6, S. 23, sub-S. 1, but also the provisions of sub-S. 2 of that section. Sub-S. 2, S. 23 expressly enacts:

"In addition to the market value of the land as above provided, the Court shall in every case award a sum of 15 per centum on such market value in consideration of the compulsory nature of the acquisition."

As I understand the Act, the amount of compensation to be awarded includes not only the market value but also the 15 per cent on such market value. A reference to the other sections of the Land Acquisition Act, in my opinion, makes this clear. Under S. 11, the Collector shall make an award of the compensation which in his opinion should be allowed for the land, and also "the apportionment of the said compensation among the claimants." Again under S. 31:

"the Collector shall tender payment of the compensation awarded by him to the persons interested; and if they did not consent to receive it, the Collector shall deposit the amount of compensation in the Court to which a reference under S. 18 would be submitted."

It is clear that the expression "amount of compensation awarded by the Collector," in S. 31 includes not only the market value but also the 15 per cent thereon, since it is clear that the Collector is bound to tender to the claimants the said 15 per cent also and to deposit the same in Court if the claimants did not consent to receive the same. Again S. 15 of the Act enacts that:

"in determining the amount of compensation, the Collector shall be guided by the provisions contained in Ss. 23 and 24,"

that is, not only by the provisions of sub-S. 1, Cls. 1 to 6, S. 23, but also by sub-S. 2, S. 23.

It seems to me to be clear that the extra amount of compensation claimed by the appellant in an appeal should under S. 8, Court-fees Act, include also the 15 per cent of the market value and that he should pay court-fees on the total amount including the 15 per cent. He cannot, it seems to me, value his appeal only at the excess market value claimed by him in the appeal, and at the same time in case of success, not only claim to have that excess market value decreed to him but also claim that the appellate decree should automatically give him an additional 15 per cent of the said excess market value. An appeal is different from the claim put forward by him before the Collector. When once the Court, on a reference to it under S. 18, Land Acquisition Act, determines the amount of compensation to be awarded for the land acquired, the claimant, if dissatisfied with the amount of compensation so awarded by the Court, should, in case he prefers an appeal value his appeal at the figure which represents the difference between the amount of compensation awarded to him and the amount of compensation that he claims in the appeal. The amount of compensation awarded to him includes, in my view, the 15 per cent also of the market value, and the extra amount of compensation that he claims in the appeal should also include the 15 per cent of the excess market value which he claims in the appeal.

Of course, it is open to an appellant in a land acquisition appeal, as in any other appeal, in which he claims a sum of money from the other side, to give up

a portion of his claim and confine his claim to any particular amount to which he may restrict his claim in appeal. In such cases he is of course bound to pay court-fee only on the amount to which he has so confined his claim in the appeal; but in such a case, in the event of success in his appeal the decree of the appellate Court should award only the amount claimed by him in the appeal, and not more: *Muhomed Ali Ajmad Khan* v. *Secy. of State* (1). In the case before me, the appellant, while valuing his appeal at the extra market value only, claims in the event of success an extra 15 per cent also. To entitle him to do so I think, on a proper construction of S. 8, Court-fees Act, that he is bound to include in the valuation of his appeal the extra 15 per cent also and pay the court-fee due on the total amount.

No reported decision on the exact point that I have to decide now had been brought to my notice either by the learned advocate for the appellant or by the learned Government Pleader. The appellant, however, relied on the observations of the Privy Council in the Mahabhalipuram Land Acquisition case reported in the *Secy. of State* v. *Shanmugaraya Mudaliar* (2). The observations relied on are at pp. 376, 377 and 379. I am of opinion that the observations relied on by the appellant do not really help me in the decision of the present question. The Privy Council had not to decide any question as to the proper amount of court-fee payable in a land acquisition appeal. The decision itself was passed under the provisions of the Land Acquisition Act (10 of 1870).

The learned Government Pleader drew my attention to Ss. 11, 13 and 24 of the old Act of 1870 and also to Ss. 11, 15 and 23 of the present Act. Sub-S. 2, S. 23 of the present Act (1 of 1894), does not find a place in S. 24 of Act (10 of 1870). On the other hand S. 42 of the old Act provided as follows:

"In addition to the amount of any compensation awarded under part 2 or part 3 of this Act, the Collector shall in consideration of the compulsory nature of the acquisition pay 15 per centum on the market value mentioned in S. 24."

The observations of the Privy Council relied on by the learned advocate for the appellant were made with reference to the provisions of S. 12 of the old Act, and as already mentioned, do not help me in deciding the question of court-fee now referred to me. I may note that in cases of appeals by the Government in land acquisition cases, it had been held in S. R. 9324 of 1923, that the Government should pay ad valorem court-fee on the amount of compensation decreed to the claimant to which objection is taken in appeal.

For the above reasons, I have come to the conclusion that the appellant in the in the present appeal, in case he wishes to have the 15 per cent also included in the appellate decree in case of his success, is bound to include the said 15 per cent also in the valuation of his appeal and pay court-fee on the total amount.

I answer the question referred to me accordingly, and give leave to the appellant to amend the valuation given in the appeal memorandum, should he elect to do so, and pay court-fee thereon within one week after re-opening of the High Court in July 1929.

P.R.S./P.R. *Order accordingly.*

(1) [1903] 30 Cal. 501.
(2) [1893] 16 Mad. 369=20 I. A. 80 (P.C.).

A. I. R. 1930 Madras 47

KUMARASWAMI SASTRI AND WALSH, JJ.

(*Muddanna*) *Sreeramulu* and *others*—Plaintiffs - Appellants.

v.

(*Muddanna*) *Hanumayya* and *others*—Defendants - Respondents.

Appeal No. 385 of 1924 and Civil Misc. Petn. No. 2535 of 1929, Decided on 18th July 1929, from decree of Addl. Sub-Judge Bapatla, D./ 15th January 1924.

Civil P.C., O. 6, R.17—Suit for declaration that certain adoption was invalid held barred by limitation—Amendment to change the suit into one for possession which could not be barred—Amendment was allowed.

A suit was filed by reversioners for a declaration that a certain adoption is invalid and that certain alienations made by the adopted son were not binding on them. The suit was held to be barred by limitation having been brought more than six years after alleged adoption became known, and an application to amend plaint by adding prayer for possession was made.

Held : that, as a suit for recovery of possession would not be barred even though one for mere declaration could be under Art. 118 and as therefore the only effect of refusing the amendment would be to force the parties to a separate suit, it was in the interest of justice

to allow the amendment: 39 *Cal.* 418 and *A. I. R.* 1924 *P. C.* 137 *Rel. on* [P 48 C 1]

V. Ramadoss—for Appellant.

I. Krishnaswami and *Ch. Raghava Rao*—for Respondents.

Judgment.—This is an application to amend the plaint by adding a prayer for possession and to convert the suit into a suit for possession. The suit was filed by the reversioners for a declaration that a certain adoption is invalid and that certain alienations made by the adopted son are also invalid and not binding against them. The Subordinate Judge held that the suit was barred by limitation as it was brought more than six years after the date of the alleged adoption was known to plaintiffs. He did not go into the question of fact whether there was in fact an adoption and whether such an adoption was valid and legal. Pending this appeal the widow died about two or three months ago and the present application is to amend the plaint as we have stated above.

It is clear from the decision of the Privy Council in *Muhammad Umar Khan* v. *Muhammad Niazuddin Khan* (1), and *Kalyandappa* v. *Chan Basappa* (2), that a suit for recovery of possession would not be barred even though a suit for a bare declaration that an adoption was invalid or never in fact took place might be barred under Art. 118, Lim. Act. The question, therefore, is whether we should allow the amendment instead of driving the parties to a separate suit, because even assuming that we confirm the decree on the ground that the prayer for a declaration is barred, the appellants can still file a regular suit and will be in time. Having regard to the fact that the suit was filed as long ago as 1922, and that the question relating to the adoption has yet to be decided, we think it will be in the interests of justice to allow the amendment and to send the case back to the lower Court with directions to try the issues of fact raised by the amendment as, in our opinion, even assuming that the Judge was right in holding that a claim for a bare declaration is barred by limitation, the death of the widow has so altered the circumstances that the Court would have to go into the question as to the validity of the adoption and the validity of the alienations impeached in a claim for possession. In this view, it is unnecessary to decide whether the claim for a bare declaration is barred or not. Even if it is barred, a suit for possession would lie and it would not be barred and in a suit for possession the question as to the factum and validity of the adoption will have to be gone into. In these circumstances, we allow the plaint to be amended as prayed. We set aside the decree dismissing the suit and direct that on the amendment of the plaint the necessary issues be raised and the suit disposed of on the amended plaint. The lower Court will pass necessary orders for filing additional written statements and frame the necessary issues thereon. The petitioner will pay the additional court-fee in the lower Court within the time to be fixed by the learned Judge.

As regards costs, we think the proper order to make is to direct the appellants to pay the costs of defendant 6 in the lower Court which have been taxed at Rs. 80-1-0. As regards the costs of the appeal, they will abide and follow the result.

P.R.S./P.R. *Application allowed.*

(1) [1912] 39 Cal. 418=13 I. C. 344=39 I. A. 19 (P.C.).

(2) A. I. R. 1924 P. C. 137=48 Bom. 411=51 I. A. 220 (P.C.).

A. I. R. 1930 Madras 48

ODGERS AND WALLACE, JJ.

(*Alluri*) *Venkatasomaraju* and *others*—Plaintiffs—Appellants.

v.

Alluri Varahalaraju and *others*—Defendants—Respondents.

Second Appeal No. 297 of 1925, Decided on 25th January 1929, against decree of Dist. Judge, Godavari, in A. S. No. 63 of 1922.

Limitation Act, Art. 47—Order against Hindu father under S. 145, Criminal P. C.—Order is binding on his undivided sons—Suit by sons after three years from such order is barred under Art. 47—Criminal P. C., S. 145.

In proceedings taken under S. 145 an adverse order passed against a Hindu father in possession of the property bought on behalf of the joint Hindu family is binding on his undivided sons though they were not parties to the proceedings. A suit, therefore, by such undivided sons for possession of the properties—subject matter of the proceedings—brought more than

three years on such order is barred under Art. 47. [P 49 C 2]

Advocate General and *V. Govindarajachary*—for Appellants.

P. Somasundaram, *A. Satyanarayana*, *V. Ramanarasu* and *S. Narayana Aiyangar*—for Respondents.

Odgers, J.- In this case the plaintiffs are the appellants. In September 1920 they brought this suit to recover possession with mesne profits of certain lands from the defendants. Plaintiffs' father bought the land in question from defendant 1 in 1911. Proceedings were taken in June 1915 against the plaintiffs' father under S. 145, Criminal P. C., when defendant 2 resisted his possession, in which the posession of defendant 2 in the land was confirmed. The question is whether those proceedings bind the plaintiffs who are the undivided sons of their father Alluri Subbaraju who bought the property on behalf of the joint family. The importance of it is this, that if those proceedings do bind the present plaintiffs they are out of time with this suit because it was instituted more than three years from the date of the final order in the case (Ex. 3) under S. 145, Criminal P. C. It is argued that this order does not bind the sons who were not parties to it and was made without jurisdiction. The order came up to this Court in Criminal Revision Case No. 205 of 1916 after the death of the father Alluri Subbaraju when plaintiff 1 asked to be brought on as legal representative of his father. In the then state of S. 145, Criminal P. C. this was impossible, but this Court held that this order was not made without jurisdiction. We are therefore bound by this decision as to this latter point. An order under S. 145, Criminal P. C. applies to anybody bound by such order or anyone claiming under such person. It is perfectly clear that the plaintiffs were aware of the proceedings, also that the property was acquired for the joint family and the plaintiffs' father was in possession as manager on their behalf. It is also plain that S. 145, Criminal P. C. is only a quasi criminal matter as it falls within the purview of Art. 47, Lim. Act, unlike most criminal proceedings. *In re, Nathubhai Brijlal* (1) held that all parties with actual notice of proceedings under S. 145 were bound by them. That has also been held here in Crim. Revn. Case No. 87 of 1917. So that not merely the actual parties to, but all persons who may be concerned in, the dispute are parties with whom the Magistrate has to deal, the object being to prevent a breach of the peace. So it is not only the actual parties to the order but all parties with notice of the proceedings who are bound. In *Ram Sahai* v. *Binode Bihari Ghose* (2), it is distinctly laid down that where the manager of a joint family has taken proceedings under S. 145 as the managing member he and the whole family are bound by the order under it. This seems to be in accordance with reason and common sense. There therefore seems no good reason why having regard to the authorities cited we should not hold that under the circumstances the plaintiffs were bound by the notice of these proceedings under S. 145. If all persons are so bound who have had actual notice though not parties to the order as laid down in *In re, Nathubhai Brijlal* (1) and followed in this Court as stated above, it stands to reason that these plaintiffs who admittedly had notice of the proceedings should also be bound. There is the additional reason that their father had acquired the properties as manager of the family on their behalf and it seems only reasonable that the other members of the family should be bound. The plaintiffs must then fail on this point of limitation and the second appeal must be dismissed on that point.

The next question is whether plaintiffs are entitled to recover compensation from defendant 1 now represented by respondents 20 and 21. The sale-deed under which the plaintiffs are said to have acquired title to these lands is Ex. A and is recited to be a deed of sale of inam grant land and zeroyati land. The vendor recites that there is a lease on the land in favour of defendant 2 for eight years from 1907 to 1915. The document then goes on:

"Therefore, you shall, subject to your continuing the cowle period in favour of the said Varahalu Raju alias Ramabhaddiraraju Garu and subject to your collecting from him in my stead, the cist at the rate of Rs. 75 payable each year, on 30th Magha Bahulam, for the four years from the fasli year 1321, according to the instalments settled in the said cowle, take possession of the said land and enjoy the same soon after the expiry of 30th Palguna Bahulam of the year Ananda (15th March 1915) continuing

(1) [1909] 11 Bom. L. R. 377=2 I. C. 513.

(2) A. I. R. 1923 All. 151=45 All. 306.

his term until the close of the said cowle period."

This is said to be a covenant for possession and enjoyment after the period of the lease but it turned out that the tenant had a right of permanent occupancy and the learned advocate for the plaintiffs admits that his client was aware of the legal status as an occupancy ryot of the defendant at the time he entered into this transaction Ex. A and he also accepts the finding that he is an occupancy tenant. The District Judge found that the plaintiffs were aware of the nature of the tenure and were therefore not entitled to damages. The Subordinate Judge came to the same conclusion, but he put it on the ground that the plaintiffs had failed to obtain possession by coming to Court too late (i. e. on the point of limitation); so that it was their own fault that they failed to obtain possession. The question is: did the plaintiffs fail to get possession owing to the representation of the defendants as contained in Ex. A? It is impossible to say that they did. This part of the case is outside the question of limitation because being a registered document the plaintiffs have six years within which to sue. It may of course be said with reason that the possession that the plaintiff was to get under Ex. A after the expiry of defendant 2's lease was something different from what he had up to the expiration of that lease. And it is perhaps possible to explain this difference by saying that after its expiry he would have been able to take advantage of the provisions of the Madras Estates Land Act with regard to enhancement of rent and so on. *Mahomed Ali Sheriff* v. *Venkatapathi Raju* (3) was cited to us for the proposition that mere knowledge on the part of the vendee of a defect in title of the vendor would not by itself defeat the vendee's right on the basis of a covenant implied by the Transfer of Property Act. This is not the only fact in this case because here the plaintiff's father was not only aware of the state of the defendant's title but knew that the covenant must be entirely ineffective. At the same time it is exceedingly difficult to say, especially having regard to the plaintiffs' knowledge of the whole state of things at the time he entered into Ex. A that he has been damnified by the fact that after 1915 he has not been able to collect from the tenants more than Rs. 75 per annum, the rate stipulated in the lease of defendant 2, Ex. B. The contract to give him possession and enjoyment has really become unenforceable either because defendant 2 has acquired occupancy rights by the enactment of the Madras Estates Land Act or by judicial decision. It seems to me that it would be very difficult for a jury or any body sitting as a jury to assess any damages or at least anything more than mere nominal damages in favour of the plaintiffs for the breach of this covenant which as a matter of fact their father knew could never be carried out. Under the circumstances I am inclined to say that the plaintiffs are not entitled to any damages but at the same time I would give them no costs.

Respondents 11 to 14 are held in the judgment of the Subordinate Judge not to be necessary parties and it is difficult to see why they have been made parties to this second appeal. They are dismissed from the appeal with costs.

The Court guardian Mr. Narayana Iyengar for respondents 20 and 21 has received Rs. 35 as his fees from the Registrar and has applied for some additional allowance. I think that an additional sum of Rs. 40 ought to be awarded to him. This sum to be paid before decree is issued.

In the result, the second appeal is dismissed but without costs except as regards respondents 11 to 14 who will receive one set.

Wallace, J.—I agree and just wish to add my own view on the point whether the plaintiff's suit is barred by Art. 47, Lim. Act.

The contention that it is not barred because the order under S. 145, Criminal P. C. was passed without jurisdiction seems to me untenable in this Court in the face of the decision of this Court itself in previous proceedings that the order was with jurisdiction. The fact that the plaintiff was not a party to these proceedings and was not allowed to come on as a party cannot affect the jurisdiction of the order. Plaintiff then can only succeed in the face of Art. 47 if he can show that he is not a person bound by the order under S. 145,

(3) [1920] 39 M. L. J. 449=60 I. C. 235=11 M. L. W. 537.

Criminal P. C. His general argument is that as the proceeding under S. 145 is of the nature of a criminal proceeding, it can only bind the persons actually named therein, and that though Art. 47 lays down that the limitation period shall apply also to persons claiming under those who were bound, he is not claiming under his father but in his own right as a member of the same joint family of which his father was the manager. On his argument therefore he is neither a person bound by the order nor a person claiming under one who is bound by the order. The latter part of his argument may be conceded; the former in my view cannot. Without going into the general question whether an order under S. 145, Criminal P. C. is a judgment in rem and maintains a party found to be in possession as against all the world until he is ousted by an order of the civil Court, I am clear that, where the manager of the joint family in his capacity as such is a party to the proceedings, the joint family as a whole is a party and the proceedings bind any member of the joint family in his capacity as such. The possession of the manager as such is the possession of the joint family, such possession as can in the nature of the circumstances he had. If eventually the civil Court declares that the joint family is entitled to possession, the manager would retain for the joint family the possession given to him by the criminal Court, while if the civil Court declared the other party entitled to possession, the manager could not possibly resist the decree and claim to remain still in possession on his own individual behalf.

The real party to the criminal proceedings in such a case obviously is the joint family and not the individual person who happens to be the manager. If the appellant's view is accepted, the usufulness of the proceedings under S. 145 will be greatly curtailed. While these proceedings are quasi criminal, they are also quasi civil and there can be no legal objection to the actual parties cited being representatives of the others as in an ordinary civil case. In the present case, there can be no doubt that the plaintiff's father was a party to the proceedings in his capacity as manager of the joint family of which the plaintiff is a member. The plaintiff was therefore represented in the proceedings by the manager of his family, and as the manager is bound equally is he bound. The appellant's learned advocate admits that he is not able to quote any reported ruling in his favour. There is a ruling to the contrary on the above lines in *Ram Sahai* v. *Binode Behari Gosh* (2). I, therefore, agree that the appellant's suit for possession was rightly dismissed as barred by time.

P.R.S./P.R. *Order accordingly.*

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RAMESAM AND JACKSON, JJ.

Lakshumi Achi and *another*—Plaintiffs—Appellants.

v.

Narayanasami Naicker and *others* — Defendants—Respondents.

Appeal No. 89 of 1924, Decided on 2nd August 1929, from decree of Sub-Judge, Dindigul, in Original Suit No. 16 of 1922.

(a) Hindu Law—Partition — Sale-deed by one brother in favour of his brother showed some debts binding on both brothers and some on vendee alone—Some property also to go to vendor's heirs—Recitals in sale deed held to be showing intention of brother's separation.

In a previous suit brought for specific performance on an agreement for sale of his property, the sale-deed executed through Court by a Hindu vendor in favour of his brother, showed that some debts were taken as binding on both brothers and others on the vendor's brother alone and that some items of property were to the heirs of vendor.

Held : that there was an unmistakable intention that the brothers should thereafter be separate : 3 *Bom.* 54, *Rel. on.* ; 25 *Mad.* 690, *Expl.* and *Dist.* ; 39 *Mad.* 265, *Dist.* ; *A. I. R.* 1916 *P. C.* 104, *Ref.* [P 53 C 1]

(b) Contract—Stranger—Sale of property —Agreement by vendee to discharge debts of vendor — Creditor being stranger cannot take advantage of agreement.

Where the only effect of the covenants in a sale deed is that vendee is liable as between himself and the vendor to pay all the debts of the vendor out of all the properties which were the subject of the sale, and personally out of the properties of his own, such a covenant cannot be taken advantage of by the creditors who are no parties to the sale deed. [P 53 C 2]

*** (c) Transfer of Property Act, S. 74 — Subrogation — Mortgagor selling mortgaged property and requiring vendee to pay prior incumbrances — Vendee paying only one of them cannot claim priority over others — Transferees from such vendee also cannot claim priority.**

Where a mortgagor sells his property to a vendee requiring the vendee to pay off two or three prior debts of the mortgagor and the ven

dee pays off only one of them, he cannot claim priority in respect of it over the others though he may claim such priority in respect of some other debts the payment of which by him was not contemplated. His transferees also cannot claim such priority, for they must be taken to have actual or constructive notice of the title deed of their vendor and they cannot pretend ignorance of its contents. The rights conferred upon the transferees who pay off prior mortgages for using such prior mortgages as a shield are the result of an equitable doctrine in spite of the fact that the mortgages are extinguished, and where a transferrer by reason of his covenants and the transferee by reason of a notice of the transferrer's covenants show a different intention, there is no scope for the application of such an equitable doctrine : 34 *Mad.* 119, *Full.*; 43 *Cal.* 69; 6 *C.L.J.* 134 ; 14 *C.L.J.* 500 and 12 *L. W.* 393, *Rel. on.* : 6 *M. L. T.* 264 and *Thorne* v. *Canu*, (1895) *A.C.* 11. *Ref.* [P 54 C 1; P 55 C 1]

S. Varadachariar and *A. Seshagiri Sastri*—for Appellants.

L. A. Govindaraghara Iyer and *K. Rajah Iyer*—for Respondents.

Ramesam, J.—The suit out of which this appeal arises was filed on the basis of a mortgage bond dated 5th March 1914 executed by defendant 1 in favour of one Subramanian Chettiar who was the son of plaintiff 1 and the husband of plaintiff 2. At the time of the mortgage, defendant 1 had a brother Natarajulu and they were undivided. The plaintiffs claim that defendant 1 Narayanasami was the manager of the family and the mortgage deed was executed for purposes binding on the family. The defendants denied these allegations and contended that the debt is not binding on Natarajulu's share. This point was found by the Subordinate Judge against the plaintiffs and the plaintiffs who are the appellants before us do not attack this finding so far as the state of things existing at the date of the mortgage is concerned. A few months after the execution of Ex. A, a suit was filed by Natarajulu for specific performance of an agreement to sell Narayanaswami's share of the family properties with certain other reliefs which it is unnecessary to mention. Ex. C-(1) dated 2nd November 1914 is the plaint and Ex. C is the compromise decree passed in that suit dated 23rd November 1915.

According to the said compromise decree, two of the items included in that suit were settled upon defendant 1's wife for life and all the other properties were to be sold to Natarajulu. In execution of this decree, a sale deed was obtained by Natarajulu through the Court. This is Ex. C (2) dated 30th November 1916. The consideration for the sale deed was Rs. 35,000 and the consideration was to be paid by the vendee undertaking to discharge various debts of the vendor. 16 debts were enumerated in the sale-deed. It is necessary to make particular mention of some of these items. The first item is Narayanaswami's half share of the debt due on a mortgage bond dated 11th August 1909 executed by both the brothers (Ex. 5). The fourth item is a sum of Rs. 356-4-0 due wholly by Narayanaswami on a mortgage bond dated 10th March 1913 (Ex. 16). Item 5 is a sum of Rs. 821-4-0 due wholly by Narayanaswmi on a mortgage bond executed by him on 18th November 1913 (Ex. 16-a). Item 6 is a sum of Rs. 1,100 due wholly by Narayanaswami on a mortgage bond executed by him on 1st November 1913 (Ex. 14). Item 10 is a sum of Rs. 2,675 due wholly by Narayanaswami in respect of Ex. A. It is unnecessary to refer to the other items.

The plaintiffs now claim that Natarajulu's share of the properties also is liable to their debt, first on the ground that after the death of Natarajulu in 1919, these properties survived to Narayanaswami and the mortgage, Ex. A, is at least now binding on the whole of the properties and secondly on the ground that Natarajulu having undertaken to pay off Narayanaswami's debts by the sale deed Ex. C (2), it has become a personal obligation and he is liable to pay off the debts due to the plaintiffs out of the properties of the family and not merely Narayanaswami's properties. This is the first point argued in appeal, the point having been decided by the Subordinate Judge against the plaintiffs. The second point argued by the appellants is that certain alienees from Nataraju or his mother, defendant 2, are not entitled to priority over the plaintiff's mortgage on account of their having paid off certain mortgages of defendant 1 earlier in date than the plaintiff's mortgage. The last point argued in appeal relates to the rate of interest. Defendant 2, the mother of the two brothers, claims to be interested in Natarajulu's half share of the properties not sold to the alienees.

Taking up the first point, one subordinate question that arises is whether after the sale-deed Ex. C(2) the two brothers should be considered as divided or

still undivided. Mr. Varadachariar, the learned advocate for the appellants, relied on certain observations of Bhashyam Ayyangar, J., in *Venkataramayya* v. *Ramayya* (1). The alienation in that case was by a member of a joint family in favour of a stranger and the point referred to the Full Bench was that fraction of the family property passed to the alienee by the sale deed. The observation relied on is at p. 717. I do not think this observation helps the appellants. If a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred and this is all that the observation at p. 717 amounts to. It almost implies that so far as the properties in which the whole or part of the member's share is sold are concerned, he must be regarded as divided from the other members. But where the sale is not to a stranger but to the remaining members of the family the matter becomes much stronger. The observations at p. 268 of *Maharajah of Bobbili* v. *Venkataramanujulu Naidu* (2), do not go beyond what I have stated above and even if there are any observations in those two cases in favour of the appellants, their value must be discounted on the ground that these observations were made long before the decision of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj* (3).

In the present case, a careful examination of the terms of the compromise and the provisions therein that certain items should go to the heirs of Narayanaswami and the terms of the sale deed, Ex. C (2), showing that some debt were taken as binding on both the brothers and others on Narayanaswami alone—all show the unmistakable intention that the brothers should thereafter be separate. So early as *Balkrisha Trimbak* v. *Savitri Bai* (4), such a conclusion was reached. We are of opinion that the finding of the Subordinate Judge on issue 2 is unsustainable. On the facts of this case the presumption of jointness is overwhelmingly rebutted. Therefore there is no survivorship of the properties of Natarajulu to defendant 1.

It is next suggested that the effect of Ex. C (2) is to make Natarajulu liable to pay the plaintiff's debt out of the whole of the properties. In the first place the sale deed is only of Narayanaswami's share of the properties. They are transferred to Natarajulu in consideration of his paying off Narayanaswami's debts. The only effect of the covenants in the sale deed is that Natarajulu is liable as between himself and the vendor to pay off all the debts of the vendor out of all the properties which were the subject of the sale, that is, Narayanaswami's share of the properties, and personally out of the properties of his own but such a covenant cannot be taken advantage of by the creditors who are no parties to the sale deed and so far as creditors like the plaintiffs are concerned their remedies are confined to the rights under their documents. The plaintiff's rights are to sell the mortgaged properties under Ex. A. It may be that if, by non-payment of plaintiff's debt by Natarajulu, Narayanaswami was put to trouble of some kind, he can sue Natarajulu for damages by reason of the breach of the covenant, but apart from this, we cannot see how creditors like the plaintiffs can take advantage of the covenant. Nor can we read anything in the terms of the sale deed to show an undertaking by Natarajulu that he will pay off all the vendor's debts out of the whole of the family properties. On the other hand, portions of the sale deed imply that some of the debts are not binding on Natarajulu at all and he is in no way liable for them and in the case of other debts, he is liable only to the extent of his half share. It is impossible to spell out of these terms an undertaking of Natarajulu in respect of his own share of the properties for Narayanaswami's share of the debts enuring to the benefi of creditors. The analogy of universal donee is invoked by the learned advocate for the appellants but we are not able to say that this analogy helps him. We are therefore of opinion that the plaintiffs can recover their debts only out of the half share of Narayanaswami in the mortgaged properties.

(1) [1902] 25 Mad. 690.
(2) [1916] 39 Mad. 265=25 I. C. 585=27 M. L. J. 409.
(3) A. I. R. 1916 P. C. 104=43 Cal. 1031=12 N. L. R. 113=43 I. A. 151 (P.C.).
(4) [1878] 3 Bom. 54.

The next question that arises is whether certain of the alienees are entitled to priority over the plaintiffs' mortgage. The following table shows the parties claiming such priority over the plaintiffs, the items in the plaintiffs' mortgage in respect of which the priority is claimed, the debts by reason of the payment of which such priority is claimed and the last column shows the amount to the extent to which the priority is claimed.

1	2	3	4
Persons claiming priority	Item in respect of which priority is claimed	Prior debts paid	Amount to the extent to which priority is claimed.
Deft. 4	Nos. 1 and 2	Ex. V	Rs. 4,500
Defts. 5 and 6	No. 15	Ex. XVI and XVI (a)	Rs. 3,900
Defts. 15	Nos. 8 and 14	Ex. XIV	Rs. 5,500

Mr. Varadachariar, the learned advocate for the appellants, argued first that as Ex. C (2) provides for the payment of Narayanaswami's debts by Natarajulu he can himself claim no priority if he pays some of these debts and does not pay others, and that being so, persons claiming through him can claim no such priority; and secondly, that in the sale deeds of Natarajulu in favour of the various alienees, they were asked to pay the prior mortgages and therefore they cannot claim any priority. Now it is clear that where a mortgagor sells his property to a vendee requiring the vendee to pay off two or three prior debts of the mortgagor and if the vendee pays off only one of them, he cannot claim priority in respect of it over the others though he may claim such priority in respect of some other debts the payment of which by him was not contemplated. This proposition was decided in *Govindasami Tevan* v. *Doraisami Pillai* (5), and both branches of the above statement are illustrated by the decision in *Har Shyam* v. *Syam Lal* (6). In the atter case it was held that the vendee could claim priority in respect of the debt X and not in respect of the debts Y or Z

(5) [1910] 34 Mad. 119=20 M. L. J. 380=6 I. C. 781—(1910) M. W. N. 390.
(6) [1916] 43 Cal. 69—22 C. L. J. 227—31 I.C. 2?=20 C. W. N. 601.

This proposition is conceded by the respondents. The question, however, arises how far this disability of the vendee applies to transferees from him. In *Bisseswar Prasad* v. *Saran Singh* (7) it was held that the transferees also cannot claim such priority, vide the observations at p. 139 of *Bisseswar Prasad* v. *Saran Singh* (7) beginning with:

"In our opinion, they do not, because they had constructive, if not, actual notice of the debt due to Munniram and of the circumstances that Prayag Lall had assumed payment of it. They are consequently, not entitled to be subrogated to the rights of the mortgagee of 28th May 1880, whose debt they satisfied."

In the present case, a perusal of Ex. C (2) shows the position undertaken by Natarajulu, and all his vendees must be taken to have actual or constructive notice of Ex. C (2); that is, the title deed of their vendor and they cannot pretend ignorance of its contents. No case has been cited to support the contention of the respondents that the transferees stand in a better position than the transferrer. There is no analogy between the relative positions of such transferrer and transferee and the relative position of the mortgagor and his transferee who would be transferrer as against a second transferee. The relative rights between the two sets of parties are entirely different. The effect of the sale deed Ex. C (2) is to calculate all the debts of Narayanaswami up to a particular date and to make them stand on the same footing as on that date. The description of the various items of consideration show that all the debts were calculated up to the 5th October 1914 and the total amount of consideration, Rs. 35,000, was made up as on that date, and neither in the hands of Natarajulu nor in the hands of transferees from him can there be any priority between these various debts whatever their original dates might have been. It is unnecessary to deal with the larger contention of Mr. Varadachari that whereover there is a covenant by the vendee to pay off a prior debt of the mortgagor, there can be no priority in respect of it. The authorities relied on by Mr. Rajah Ayyar, for example, *Satnarain Tevan* v. *Shoebaran Singh* (8) and *Chidambara Nadan* v. *Muni Nagendrayyan* (9) show that no such broad

(7) [1907] 6 C. L. J. 134.
(8) [1911] 14 C. L. J. 500=11 I. C. 649.
(9) [1920] 39 M. L. J. 445=12 M. L. W. 393=58 I. C. 813=(1920) M. W. N. 534.

proposition can be insisted on and it is safer to rest the decision in each particular case on the particular intention in that case derived from the facts and not upon any general formula of that kind. But so far as transferees from the first transferee are concerned, there can be no question of their intention, for they stand in no better position than their transferrer and it is unnecessary to examine their intention. After all, the rights conferred upon the transferees who pay off prior mortgages for using such prior mortgages as a shield are the result of an equitable doctrine in spite of the fact that the mortgages are extinguished, and where a transferrer by reason of his covenants and the transferee by reason of a notice of the transferrer's covenants show a different intention, there is no scope for the application of such an equitable doctrine. The decisions in *Kasim Moideen Routher* v. *Annamalai Thevan* (10) and in *Thorne* v. *Cann* (11), do not help the respondents. I therefore hold that the respondents mentioned in the above table cannot claim priority over the 'plaintiffs' debts in respect of the half share of Narayanaswami's debt under Ex. 5 and the other debts of Narayanaswami and the other bonds mentioned in the table.

The other point which arises in the case is the question of interest. There is no dispute about this. The plaintiffs are entitled to the contract rate up to the date mentioned in the decree for payment, namely, 10th April 1924. The Subordinate Judge allowed it up to the date of the decree and thereafter at 3 per cent per annum. The appellants will be allowed interest at the contract rate up to 10th April 1924 and on the consolidated amount from that date at 6 per cent per annum up to date of payment.

The decree will be modified according to the second and third of the above findings.

The appellants will pay the costs of defendant 2, Govindammal. The appellants will be entitled to proportionate costs on the amounts in respect of which there is a dispute as to priority from the 5th and 6th (in whose place defendant 4 has stepped in) pending appeal and from defendant 15 respectively but as to defendants 4 and 5 the appellants will be entitled to half the costs.

(10) [1901] 6 M. L. T. 264=3 I. C. 936.
(11) [1895] A. C. 11=64 L. J. Ch. 1=71 L. C. 852.

Jackson, J.—I agree. The question of the alienees' priority appears to me to be simply one of fact. They knew that their vendor had undertaken to pay off the mortgages, and they knew that their own sales were effected in pursuance of that undertaking. There is no ground for presuming that with that knowledge they ever intended to keep alive the mortgages which they paid up; and I should find, as a matter of fact that the idea never crossed their minds. No doubt as observed in *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (12), it may ordinarily be presumed that a man having a right to act in either of two ways has acted according to his interest. But that presumption of fact is rebuttable as shown in *Govindaswami Tevan* v. *Doraiswami Pillai* (5). If the party who pays off the mortgage suffers by the presumption not being in his favour, he has only himself to thank for not committing his intention to paper. Although the intention to keep a mortgage alive need not be formally expressed in India, nevertheless such formal expression by way of deed would save parties considerable confusion, litigation and expense.

P.R.S./V.S. *Order accordingly.*

(12) [1884] 10 Cal. 1035=11 I. A. 126—4 Sar. 543 (P. C.).

A. I. R. 1930 Madras 55

PHILLIPS AND REILLY, JJ.

Corporation of Madras — Appellants.

v.

Spencer & Co., Ltd.—Respondents.

Appeal No. 71 of 1928, Decided on 21st February 1929, against original judgment of Beasley, J, D/- 19th April 1928.

(a) Madras City Municipal Act, S. 365 (2) —Power given to council to levy license fees cannot be used as power of taxation.

A Corporation empowered to levy license fees, wanted to raise them from Rs. 25 to Rs 200, solely for the purpose of raising the revenue, the rise being merely a counter demonstration to the order of Government refusing to allow the Corporation to take the abkari revenue of the city.

Held : that the power given to council to levy license fees cannot be used as a power of taxation. [P 58 C 2]

(b) Madras City Municipal Act, Ss. 110 and 111—Taxes and license fees distinguished.

There is a great difference between taxes and license fee. That a tax is not the same as a license fees, is clear from the fact that no permission has to be obtained before the tax becomes payable and the tax is not paid for such permission, whereas the license fee is payable in respect of a permission which is granted by the corporation. So the taxes cannot be treated as being in the same category as license fees under the Act. [P 56 C 2, 57 C 1]

(c) Madras City Municipal Act, Ss. 365 (2) —License fee — Income should be proportionate to trouble and expense of corporation —If otherwise Courts can interfere on grounds of unreasonableness.

The fee income must be more or less proportionate to the trouble and expense incurred by the corporation in issuing license and in controlling trades and other matters for which licenses are issued. But roughly speaking if the fees bring in much more than the cost of necessary operations, or if the fees are so fixed that the whole cost incurred by the corporation in connexion with all the licenses or a grossly disproportionate part of it was imposed on one particular trade or a few particular trades, then the Courts can interfere on grounds of unreasonableness. Hence where the license fees for storing spirits was raised from Rs. 25 to Rs. 200, the Courts interfered : *Kruse* v. *Johnson*, (1898) 2 *Q. B.* 91 and 2 *Rang.* 215 ; *Foll.* : *Institute of Patent Agents* v. *Lockwood*, 1894 *A. C.* 347, *Ref.* [P 58 C 1]

S. Rangaswami Ayyangar — for Appellant.

Vere Mockett and *O. T. Govindan Nambiar* —for Respondent.

Phillips, J.—The only question for determination in this appeal is whether the action of the appellant, the Madras Corporation, in raising the license fee for storing spirits from Rs. 25 to Rs. 200 was within its powers. Beasley, J., who tried the case has held that the increase in the fee is unreasonable within the meaning of the term as defined by Lord Russel, C. J., in *Kruse* v. *Johnson* (1), and has directed refund to the plaintiffs, Messrs. Spencer & Co. of the excess amount paid by them. Mr. Rangaswami Ayyangar for the appellant now takes exception to this finding and says that the power to levy fees for licenses under the Madras Act 4 of 1919 is conferred on the council and it is within their power to fix the fee at any figure they please. He contends that if they fixed it at a figure too high or too low, the taxpayer has two remedies : (1) by exercising pressure on the member of the corporation for his ward with a view to getting the figure altered, and (2) the correction of its own mistake by the council ; but he was not at first prepared to accept the dictum in *Kruse* v. *Johnson* (1), that the Court has power to interfere with bye-laws which are unreasonable. The definition given of "unreasonable" at p. 99 of the report of that case is as follows :

"If, for instance, they (i. e., the bye-laws) were found to be partial and unequal in their operation as between different classes ; if they were manifestly unjust, if they disclosed bad faith ; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.

Appellant's contention in the first place is that the fees fixed for licenses for what are called dangerous and offensive trades which are leviable under the provisions of the Act are revenue in the same sense as the taxes which the council is empowered to levy. When there is a question of what is the power of taxation conferred by Government on a public body, a very careful scrutiny is necessary to see that only powers specially conferred are exercised and that nothing further is added to them. In part 3 of the Act which purports to deal with Taxation and Finance, Chap. 5 deals with taxation and enumerates the several taxes which the council is empowered to levy. Licenses are dealt with in part 4 of the Act, and are leviable under S. 287. The power to levy fees for licenses is given in the chapter on procedure. There can be little doubt that there is great difference between taxes and license fees. The fact that in Ss. 110 and 111 the levying of taxes is authorized but is stated to be by way of license fee does to some extent support the argument that taxes and license fees have something in common, but that a tax is not the same as a license fee, is clear from the fact that no permission has to be obtained before the tax becomes payable and the tax is not paid for such permission, whereas the license fee is payable in respect of a permission which is granted by the corporation. I must confess that the words "by way of license fee" in Ss. 110 and 111 are not very intelligible to me and I cannot think that the sections would be affected in any way by the omission of these words. Presumably the legislature in-

(1) [1898] 2 Q. B. 91—67 L. J. Q. B. 782—14 T. L. R. 416=62 J. P. 469=46 W. R. 630.

tended to attach some meaning to those words, but nothing has been suggested in the course of these proceedings in explanation of the meaning. Whatever may be the meaning, I am satisfied that taxes cannot be treated as being in the same category as license fees under the Act. The argument, therefore, that, when the corporation is empowered to levy license fees, it may do so solely for the purpose of revenue does not seem to me to be tenable. Beasley, J., has held that the fees are leviable as compensation to the corporation for the expenses incurred in the issue of licenses and the general regulation of the trades and other occupations which are licensed and there must be some relation between these expenses and the amount of fees leviable. This was the view which was adopted by the Rangoon High Court in *Municipal Corporation Rangoon* v. *Coorratee Bara Bazaar Co. Ltd.* (2).

With all respect, I think this is a very reasonable view to take and, although possibly the above is not the sole consideration which may be taken into account in fixing the amount of fee, it is the main consideration. The license fees are in respect of what are called dangerous and offensive trades, that is to say, it is necessary in the interests of the city that the corporation shall know where such trades are being carried on and shall be in a position to see that they are carried on in a proper manner without causing unnecessary nuisance to other people or danger to the public generally. That being so, it is clear that the corporation must have power, but it does not follow that the corporation has the power to levy any sum it likes by way of license fee in order to raise the revenue and in fact it is conceded by Mr. Rangaswami Ayyangar that there must be some limit to the fee which can be imposed ; but he is not prepared to suggest what that limit will be. If there is such a limit, there is good reason for holding in accordance with the principle of *Kruse* v. *Johnson* (1), that, if the fee is unreasonable within the meaning of Lord Russell's definition in that case, the Court has power to interfere with its levy. We have been referred to another case *Institute of Patent Agents* v. *Lockwood* (3), in which Lord Herschell when dealing with the rules framed by the Board of Trade under the Patents, Designs, and Trade Marks Act, 1888, which fixed a certain fee, in the course of his judgment observed :

"I confess that it seems to me, if there were any power to impose fees at all, very difficult indeed to arrive at the conclusion, when the Board of Trade have sanctioned a particular fee, that it is within the province of a Court of law to canvass their conclusion, and to determine what is the legitimate amount at which the fee may be fixed."

If that remark is applicable to the present circumstances, it would follow that, as the council has power to fix the fee, it is not within the province of this Court to interfere, but there is a subsequent remark at p. 357, namely :

"I will say one word, however, before leaving this part of the subject, upon the point suggested that they involved something harsh or unfair as regards the respondent".

It is not unreasonable to interpret that as showing that that the learned Judge had the principle laid down in *Kruse* v. *Johnson* (1) in his mind, namely, that if there was something harsh or unfair in the rules, it may be that the Court will interfere. The case is certainly no authority to the contrary, and was not even cited in *Kruse* v. *Johnson* (1). The question, therefore, before us is whether Beasley, J., was right in holding that the levy of this fee was unreasonable. Apparently from 1904 to 1924 the fee of Rs. 25 was fixed as the fee for storing spirits. Until that date the word "spirits" was interpreted as denatured spirits and the fee was levied for the storage of such spirits. In 1924 and 1925 the license in its present form was granted for a fee of Rs. 25. At the end of 1925 a proposal was made to raise it and we have the minutes of the proceedings of the council from 15th December 1925 to 9th March, 1926 when the council finally fixed the fee at Rs. 200, changing the nature of the license to one for arrack and for foreign liquors containing alcohol. From the notes of the then Commissioner it would appear that the corporation resented the action of Government in collecting the abkari revenue within the city and in not allowing the corporation to utilise such revenue for themselves. As compensation the Government were paying a fixed sum

(2) A. I. R. 1927 Rang. 183=5 Rang. 212.

(3) [1894] A.C. 347 = 63 L. J. P. C. 74 = 71 L. T. 205.

annually to the corporation. The Commissioner suggested that, as the Government insisted on the old conditions being adhered to, the power to levy a fee for storing spirits should be fully exploited and raised. Accordingly the fee was raised from Rs. 25 to Rs. 200. Can it be said that this alteration was made reasonably? Taking it that the fee income must be more or less proportionate to the trouble and expense incurred by the corporation in issuing licenses and in controlling trades and other matters for which licenses are issued, the reason at the bottom of the resolution of the council is clearly not in accordance with the spirit of the Act. The fee was not raised because of the expense of collection or regulation but was merely a counter demonstration to the order of Government refusing to allow the Corporation to take the abkari revenue of the city.

The result of this increase of fee has undoubtedly been to impose on the persons who store such liquor a very unfair burden as compared with other tax payers in the city. From the evidence which has been adduced it would appear that the expenses of supervising the places where foreign liquor is stored are practically nil. The site is inspected when the license is originally granted and, so far as the evidence goes, no further action appears to be taken. If we compare the fee for this license with the fees for other matters which entail much greater expense and trouble on the corporation, such as fees for stables, dairies and storing skins and explosives, we find that the fee for storing spirits is by far the highest, although those other matters entail much greater trouble and are more dangerous and offensive to the general public. The fee for other licenses was not raised at the same time and consequently it is impossible to hold that there was justification for raising the fee for a license for storing spirits by 800 per cent. It was certainly not done with a view to pay for the expenses in connexion with such licenses but was obviously done to increase the revenue of the corporation from liquor, thereby replacing the abkari revenue taken by Government. This being so, I must find that Beasley, J., was amply justified in finding that the levy of the enhanced fee was unreasonable.

While holding that the enhanced license fee is unreasonable, the learned Judge has in his decree ordered that:

> "the plaintiffs are therefore liable only to pay a license fee of rupees twenty five (Rs. 25) which sum is amply sufficient to cover all the duties performed and the expenses incurred by the defendant corporation with respect to those licensed premises and other premises in respect of which licenses have been granted."

While agreeing with him that the enhanced fee is excessive, I do not think that the Court is justified in taking upon itself the power conferred by the Act upon the council, namely, the fixing of the amount of fees; in this case the omission to fix the fee for a license will make no difference in the substance of the decree, for the fee which was formerly leviable was Rs. 25 and this figure must be restored, as the resolution for its enhancement is invalid and the plaintiffs are therefore entitled to the refund of the balance of Rs. 175. The words of the decree quoted above should therefore be removed, but the decree is in other respects confirmed.

A somewhat surprising argument has also been advanced on the question of costs. The learned Judge has passed the usual order that costs should follow the result, and the circumstances would have to be exceptional to justify our interference with the order. Not only must we be of opinion that there were circumstances which justified a departure from the usual order as to costs, but we must be further satisfied that those circumstances were so exceptional that the learned Judge cannot have exercised his discretion judicially in ignoring them.

That is far from being the case here and this ground of appeal must be rejected.

The appeal is accordingly dismissed with costs.

Reilly, J.—I agree with the finding of the learned Judge on the original side that the power given by the Madras City Municipal Act to the council to levy license fees cannot be used as a power of taxation. The Act clearly provides in Part 3 for taxation and lays down what taxes the corporation may levy. Then the Act goes on to an entirely different part, Part 4, which is headed "Public Health, Safety and

Convenience." In that part there are provisions to the effect that no person shall carry on certain trades, occupations or use any premises for certain purposes without getting a license from the Commissioner. The section in that part with which we are particularly concerned is S. 287, which provides that no person shall use any place for any of the specified purposes without getting the permission of the Commissioner in the form of a license. A person who wishes to use his premises for such purposes has to apply for a license. The Commissioner may grant, or refuse to grant, such a license. If he grants it, he may fix any conditions or restrictions which he thinks necessary. There is nothing whatever in this section about a person who wishes to use his premises for such a purpose being taxed, or his occupation or his premises being taxed. He has under those provisions to get a license. When we come to the end of the Act, there is another part headed "Procedure and Miscellaneous." S. 365 at the beginning of that part sets out that every license or permission must be signed by the Commissioner and must specify the restrictions, if any, which are imposed by the Commissioner. Then sub-S. (2) goes on to say:

"For every such license or permission fees may be charged at such rate as may be sanctioned by the council."

It is suggested that the fixing of fees for those licenses may be used by the council as method of taxation. Surely, if that was intended, that power would have been provided for in the part of the Act which deals with taxation. What could be the reason for bringing it in as a mere matter of procedure at the end of the Act? Mr. Rangaswami Ayyangar for the corporation has suggested that, because in the sections which deal with taxation one or two of them refer to the method of collecting taxes as "by way of license fees," therefore we must hold that there is no distinction between license-fees and taxes. I can see no sufficient reason in the rather loose language which is used in those sections about the means of collecting taxes to lead us to hold that under the Act it is intended that there should be no distinction between license-fees and taxes. I do not think that the matter really admits of any doubt. But, if there were any doubt about the meaning of S. 365 (2), if it were possible to read that subsection in two ways, in one way as empowering the council to impose taxes on persons who apply for licenses and in another way as empowering them only to require those persons to pay fees, then under the ordinary principle of construction when we are dealing with a statute which imposes or which it is contended imposes any liability on a subject or citizen to taxation, it would be imperative upon us to adopt the construction most favourable to the subject or citizen. But I do not think it is necessary to call that principle of construction to our aid in this case. I cannot imagine that the legislature, when providing for license-fees under the heading "procedure" and omitting them from the provisions regarding taxation, ever intended them to be treated in any way as taxes.

If the power to levy these fees cannot be used for taxation, it is admitted that the council has not the power to fix any arbitrary fee which it chooses. Mr. Rangaswami Ayyangar has admitted that there must be some limit to its power and that the fees must be reasonable. He has rightly contended that in interpreting the word "reasonable" in this connexion we must give it a wide and liberal interpretation. And I quite agree with his contention, that, when such a question comes before a Court, it is not for the Judge to try minutely to assess what is the proper fee; nor is it for the Judge to substitute his judgment in the matter for that of the public body to which the legislature has entrusted it. But I think there are two principles which we may use to determine whether the fees fixed by a Municipal Corporation with powers such as these can be held to be reasonable or not. If we accept the proposition that the power of charging license-fees cannot be used for taxation, then we must say that as a whole the fees charged by the corporation must not be very much in excess of what the duties cast upon them and their staff in connexion with the licenses cost them. There is the cost of issuing the licenses; there is the cost of inspecting the premises to see whether they are suitable for the purpose proposed; and there is the subse-

quent cost of inspecting the premises to see that they are being used properly and that the conditions and restrictions imposed by the Commissioner are observed. But roughly speaking, if the fees are charged at so high a rate that as a whole they bring in very much more than the cost of these operations to the corporation, then I think we can rightly say that they are unreasonable. There is another principle. Although it is almost impossible for the corporation itself to ascertain, when they are issuing a number of licenses to persons engaged in different trades and occupations, exactly what is the cost of any particular license or of licenses or of licenses for persons engaged in particular trades or occupations—and certainly we could not attempt anything of that sort—yet surely it would be unreasonable if they so fixed the fees that the whole cost incurred by them in connexion with all the licenses or a grossly disproportionate part of it, was imposed on one particular trade or a few particular trades. These principles I think may be of help in ascertaining whether a particular fee is reasonable or not. Mr. Rangaswami Ayyangar referred us to the case of *Kruse* v. *Johnson* (1), and asked us to accept the view of what is reasonable and unreasonable taken by Lord Russell, C. J., in that case. That I am very willing to do. But we must remember that Lord Russell in that case said that a bye-law which was partial or unequal in its operation would be unreasonable; and in the same way I think we can properly say that a license fee, if it was imposed partially or in a way which would make it unequal in operation, would also be unreasonable.

Mr. Rangaswami Ayyangar has tried to tell us how much the issue of these licenses is costing the corporation a year, and he has put before us some calculations which show that the total cost of the licensing operations is about Rs. 95,000 a year. I cannot say that I am entirely satisfied with the way in which he has arrived at that result. It appears to me that some parts of his calculations require a good deal of clearing up. But let us assume that his figures are correct. He has also told us that the total amount collected for these licenses is about Rs. 90,000 a year. If these figures are correct, the Corporation is collecting about Rs. 5,000 less than what the licensing operations cost them. If that is so, it would be very reasonable for them to increase their license-fees so as to cover the deficit. How they should increase them is not for us to determine. One obvious method would be an all round increase of license-fees so as to cover the deficit.

Another method would be to find out whether some license fees are clearly too low and to raise them. But what has the corporation done in this case? From the schedule with which Mr. Rangaswami Ayyangar has provided us it appears that there are over a 100 different classes of occupations and trades for which people have to apply for licenses. They have selected the one with which we are concerned—the storing of spirits. The fee for storing spirits before the change with which we are concerned was made was Rs. 25 a year. The storing of spirits is obviously not a very dangerous thing. It is not a thing which is offensive to the physical senses of persons in the neighbourhood. And the evidence shows that the corporation and its staff spend practically no time or effort on inspecting places where spirits are stored. For that kind of license one would expect to find a very moderate fee charged. Perhaps it may be said that Rs. 25 was a moderate fee. But they determined to raise it; and they proceeded to raise it eight times, to Rs. 200. That I find is double the amount charged for storing any other thing, however, dangerous or offensive, in this town. It is four times what is charged for licensing places for storing such dangerous things as nitroglycerine, fulminate of mercury and other explosives. It is many times the fee charged for storing fire works. On the calculations which Mr. Rangaswami Ayyangar has made it appears that, before this change in the rate of fee, about Rs. 1/48 of the whole cost of the licensing operations was collected from the persons who had to obtain licenses for storing spirits; after the change, about Rs. 1/6 of the whole cost of the licensing operations is collected from them. We are informed that there are only 72 of these particular licenses. I find from the schedule with which we have been provided that more than 6,700

licenses are issued for trades, businesses, and occupations. But 72 of them are made to pay about Rs. 1/6 of the cost of the whole licensing operations. I think that, when these facts are stated, no one could really contend that the fee fixed Rs. 200 is in any sense of the word a reasonable one. That being so, the council had no power to fix the fee at so high a figure. They appear to have done it with the intention of using their power as a power of taxation; and I may add that they appear to have used their power for improper discrimination.

I, therefore, agree that there is no sufficient reason for us to interfere with the decree of the learned Judge that the excess over Rs. 25 for each of these licenses must be refunded to the plaintiffs. I agree also that the learned Judge went too far when he attempted to decide for the present or for the future what is the reasonable fee which the council should fix. That, I think, is a matter for them; and, therefore, I agree that the words quoted from the decree by my learned brother should be struck out. With that modification I agree that this appeal must be dismissed with costs.

P.R.S./P.R. *Appeal dismissed.*

A. I. R. 1930 Madras 61

ANANTAKRISHNA AYYAR, J.

Sundaram Ayer—Plaintiff—Appellant.

v.

Kulathu Iyer and *others*—Defendants—Respondents.

Second Appeals Nos. 260 to 291 of 1926, Decided on 23rd July 1929, from decrees of Dist. Judge, Tinnevelly.

(a) Madras Estates Land Act—Policy of Act is that ryots should know exact terms on which they are holding properties—Important change in terms of holding—Ryots must have notice.

The policy of the Madras Estates Land Act would seem to be that ryots should know the exact terms and conditions on which they are holding the properties for any particular fasli, and in case there should be any important changes in the terms of the holding they must have some reasonable notice of the same. That such is the intention is clear from the wording of several sections of the Act [P64 C 1]

(b) Madras Estates Land Act, S. 3 (5)—"Landholder" includes lessee from him.

The definition of "landholder" in S. 3 (5) is wide enough to include also the lessee from the owner or the landlord. [P 64 C 1]

(c) Madras Estates Land Act, S. 52 (3) - Landholder exchanging patta for one fasli - Same will be in force in succeeding fasli.

In cases where the landholder exchanges patta for one fasli, the same will be deemed to be in force in the succeeding [illegible] S. 52 (3); he cannot evade the applicability of S. 52 (3) by giving a lease and putting the lessee in a position to exchange pattas. Where, therefore, a landlord, having granted a lease for a term of years, places the lessee in the position of the landholder, and the patta is tendered by the lessee in the usual Court it shall have the same force as if the same is tendered by the landholder himself: *A. I. R. 1922 P. C. 255, Rel. on.* [P 65 C 1]

(d) Madras Estates Land Act, S. 27—Under S. 27 Court is entitled to presume that conditions of tenancy for one year continue to be in force for next year—But under S. 52 it so remains in force.

By S. 27 a rule of presumption is enacted and the Courts are entitled to presume that the conditions of tenancy for a particular year continue to be in force in the year immediately following. But under S. 52 it is not merely a question of presumption, for the section enacts that pattas "shall" remain in force. [P 65 C 1]

K. V. Sesha Iyengar and *S. Anantarama Iyer*—for Appellant.

E. Krishna Iyer and *M. S. Venkatarama Iyer*—for Respondents.

Judgment.—Plaintiff is the appellant in these second appeals. Summary Suits Nos. 44 etc. of 1916 and Nos. 36 etc. of 1917 were instituted by the plaintiff-appellant in the Court of the Honorary Deputy Collector of Tinnevelly Division to recover rent due in respect of properties in the possession of the ryots defendant in the inam village of Vagaikulam. The inam village belongs to Sri Vyasaraya Swamigal Mutt at Sosalai in the Mysore State. The practice of the Mathadhipati had been, as is disclosed by the evidence in these cases, to grant leases to persons for different terms authorising them to recover the rent from the ryots in possession of the lands. It is in evidence that leases for particular terms were granted, among others, to the father of the plaintiff. The last of the said leases came to an end with fasli 1321; and the plaintiff obtained a lease for faslis 1322 to 1331 from the Mathadhipati, and on the basis of the said lease he instituted the various suits mentioned by me to recover arrears of rent due for faslis 1322, 1323 and 1324.

In the plaints, the plaintiff claimed rent on the basis of "waram." The defendants pleaded that it was the "sharing system" that was in vogue in the

village, but that the rates claimed by the plaintiff were not the correct rates and that the correct rates of rent were those paid by them to the plaintiff's father, the previous lessee. As I said, though both claims involved division of the produce, yet, there was difference as regards the proportion in which the produce was to be divided according to the contention of the plaintiff and the defendants, the plaintiff claiming more, while the defendants contended that the plaintiff was entitled only to a less proportion of the produce.

When the present suits were filed, there was pending in the High Court a batch of second appeals preferred by the plaintiff's father as lessee against other ryots of the village to recover rent due for certain faslis. A similar contention was raised in those suits also, and though the Deputy Collector had accepted the contention of the plaintiff, the landlord in those suits, the District Court had modified the decree passed by the Deputy Collector and consequently, second appeals were preferred to the High Court in which similar questions were raised. The parties agreed to have the hearing of the present suits adjourned from time to time so that they may have the benefit of the High Court's decision in the second appeals mentioned by me. The final decision of the High Court was pronounced, after findings had been called for by the High Court, and submitted by the then District Judge, only on 23th December 1916 : vide Ex. H (6) in the case. The real trial of the present suits, therefore, began only after the said judgment of the High Court was passed. Though the present defendants were not parties to the litigation that was pending in the High Court, yet having regard to the fact that similar questions had to be decided in the present suits, the judgment of the High Court was treated as evidence on the points on which the parties were at issue in the present suits. The Deputy Collector considered the judgment of the High Court and the other evidence adduced by the parties to the present litigation and came to the conclusion that the contention of the plaintiff as regards the proportion in which the produce was to be divided was the correct one according to the evidence adduced in the case. There were, however, other disputes raised before him about the plaintiff's right to recover certain cesses. I may mention that as many as nine cases were the subject of dispute between the parties. The Deputy Collector upheld the contention of the plaintiff in respect of seven out of the nine cases ; and in respect of two, namely Kalvainazar and Yavanai, he held that, though the High Court had in the previous litigation upheld the validity of the same, yet, having regard to the evidence adduced by the parties in these present suits the plaintiff was not entitled to recover these two cesses. There was another important question raised before the Deputy Collector with reference to the amount of rent due to the plaintiff for fasli 1322. To properly appreciate the exact contention between the parties relating to the dispute regarding the rent due for fasli 1322 I must mention that, during the existence of the lease in favour of the plaintiff's father, the plaintiff's father had admittedly exchanged pattas and muchilikas for faslis 1315 and 1316. It was a point for decision whether there were subsequent pattas tendered by him for subsequent faslis.

The Deputy Collector held that having regard to the provisions of S. 52 (3), Madras Estates Land Act, pattas which were in force during the currency of the lease granted to the plaintiff's father continued to be in force for faslis 1322 also and, consequently, the plaintiff, who tendered a patta for fasli 1322 which was not accepted by the defendants, was not entitled in this suit to recover rent at a rate different from that mentioned in the patta exchanged by the previous lessee. There was also a further question as regards interest, and also as to the liability of one Kulathu Ayyar, defendant in summary suit 48 of 1916. The plaintiff preferred appeals to the District Court against the disallowance by the Deputy Collector of the two cesses mentioned above. He also appealed against that portion of the decree of the Deputy Collector wherein he disallowed the plaintiff's claim to rents at the higher rates at which he had tendered pattas for fasli 1322. On appeal the learned District Judge discussed the applicability of S. 52 (3), Madras Estates Land Act, in paras. 18 to 22 of his judgment.

His decisi on was that th Deputy Collector was right in his view that the plaintiff was not entitled to the higher rate of rent in respect of fasli 1322.

The main arguments raised before me by the learned advocate for the appellant in these second appeals turn on the correctness or otherwise of the decision of the lower Courts on the applicability of S. 52 (3), Madras Estates Land Act, to the suits in question, so far as the rent for fasli 1322 is concerned. In the first place, it was argued that there was no patta tendered to these defendants after the coming into force of the Madras Estates Land Act, namely after 1st July 1908. It was contended that the very basis for the application of S. 52 (3) would be wanting as no patta tendered prior to the coming into force of the Madras Estates Land Act would according to the contention, attract the result mentioned in S. 52(3). With reference to this argument it was pointed out by the learned advocate on behalf of the respondent that, as a matter of fact, Ex. 4 is a patta on record exchanged by the plaintiff for fasli 1312 that is for the year begining from 1st July 1908 and ending with 30th June 1910, that is, for a period after coming into force of the Madras Estates Land Act. To this it was replied by the learned advocate for the appellant that this solitary patta would not be an answer so far as the other defendants to these suits are concerned. In answer to this it was urged that the case was conducted in the lower Courts on the footing that there was no difference between the reliefs to be decreed as against one defendant, and other defendants in these several suits, and probably it was on that understanding that patta granted to one particular ryot only, out of the several defendants ryots, for fasli 1319 was exhibited. Whatever might be the real reason, I think, having regard to the way in which these cases were conducted in the lower Courts and having regard to the agreement between the parties that the evidence in the main case was to be taken as common to all the other cases and that the decision was to be arrived at on the common evidence, that the circumstance that pattas tendered to other defendants for fasli 1319 have not been exhibited should not make any difference in my decision of these several second appeals. Having this before me the patta tendered for fasli 1319, I think the distinction which was sought to be drawn by the learned advocate for the appellant, that S. 52 (3), Madras Estates Land Act, would not apply to these cases, does not exist. My attention was also drawn to the circumstance that in ground 11 of the grounds of appeal preferred to the lower appellate Court there is a statement to this effect :

"Further the patta for fasli 1321 was only a waram patta and not a pattam patta."

The case of the appellant here, however, is that for fasli 1321, no patta was in fact tendered by the plaintiff or accepted by the defendants. The learned advocate for the appellant suggests that this statement in the lower appellate Court appeal memorandum is probably a mistake and that the reference to patta for fasli 1321 should really be, to patta for fasli 1322. Whatever might be the real explanation for this, there is, as I stated, the fact proved in this case that in respect of at least one fasli after the coming into force of the Madras Estates Land Act the plaintiff's father (the then lessee) did tender a patta containing rates which support the plea of the defendants and, as I have already said, no distinction can be made between the case of defendant 1 and another, having regard to the manner in which this batch of cases has been tried in the lower Courts.

The second argument raised by the learned advocate for the appellant in support of his position that S. 52 (3), Madras Estates Land Act, does not apply to these cases is this. The section evidently contemplates cases where the person who exchanged the previous patta is either the very person who is the plaintiff in the present case, or any other person who is the representative in interest of the person who tendered the previous patta ; and that, as it is admitted in this case that the previous patta was tendered not by the landlord, the Matadhipati, but by a lessee from him for a term of years, therefore, it was argued that, the patta does not enure after the expiry of the lease and that S. 52 (3) could not apply to such a state of circumstances. I had to consider this question in a recent case from

Madura, and having regard to the arguments advanced before me then, I came to the conclusion that that argument was not sound. I had the benefit of another argument in this case, and I may say that I have not been convinced that my previous decision was in any way erroneous.

The policy of the Madras Estates Land Act would seem to be that ryots should know the exact terms and conditions on which they are holding the properties for any particular fasli, and in case there should be any important changes in the terms of the holding they must have some reasonable notice of the same. That such is the intention is clear from the wording of several sections of the Act. The definition of 'landholder' in S. 3 (5), Madras Estates Land Act, is wide enough to include also the lessee from the owner or the landlord. There are other provisions of the Act—namely those relating to (1) to commutation of rent, (2) to enhancement of rent and (3) to the conferring of permanent occupancy rights on tenants : see Ss. 40, 30 and 6 of the Act, which contemplate that the landholder under the Estates Land Act would include also lessees in the position of the plaintiff's father and in the position of the plaintiff. It was asked on what principle of law could it be said that the landholder claims from the lessee? It is true that though the lessee could be said to claim from the lessor, it cannot, according to the ordinary law, be said that the landholder is the representative of the lessee. But as remarked by the Privy Council in the case reported in *Radhakrishna Ayyar* v. *Sundarswami Iyar* (1) at p. 484 (of 45 *Mad.*) the question is not whether the plea is res judicata ia the sense that it is binding upon a person who is the representative of the prior party who is bound. After quoting a sentence from the decision of the Divisional Officer in that case to the following effect :

"I therefore find that the previous judgments are res judicata in these suits as they have gone fully into the question of custom relating to the different stipulations in the patta."

Their Lordships observe :

"However natural it may have been to treat the position thus, their Lordships cannot sustain on any legal grounds the plea of res judicata here suggested. In the language of the High Court, the answer is that the general doctrine of res judicata is not in question, but the application of the special rule stated in S. 52 (3), Estates Land Act, under which muchilikas decreed for any revenue year remain in force until the beginning of the year for which fresh ones are exchanged or decreed, and that there is no reason for restricting the scope of the general reference to muchilikas decreed to those decreed by any description pf Court. With this view the Board is in full agreement."

If I understand the reasoning of their Lordships aright, their Lordships, while upholding the plea of the defendants to the effect that the judgment of the revenue Court under Act. 8 of 1865 relating to rates of rent does not constitute the matter res judicata, because according to the ordinary requirements of the doctrine of res judicata the Court which decided the first suit should have competency to entertain the subsequent suit under the Madras Estates Land Act—at the same time held that adjudication in these prior suits as regards the terms of a patta was such as attracted the special provisions of S. 52 (3) of the Act. Turning to S. 52 (3) of the Act I find that a patta accepted for one fasli shall remain in force until the commencement of the revenue year for which fresh pattas and muchilikas are accepted, exchanged or decreed. The decision of the Privy Council is direct authority in support of the position that the section applied to cases where the previous pattas were the subject matter of a decree between the parties. Even in such cases, though the doctrine of res judicata did not apply, they held that the parties were bound, having regard to the provisions of S. 52 (3), by the pattas so decreed. In my view the same reasoning will also apply to pattas and muchilikas which were accepted or exchanged between the parties for the previous fasli. I am accordingly of the opinion that even if the present suits were instituted by the landlord, I should arrive at the same conclusion. Though the lessor could not be said to be the representative of the lessee, yet, having regard to the special provisions of S. 52 (3), patta exchanged for the previous fasli should be taken to be in force for purposes of these second appeals, so far as the rent for fasli 1322

(1) A. I. R. 1922 P. C. 257=45 Mad. 475=49 I. A. 211 (P. C.).

is concerned. One further argument was advanced on behalf of the respondent. In cases where the landholder exchanged patta for one fasli, the same will be deemed to be in force in the succeeding fasli under S. 52 (3); he cannot evade the applicability of S. 52 (3) by giving a lease and putting the lessee in a position to exchange pattas. If the landlord cannot evade the section, then the lessee from him should also be held to be unable to escape the applicability of the section. In the case before me the landlord, having granted a lease for a term of years, placed the lessee in the position of the landholder, and the patta tendered by the lessee in the usual course should have the same force as if the same was tendered by the landholder himself. In this connexion I should draw attention to S. 27, Madras Estates Land Act, where it is enacted that

"if a question arises as to the amount of rent payable by a ryot or the conditions under which he holds in any revenue year, he shall be presumed, until the contrary is shown, to hold at the same rate and under the same conditions as in the last preceding revenue year."

By that section a rule of presumption is enacted and the Courts are entitled to presume that the conditions of tenancy for a particular year continue to be in force in the year immediately following. When we turn to S. 52 we find that it is not merely a question of presumption for the section enacts that pattas "shall" remain in force etc.; so that the legislature for reasons of its own thought it proper to enact S. 52 in a way different from that in which S. 27 is worded. After all, it is open to the landholder in such cases to take proper steps to have what he alleges to be his real rights enforced, and if he waited without taking such steps, the section says that the previous patta shall remain in force until certain things are done.

The learned District Judge in dealing with this question observes as follows: see para. 19:

"On the other hand the Act does not make any distinction between a proprietor's patta and muchilika and a lessee's patta and muchilika; there seems some reason to suspect that, if the validity of the appellant's claim were conceded, the safeguards provided for the tenant by the Act with regard to patta and muchilika will prove illusory and in practice enable the landholder to reduce S. 52 (3) to a dead letter in some cases like the present.

Similar observations were made by the Deputy Collector also in support of the defendants' contention and he also came to the conclusion that S. 52 (3) applied to these cases.

For the foregoing reasons, I am of the opinion that the lower Courts were right in these cases in coming to the conclusion that S. 52 (3) applied with reference to the claim of the landlord for rent for fasli 1332. I am not here concerned with the claim for rent for faslis 1323 and 1324, as there is no appeal before me regarding the same. (After considering the subsidiary question of Kalvainazar his Lordships dismissed the appeals and cross-objection and proceeded).

LEAVE TO APPEAL.

Though I feel that this litigation which started in 1915 should come to an end by this time, I regret I am unable to give effect to the same: for one of the questions raised in this batch of second appeals relates to the construction of S. 52, (3), Madras Estates Land Act. It was represented to me that there was no reported case on the construction of this section, and in that view I granted leave to appeal in S. A. Nos. 540 to 568 of 1928 where this question arose. Having given leave in those cases, I feel I am bound to grant leave to appeal in these cases also, since the construction of S. 52 (3) arises in these second appeals also. I accordingly grant leave to appeal.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 65

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

C. Ahamad Haji—Defendant—Appellant.

v.

Mayan and *others*—Plaintiffs—Respondents.

Appeal No. 431 of 1927, Decided on 23rd July 1929, from order of Sub-Judge, South Malabar, in Appeal No. 214 of 1927.

(a) Transfer of Property Act, S. 91—Suit for redemption by second mortgagee—Second mortgagee can rely upon admission by first mortgagee regarding subsistence of mortgage—Limitation Act, S. 19.

In a suit for redemption the second mortgagee can rely upon an admission made by the first mortgagee in a deed, executed within sixty years next before the suit, in which deed he admitted that the common mortgagor was the owner and that the suit properties were demis-

ed to his family on kanom. Such an admission necessarily implies that the mortgage was then subsisting and that it was liable to be redeemed: 26 *All.* 313, *Rel. on.* [P 66 C 2]

(b) Evidence Act, S. 114—Mere allegation of loss of instrument — Court concluding that there was mortgage—Mortgagee is not relieved from affirmatively making out terms of mortgage—Finding based on such wrong presumption — High Court can take notice of it under Civil P. C., S. 103.

It is a wrong presumption to hold that the mortgagee has only to allege that the original instrument is lost and if the Court comes to the conclusion that there was a mortgage, the mortgagee is relieved from the duty of affirmatively making out the terms of the contract, because the Court may presume that any contract which they set up is true. And a finding based upon such a presumption is vitiated by an error of which the High Court can, if it pertains to facts, take notice under S. 103, Civil P. C. [P 66 C 2 P 67 C 1]

K. Kuttikrishna Menon—for Appellant.

P. Govinda Menon—for Respondents.

Venkatasubba Rao, J.—This is a suit for redemption of a kanom alleged to have been made is 1856. It is in its turn said to be a renewal of kanoms of still earlier dates. The plaintiffs claim redemption having obtained a melcharth or second mortgage from a Devaswom said to be the original owner of the properties in question. Their case is that the Devaswom mortgaged those properties to a certain Naduvakat tarwad to secure 2650 fanams and that the annual purapad is 15 paras of paddy. Defendants 1 to 5 and 19 are members of the aforesaid tarwad and represent the original mortgagee. Defendant 6 who is the appellant is in possession of some items and claims an interest in virtue of some deeds executed in his favour by certain members of the same tarwad.

The plaintiffs seek to prove the mortgage by a copy (Ex.-A) of the original kychit executed in their favour. Their case is, that the document was filed in a case and the records in that suit including the original kychit were destroyed during the Moplah rebellion. The District Munsif came to the conclusion that the copy produced is a fabrication and on that ground dismissed the suit.

He has, however, held that it has been proved that the Devaswom is the owner of the properties and that they were demised on kanom to the predecessor-in-interest of defendants 1 to 5 and 19. In coming to this conclusion he acted upon two Exs. S. and W. of the years 1881 and 1893. In those deeds the executants, some members of the tarwad, admitted that the Devaswom was the owner and that the properties were demised to their family on kanom. The District Munsif was justified, on these admissions, in finding that the plaintiffs' Devaswom was at one time the owner of the property. But he observes that these admissions by themselves cannot avail the plaintiffs, for it is their duty to show that a kanom answering to the mortgage alleged in the plaint was created and, secondly, that it was subsisting on the date of the suit. Let us now take the second point first. Under S. 19, Lim. Act, an acknowledgment to be effective must be made before the period of limitation has expired. True, but it is necessarily implied in the admission we have referred to, that the mortgagee acknowledges that the mortgage was then subsisting; in other words, that it was liable to be redeemed. This is the plain effect of the admissions and we are supported in this view by *Dip Singh* v. *Girand Singh* (1) at p. 316. On this point therefore we do not agree with the District Munsif; but this does not dispose of the case. It is not sufficient for the plaintiffs to show that there is a subsisting mortgage. It is their duty to prove further the terms of that mortgage and the case with which they came to Court having been disbelieved by the District Munsif, we must hold that they have failed to prove the terms.

An appeal was taken to the Subordinate Judge and he has held that Ex.-A has been satisfactorily proved. If the question is one of fact, we should certainly refuse to disturb his finding, for our powers, though this is in form a civil miscellaneous appeal, are substantially those of a second appellate Court. In reversing the Munsif's finding, the Subordinate Judge has given effect to a wrong presumption. What he says in effect is this: If you find that the plaintiffs have a title, if it further appears that there was a mortgage in favour of the defendants, it is for the latter to disprove the terms of the contract as spoken to by the plaintiffs. In other words, the plaintiffs have only to allege that the original instrument is lost and if the Court comes to the con-

(1) [1904] 26 All. 313=1 A. L. J. 1=(1904) A. W. N. 38.

clusion that there was a mortgage, the plaintiffs are relieved from the duty of affirmatively making out the terms of the contract, because it is said, the Court may presume that any contract which they set up is true. This is, in our opinion, quite a wrong presumption and the judgment of the lower Court, vitiated by this error, cannot be supported.

Applying this presumption, the Subordinate Judge first records a finding in these words:

"It appears to me that there is not sufficient evidence to hold that Ex. A is not a true copy of a kychit that was executed in favour of the Deveswom."

A little lower down he states his conclusion in words very positive and remarks:

"My finding on issue 2 is that the kychit sued on is genuine and that the properties are held under it."

The learned Judge overlooks the apparent contradiction between these two passages.

We have had to reject his finding for this reason and the question is, what is the course we are now to adopt. Under S. 103, Civil P. C., we have ourselves examined the evidence and come to the conclusion that the Munsif has recorded a correct finding. The plaintiffs have made no attempt to prove the case with which they came to Court namely, that the purapad was being paid till 1924. This, in our opinion, confirms the view of the Munsif and in the result we allow the appeal, set aside the order of remand and confirm the decree of the District Munsif.

This appeal against order having been posted to be spoken to this day, the Court made the following order:

Posted for being spoken to. Defendant 6 alone has filed this appeal. But under O. 49, R. 4, Civil P. C., defendants 12 to 17, respondents 4 to 9 are entitled to the benefit of our judgment. The decree of the District Munsif in favour of defendant 6 and defendants 12 to 17 is restored. The result is, the appeal is allowed with costs of the appellant in this and the lower appellate Court.

P.R.S./V.S. *Appeal allowed.*

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* A. I. R. 1930 Madras 67

WALLER AND ANANTAKRISHNA AYYAR, JJ.

Muthu Vira Reddi, Rami Reddi and *others*—Defendants—Appellants.

v.

Mayandi, Venkatesa Modali and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 348 to 381 of 1925, Decided on 29th July 1929, from decrees of Dist. Judge, Chittoor.

*** (a) Civil P. C., O. 40, R. 1 (d)—Receiver's powers do not terminate until discharged though suit is dismissed in appeal.**

Though a suit, in which a receiver is appointed, is dismissed by appellate Court, the receiver's powers do not terminate until he is discharged by the Court which appointed him.

[P 68 C 1]

(b) Madras Estates Land Act, S. 26 (3)—Receiver authorized to file suit for enforcement of pattas is a person entitled to rent.

Where a Court has granted permission to the receiver under O. 40, R. 1 (1) (d), Civil P. C., to file suits for the enforcement of pattas and also dismissed the application subsequently filed by the ryots to cancel the order granting the said permission for the institution of these suits, the receiver is a person entitled to the rent within the provisions of sub-S. (3), S. 26, having regard to the definition of "landholder" in S. 3 (5); *A. I. R.* 1921 *Mad.* 314, *Dist.*

[P 68 C 2]

L. A. Govindaraghava Iyer and *S. A. Seshadri*—for Appellants.

S. Rangaswamy Iyer, T. Kumaraswamiah and *S. Rangachary*—for Respondents.

Judgment.—The defendant is the appellant in this second appeal. The receiver of Melappudi village sued for enforcement of pattah on the defendant a ryot of the village. There was the usual dispute between the parties as to what the proper terms of the pattah should be. The defendant's plea was that one Subbaraya Pillai, who, it was alleged, was owner of the suit village, agreed with the defendant to commute the rents into a fixed money rent permanently and once for all, and issued pattah in Fasli 1328 embodying the rates agreed upon. The Special Deputy Collector of Chandragiri Division who tried the summary suit upheld the contention of the defendant, and came to the conclusion that the proper rates of rent were the cash rates that the commutation was bona fide and binding on the plaintiff. He accordingly directed that the pattah should be amended by insertion of the cash rates as contended by the defendant. On plaintiff's appeal, the learned

District Judge of Chittoor disagreed with the findings of the first Court and held that the rates in the tendered pattahs were the proper rates, and he directed the defendant to accept the tendered pattah and execute a muchilika in exchange with similar terms.

The defendant has preferred the second appeal and on his behalf it was first contended that the appeal to the lower appellate Court filed by the receiver was incompetent. To appreciate the contention it is necessary to state that the Rajah of Karvetnagar had filed a suit to recover possession of the suit village among others, that in the appeal preferred by him to the High Court against the decree of the Subordinate Judge of North Arcot dismissing the suit, the High Court appointed a receiver in respect of the suit village, and that on an appeal preferred by Subbaraya Pillai and others to the Privy Council against the decree of the High Court passed in favour of the Rajah of Karvetnagar, the Privy Council on 21st May 1922, reversed the decision of the High Court and dismissed the Rajah's suit on the ground that the suit was barred by the law of limitation.

The appeal to the lower appellate Court was presented by the receiver on 12th June 1922. The appellant contends that as soon as the Privy Council dismissed the suit on 21st May 1922, the receivership came to an end and that the receiver had no locus standi to prefer the appeal on 12th June 1922. We are unable to accept the contention. The receiver had not been discharged by the Court which appointed him, time for preferring the appeal would expire before the High Court which appointed the receiver could be moved to pass orders on the re-opening of the High Court, in July 1922, and in the circumstances we think that the receiver's appeal could not be said to be incompetent as contended by the appellant We accordingly overrule this objection.

The next objection raised by the appellant was that Subbaraya Pillai was the owner of the suit village and that the commutation arrangement made by him with the ryot was bona fide and binding on the plaintiff and that the proper rates of rent are the cash rates agreed to between Subbaraya Pillai and the ryot. The respondent in answer to this contention, relied on S. 26, sub-S. (3), Madras Estates Land Act, under which no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder, if such rate is lower than the lawful rate payable by the ryot before the date of the grant upon the land. The finding of the lower appellate Court is that the new rates fixed by Subbaraya Pillai are lower than the rates payable by the ryot before. As the present case is not sought to be brought within the exception contained in sub-S. (1) of the section, it is clear, having regard to the admitted fact that Subbaraya Pillai died before the fasli in respect of which the present suit was brought, that the rates of rent agreed to by Subbaraya Pillai would not be binding upon the person entitled to the rent after the death of Subbaraya Pillai. It was, however, argued by the learned advocate on behalf of the appellant that it could not be said that the receiver was "a person entitled to the rent" within the meaning of the subsection. Having regard to the definition of "landholder" in S. 3, Cl. 5, Estates Land Act, and having regard to the fact that the Court granted permission to the receiver under O. 40, R. 1 (1) (d), Civil P. C., to file these suits, and also dismissed the application subsequently filed by the ryots to cancel the order granting the said permission for the institution of these suits, we think that the plaintiff the receiver comes within the provisions of sub-S. 3, S. 26, Estates Land Act.

The decision in *Swaminatha Odayar* v. *Sundaram Aiyar* (1), relied on by the appellant is distinguishable, as it turned on the wordings of S. 46, Estates Land Act, sub-S. 5 of which specifically provides that sums payable under that section for the acquisition of occupancy ryots shall be paid to the landholder who is the owner of the estate, and any application or proceeding under the section shall be made only to or against such landholder. The Court accordingly held that the application by a non-occupancy ryot under S. 46 of the Act could be made only to the 'owner' of the estate, and not to the receiver in charge of the estate. the word 'owner' does not occur in

(1) A, I. R. 1921 Mad. 314=44 Mad. 274.

S. 26, which is the section with which we are here concerned.

On the merits the lower appellate Court held that Subbaraya Pillai was not the sole proprietor of the village, that he was only one of the legal representatives of the deceased Saravana Pillai, and that the other legal representatives did not join Subbaraya Pillai in the act of commutation of rents relied on by the ryots. It also held that Subbaraya Pillai was in needy circumstances at the time that the new rates fixed by him fell short of the old rates and that

" there was no evidence as to the circumstances under which a lower set of rates was charged by Subbaraya Pillai, "

and further that

" the grounds on which the so called commutation was made were not really tenable and that they were hardly real. "

We think that the learned District Judge's findings, being findings of fact, should be accepted by us in second appeal.

We hold that under S. 26 (3), Estates Land Act, the rates fixed by Subbaraya Pillai are not binding on the receiver who represents the proprietor of the village.

We accordingly dismiss the second appeal with costs.

S. A. Nos. 349 to 381 of 1915 follow :

P.R.S./M.N. *Appeal dismissed.*

A. I. R. 1930 Madras 69

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

(*Halekote*) *Kunhi Kalanda Beari*—Appellant.

v.

Kunhipakki and *others*—Respondents.

Appeal No. 288 of 1927, Decided on 13th September 1929, from order of Dist. Judge, South Kanara, D/- 15th January 1927, in Appeal Suit No. 442 of 1925.

Civil P. C., O. 22, R. 4—Defendant dying after preliminary decree in mortgage suit—Out of his three legal representatives who were not brought on record, two were already on record—Entire estate held to be sufficiently represented by the two representatives—Civil P. C., O. 34, R. 1.

After the passing of the preliminary decree in a suit brought to enforce a mortgage, defendant 3 died. He left three heirs, one of them being a minor son, and the other two were his grandfather and mother. These were not brought on record as legal representatives before the final decree was passed though two of them who were adults were already on record.

Held: that the grandfather and mother had sufficiently represented the estate and the final decree that was passed and the sale that was held in execution were binding upon the entire estate, including that of the infant son: *A. I. R.* 1928 *Mad.* 914 (*F.B.*); 32 *Cal.* 296, (*P.C.*); 26 *Mad.* 230; *A. I. R.* 1925 *All.* 479 and 33 *Mad.* 6, *Rel. on.*; 38 *Mad* 682; *A. I. R.* 1926 *Mad.* 420 and *A. I. R.* 1925 *Cal.* 907, *Dist.*

[P 71 C 1]

B. Sitarama Rao—for Appellant.

P. Govinda Menon—for Respondents.

Venkatasubba Rao, J.—The question we have to decide arises in execution of a decree passed in a suit brought to enforce a mortgage. The first three defendants in that suit were father, mother and son respectively. Defendant 4 is the wife of the third. Defendant 2, the mother, died before the passing of the preliminary decree. Defendants 5 and 6, her daughters, were added as her legal representatives, defendant 3, her son, another heir, being already on the record. I may mention, though it is not necessary for the purpose of this case, that defendant 5 died and her children were brought in her place on the record. It was after these changes in regard to parties that the preliminary decree came to be passed. Subsequent to the passing of that decree, defendant 3 died. His legal representatives were his father, defendant 1, his widow, defendant 4 and his infant son, who now intervenes in execution and impeaches certain proceedings as being void. On the death of defendant 3, no application was made to bring his legal representatives on the record. They were three in number as I have just shown. Two of them who were adults were already on the record. The third, whose name was omitted to be added was an infant. What happened, however, was, that without defendant 3's legal representatives being formally brought on the record, the final decree in the case was passed. In execution of this decree, a certain sale was held. Defendant 3's infant son to whom I have already referred, now applies that the sale may be set aside on the ground that it is null and void.

The first question that arises is, what is the effect of the omission to bring formally the representatives of defendant 3 on the record? What the result would have been if such omission had occurred, before the passing of the preli-

minary decree, it is unnecessary to enquire; although I very much doubt, when the representatives happen already to be on the record, whether O. 22, R. 4, applies and the suit abates, as against the deceased party, on the ground that they were not formally added as such representatives. Here, it was after the passing of the preliminary decree, that defendant 3 died; to such a case, it has been held that the provisions relating to abatement do not apply. The principle is thus stated in the judgment of the Full Bench in *Perumall Pillai* v. *Perumal Chetty* (1).

"The right of action . . . . . is determined by a preliminary decree, because the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree."

The case is then analogous to a party being absent on the record at the stage of execution. A good deal of argument was directed at the Bar to the point, what are the powers of an executing Court to call the decree in question, first, when it is wholly null and void, and, secondly, when it is merely voidable? Mr. Sitarama Rao contends that in neither case, can the executing Court decide questions relating to the executability of the decree. He next urges, that although he may concede without admitting, that the executing Court may refuse to give effect to wholly void decrees, in the case of other decrees, its duty is merely to execute them as they stand. The decree before us is clearly not a nullity; and in the present case it is unnecessary to express any opinion on the vexed question regarding the powers of an executing Court.

The question in this case is not one of procedure but of substance. The cases cited at the Bar as to the proper remedy open to the petitioner need not, in my opinion, be discussed. The question of remedy does not arise unless the party has a right which he can enforce; and it is therefore needless to consider whether S. 47 applies, or whether his remedy is by an independent suit. Having regard to the facts of the present case, the principle applicable is that set forth by the Privy Council in the judgment in *Khirajmal* v. *Daim* (2). It is sufficient to state only a few facts of that complicated case. Nabibaksh was one of many defendants to the suit which was brought to enforce a mortgage. On a petition presented by him and others the suit was referred to arbitration. Shortly afterwards, Nabibaksh died leaving two widows, an infant son and a daughter. The names of the widows and son were added to the record but the daughter was omitted. The award was duly made and a decree passed. In execution of that decree, certain sales took place. At the instance of the heirs of Nabibaksh, the question arose in a subsequent suit (the one before the Privy Council), are the proceedings binding upon Nabibaksh's estate? Their Lordships held that notwithstanding that the name of the infant daughter was omitted, the estate was sufficiently represented and that the share of the deceased Nabibaksh in the equity of redemption in the property sold was wholly bound by the sale and irredeemable.

The same principle was applied in *Kadir Mohideen Marakayar* v. *Muthu Krishna Ayyar* (3). That was a suit upon a mortgage, and before the decree was passed, the mortgagor died. The plaintiff thereupon brought the mortgagor's son, defendant 1, on the record as his legal representative, and after that, a decree for sale was passed. As a fact, defendant 1 was not the sole representative as the mortgagor had left two other sons and three daughters. In execution of the decree, the mortgaged property was sold and the question arose, whether the sale was binding upon the second son of the mortgagor whose name had not been added. It was held that the mortgagor's estate was sufficiently represented and that the sale passed his entire interest including that of his second son. The learned Judges observe:

"In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estates of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate. It will of course be open to any other person who is or claims to be the legal representative or one of the legal representatives of the deceased defendant to apply to have his name also entered on the record as a legal representative in the place of the deceased defendant."

(1) A. I. R. 1928 Mad. 914=51 Mad. 701 (F.B.).

(2) [1905] 32 Cal. 296=32 I. A. 23=9 C. W. N. 201=8 Sar. 734 (P.C.).

(3) [1903] 26 Mad. 230=12 M. L. J. 368.

It is noteworthy that in the judgment, it is stated that in the case of a Muhammadan family, there is a special need to apply this rule. Otherwise, when a Muhammadan dies leaving innumerable heirs (as not infrequently happens) the omission to bring any one of them on the record may wholly vitiate the proceedings. I refer to this fact specially to show that the contention of Mr. Govinda Menon is without force, that the theory of representation, while it holds good in the case of Hindu joint families, is inapplicable where the parties happen to be Muhammadans. In these two cases which I have quoted, the death occurred before the decree was passed. The rule applies even with greater force when the party as in the present case, dies subsequent to the decree, that is to say, the decree which declares and determines the rights of the parties. The case which more nearly resembles this, is *Dip Narain* v. *Lachman* (4). After the preliminary decree, the judgment-debtor died and one of his representatives was brought on the record. A final decree was thereafter passed, which, it was held, was binding upon the other representatives whose names had been omitted to be added.

The representation may be incomplete but yet sufficient : vide *Ramaswami Chettiar* v. *Oppilamani Chetty* (5) at p. 8. Was the estate then of defendant 3 sufficiently represented? He left three heirs, one of them being his minor son, the present petitioner; but the other two, who were brought on the record, were the paternal grandfather and the mother of the minor. They must be held to have sufficiently represented the estate and the decree that was passed and the sale that was held are therefore binding upon the entire estate, including that of the infant son. Mr. Govinda Menon urges strongly that there must be something on the record to show that the Judge, who made the order bringing the representatives on the record, applied his mind to the question and was satisfied that the representation was, in the circumstances, sufficient. There is an obvious fallacy in this argument, for, when the Judge makes the order, it is assumed he is not aware of the existence of other representatives. If he then proceeds upon the footing that the representative whose name he is adding, is the sole representative, how can it be said that he has applied his mind to the question of the sufficiency of representation ? There is one feature of this case, which, on facts distinguishes it from the cases I have referred to. Some of the legal representatives were already here on the record, though of course, in a different capacity ; but in those cases an application for that purpose had to be made. This cannot make any difference in principle. The question is not one of form but of substance. The father and the widow of defendant 3 doubtless knew that they were his legal representatives, and I fail to see why on the ground that they were not so described, they should be held not to have represented his estate. A preliminary decree having been passed, they could object to the final decree, only by showing that in the meantime the amount declared to be due had been paid. It is not alleged that any such payment was made and that the decree should not have been made absolute. There is no reason for holding that there was not sufficient representation when the only adult representatives were on the record, and having no defence to make, allowed a final decree, in the usual course, to be passed. The minor therefore cannot question the sale which, as I have shown, is binding upon him. The appeal is allowed with costs throughout.

Madhavan Nair, J.—I agree. In this case a preliminary decree for sale on a mortgage was passed against defendants 1 to 3. Before the final decree was made, defendant 3 died. His legal representatives were his father, defendant 1, his widow defendant 4, and an infant son who now takes objection in the execution proceedings. These were not brought on record as legal representatives before the final decree was passed though two of them who were adults were already on record. In execution of the final decree the rights of defendants 1 to 3 were sold. The respondent, the son of the deceased defendant 3 whose name was omitted to be brought on the record as a legal representative defendant 3 now objects to the sale. The question for consideration is whether the objection raised by him regarding the validity of the decree can

(4) A. I. R. 1925 All. 479=47 All. 466.
(5) [1910] 33 Mad. 6=4 I C. 1059=19 M. L. J. 671.

be gone into in execution. The District Judge relying on two decisions of this Court, *Subramania Aiyar* v. *Vaidyanatha Aiyar* (6) and *Arunachala Chettiar* v. *Abdul Subhan Sahib* (7) and also on the decision of the Calcutta High Court in *Gora Chand Haldar* v. *Prafulla Kumar Roy* (8), came to the conclusion that the objections raised by the respondent could be heard, and decided by the executing Court. The decisions quoted are inapplicable to the present case as the decrees in those cases were void decrees and the Court had no jurisdiction to pass such decrees. The same cannot be said about the decree in the present case. Though the respondent was not brought on record as the legal representative of defendant 3 in the suit before the final decree was passed, the decree cannot be said to be an absolute nullity on that ground. It is to be noticed that defendant 3 was on record at the time when the preliminary decree was passed and that he died only subsequently. It was held in *Perumal Pillay* v. *Perumal Chetty* (1), that O. 22, Rr. 3 and 4, Civil P. C., do not apply to cases of death after the passing of the preliminary decree in a suit. According to the opinion of the Full Bench :

"the right of action.....is determined by a preliminary decree because the final decree is only by way of working out in detail the principles laid down and determined by the preliminary decree."

If so, the decree passed in this case cannot be objected on the ground that it is a void decree and that the Court had no jurisdiction to pass such a decree. It follows that the objection raised by the respondent cannot be gone into in execution. This appeal must therefore be allowed with costs throughout.

In this view, I do not discuss the question whether the final decree in this case is a valid decree binding on the respondent having regard to the fact that the ther legal representatives of the deceased defendant 3, viz., defendants 1 and 4, were already on record though they were not formally brought on record as legal representatives.

P.R.S./v.S. *Appeal allowed.*

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(6) [1915] 38 Mad. 682=31 I. C. 198.
(7) A. I. R. 1926 Mad. 429.
(8) A. I.R.1925 Cal. 907=53 Cal. 166 (F.B.).

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WALSH, J.

Thirukaval Chetti and *others*—Defendants—Petitioners.

v.

Karia Goundan and *others*—Plaintiffs—Respondents.

Civil Revn. Petn. No. 324 of 1928, Decided on 6th November 1928, against decree of Sub-Judge, Dindigul, D/- 14th November 1927.

(a) Civil P. C., O. 41, R. 23 — Even where R. 23 does not apply, Court has power to remand case under Civil P. C., S. 151.

Even where O 41, R. 23, does not apply, the suit not having been disposed of on a preliminary issue, the appellate Court has inherent power to make an order of remand under S. 151: 37 *M. L. J.* 536 ; *A. I. R.* 1927 *Mad.* 335 ; *A. I. R.* 1928 *Mad.* 984 ; *A. I. R.* 1928 *Mad.* 491 and *A I.R* 1928 *Mad.* 430, *Foll.* [P 73 C 1]

(b) Civil P. C., S. 151—Redemption suit—Plaintiff purchaser of equity of redemption from *X*—During argument defendants objecting that purchase by plaintiff would not bind *X's* heirs — Trial Court upholding objection — Appellate Court having amended plaint and added *X's* heirs as parties, remanding case, and awarding costs of appeal —Inherent powers of remand were not exercised without jurisdiction and there was no reason to interfere in revision with award of costs.

The plaintiff in a redemption suit based his claim on the purchase of the equity of redemption made by him from *X*. At the time of the argument the defendants took the objection that the purchase would not be binding on the heirs of *X* and the trial Court upheld the objection. But the appellate Court allowed the plaint to be amended adding the heirs of *X* as parties to the suit and remanded the suit under its inherent powers, and awarded the plaintiff's costs of the appeal

Held : that the Court did not exercise its inherent powers of remand without jurisdiction.

Held further : that there was no reason to interfere in revision with the order as to costs in this case : 20 *C. W. N.* 1354, *Dist.* [P 74 C 1]

R. Jayaraman and *T. S. Swaminathan*—for Petitioners.

T. L. Venkatarama Iyer—for Respondents.

Judgment.—This is a revision petition against the order of the Subordinate Judge of Dindigul in A. S. No. 120 of 1925 on the file of this Court allowing an amendment of the plaint and remanding the suit to the lower Court for ascertaining the amount of compensation due to the plaintiffs from defendants 7 and 23 to 25. The facts which have led up to this order are as follows. The suit was for redemption of 16 items of pro-

perty mortgaged usufructuarily by the predecessor-in-title of the plaintiffs to the predecessors-in-title of the defendants. The Court of first instance found that the plaintiffs had no title as regards items 1 to 12 of the mortgaged property and as regards the four remaining items that they had sold away the equity of redemption and had purchased it in the case of only one item 14, with which alone the appeal and the present petition are concerned. It was found that defendant 6 who had purchased this property from defendants 5 and 7 had acquired absolute title and that the plaintiff had lost the right of redemption by limitation. The plaintiffs sought to amend their suit by asking for damages against defendants 5 and 7, which was refused by the Court of first instance but allowed on a revision petition to the High Court in the case reported in *Kariya Goundan* v. *Thirukkaivelu Chetty* (1). The plaintiffs had repurchased the equity of redemption from one Ajam Khan but the Court held that the document under which they made this purchase would not be binding on the heirs of Ajam Khan as the plaintiff had imagined at the time of the plaint. This objection to the validity of the document was taken by the defendants for the first time during arguments of the case and I am told by the petitioner's advocate that it was due to a certain decision of the Privy Council which had been given after the suit commenced. In appeal, the learned Subordinate Judge allowed an amendment by adding the heirs of Ajam Khan as parties and found that defendants 5 and 7 were bound to pay compensation to plaintiffs and remanded the suit to the lower Court for ascertaining the amount of compensation due in the shape of mesne profits.

It was sought to be argued before me that there could be no damages awarded for what was lost by limitation. It is not, however, open to the petitioners to take this ground in a revision petition which must be confined to the point on which the remand was made. Other matters have to be taken in the ordinary course of appeal : vide *Jainulabideen Maracayar* v. *Habibulla Sahib* (2). The only question therefore before me is whether the amendment should have been allowed and the suit remanded for taking evidence. It is objected that as the suit has not been disposed of on a preliminary issue, O. 41, R. 23 does not apply. Assuming that the rule does not apply, it is now well established that the Court has inherent power to make such remand under S. 151 : vide *Muthappa Chetty* v. *Ramanathan Chetty* (3), *B. Mallayya* v. *P. Veerayya* (4), *Karuppanna Pillai* v. *Ethumalai Pillai*, A. I. R. 1927 *Mad.* 859 ; *Mallayya* v. *Veerayya*, A. I. R. 1927 *Mad.* 335, *Venkamma* v. *Goparaju Perraju*, A. I. R. 1928 *Mad.* 991, *Suppia Nadar* v. *Muthiah Pillai*, A. I. R. 1928 *Mad.* 984. *Jainulabideen Maracayar* v. *Habibulla*, A. I. R. 1928 *Mad.* 430. The only question therefore is whether in making the remand the Court has transgressed any rule of law, or of procedure so that it must be held to have acted without any jurisdiction. It is argued for the petitioners that the amendment involves a change of the plaintiff's case since they had distinctly stated in their plaint that they were the full possessors of the equity of redemption in this item by purchase from Ajam Khan, whereas now they may be turning out to be only joint owners of the equity of redemption.

It is further argued that there was no reason for the defendants petitioners to take any ground of non-joinder of parties in their written statements as there was nothing in the plaint to disclose such non-joinder. Finally it is urged that evidence of mesne profits should not be now allowed since the plaintiffs had the opportunity of adducing it before and did not do so. I do not think the petitioners have any real grievance in the matter of the amendment. In suits for redemption of mortgages it is necessary to add any one who may have any interest in the redemption in order that the mortgagee may not be worried by multiplicity of suits. But it does not affect the real question between him and the mortgagors once they are all brought on the record. Moreover, in this case it was the petitioners themselves who raised during the course of the argument the objection that Ajam Khan's heirs were necessary parties. They need not have raised this objection at all had

(1) A.I.R. 1925 Mad. 585.
(2) A.I R. 1928 Mad. 430.
(3) [1919] 37 M.L.J. 535=53 I.C. 401=10 M. L W. 859.
(4) A I R. 1927 Mad. 335.

it not been obviously to their interest to do so, and they cannot therefore object with very good grace to an amendment of the plaint being allowed, which has become necessary owing to their objection and which does not substantially affect the question at issue. As regards the admission of evidence, it is seen from the judgment of the Court of first instance that evidence was adduced but it related to all the items 1, 2, 13 and 14 together, and the learned District Munsif himself states :

"If the damages had to be assessed, more evidence will have to be taken. That course, however, is unnecessary in my view, as the suit is liable to be dismissed for non-joinder of parties."

Thus evidence of mesne profits was tendered as regards item 14 and the Court of first instance has clearly stated that it would not take more evidence on the point since the suit had to be dismissed for non-joinder of parties. I do not find that there is any reason to suppose that the Court has exercised its inherent powers of remand without jurisdiction.

The last objection is that the learned Subordinate Judge should not have awarded the petitioners to pay costs of the appeal. The only instance which the learned advocate for the petitioners was able to show me of an order as to costs being interfered with in revision is *Brij Behari Lal* v. *Shivnath Prasad* (5). That was a peculiar case in which it was held that the Court which gave costs had actually no power in the circumstances to award costs at all. There is no reason to interfere in the present case. In the result, the petition is dismissed with costs.

P.R.S./S.N. *Revision dismissed.*

(5) [1916] 23 C.W.N. 1354=35 I C. 837.

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VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

S. Natarajan and *others*—Appellants.

v.

V. Narasimha Ayyangar—Official Liquidator—Respondent.

Appeal No. 237 of 1929, Decided on 23rd August 1929.

(a) Companies Act, Ss. 200 and 3—The only Court that can enforce order passed by High Court under S. 187 against property situated in district place is High Court.

An order was made by the High Court under S. 187 ordering the payment of a contributory in respect of a call. He had property in the District of Tanjore against which the liquidator could proceed. The latter accordingly produced the order before the District Judge and applied for its execution. The Judge overruling the objection of the contributory held that he had jurisdiction to enforce the order.

Held : that by reading S. 200 with S. 3 it followed that the only Court that could enforce the order against property at Tanjore was the High Court : 1927 *Pat.* 182, *Rel. on.* [P 75 C 1]

(b) Companies Act, S. 200—Scope.

Section 200 applies to a case where an order made by the High Court of one Province is to be enforced in another Province; it can only be enforced by the High Court of that other Province : 1927 *Pat.* 182, *Rel. on.* [P 75 C 1]

(c) Companies Act, S. 3 (3)—Objection taken at proper time—Cl. 3 does not apply.

Clause 3 can have no application when objection to jurisdiction is taken at the very commencement and at the proper time: *A.I.R.* 1927 *Pat.* 182, *Foll.* [P 75 C 1, 2]

N. Suryanarayana—for Appellants.

C. S. Venkatachariar—for Respondent.

Venkatasubba Rao, J.—The short question is : What is the effect of Ss. 199, 200 and 201, Companies Act, read with S. 3 ?

An order was made by the High Court under S. 187 ordering the payment by a contributory in respect of a call. He has property in the District of Tanjore against which the liquidator can proceed. The latter accordingly produced the order before the District Judge and applied for its execution. The Judge overruling the objection of the contributory held that he had jurisdiction to enforce the order.

We have to decide whether the order of the District Judge is right. It is stated by both sides that the only relevant provisions of the Act bearing on the question are the four sections to which we have referred. To them, therefore, we propose to confine our attention. The decision really turns on the meaning of S. 200 read in the light of S. 3.

The relevant portion of the former section runs thus :

"Any order made by a Court for or in the course of the winding up of a company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate at such other place."

Let us apply the section to the facts of this case. The order was made by the High Court in the course of the winding up. It is sought to be enforced

in Tanjore. Under the section, which is the Court that can enforce it? The answer is :

"the Court that would have had jurisdiction in respect of such company, if its registered office had been situate at Tanjore."

What then is that Court? The answer to this question is furnished by S. 3, which reads thus :

"The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate."

In other words, if the registered office of this company is situate at Tanjore, the Court having jurisdiction under the Act, would be the High Court. From the foregoing statement, it follows that the only Court that can enforce the order in question against property at Tanjore is the High Court of Madras. We do not propose to decide the question, in what manner, in the event of an application being made to the High Court, is the order to be enforced, by direct action or by its being transmitted to the Tanjore Court? That is a point which does not arise at present. We fail to see how Ss. 199, 201 relied upon by Mr. Venkatachari support his contention. The section that confers jurisdiction is S. 200 and the other two sections referred to by the learned advocate merely deal with the mode of enforcing the orders. This, in our opinion, is the proper construction of these previous sections.

The view we have taken receives support from *Kayastha Trading and Banking Corporation* v. *Jai Karan Lal* (1). Mr. Venkatachari asks what purpose then does S. 200 serve? The answer is simple. It obviously can apply to a case where an order made by the High Court of one Province is to be enforced in another Province; and as the Patna High Court in the decision we have cited has pointed out, in such a case, it can only be enforced by the High Court of that other Province.

Lastly, Mr. Venkatachari seeks to support the order of the lower Court by relying upon S. 3, Cl. 3, which says :

"Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court."

It is very doubtful whether this clause applies to a case of this kind. In any case, it can have no application, as the Patna case has decided, when the objection was taken at the very commencement and at the proper time. This appeal is allowed with costs.

The act of the Official Liquidator in applying to the lower Court is bona fide and we, therefore, allow him to take his costs out of the estate.

P.R.S./V.S. *Appeal allowed.*

(1) A. I. R. 1927 Pat. 182=6 Pat. 132.

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WALLER AND ANANTAKRISHNA AYYAR, JJ.

Anumanchi Ramanayya—Appellant.

v.

Thulati Kotayya and *another*—Respondents.

Letters Patent Appeal No. 38 of 1929, Decided on 30th April 1929, against order of Venkatasubba Rao, J., D/- 27th February 1929 reported in *A. I. R.* 1929 *Mad.* 607.

*** Letters Patent (Mad.), Cl. 15—(As amended up to December 1928)—Judgment by a single Judge after 1st February 1929—Judge refusing leave to appeal—Refusal to grant leave is not appealable.**

The intention of the legislature as appearing from Cl. 15 is that a judgment passed by a single judge in a second appeal after 1st February 1929 is final and not appealable and that an appeal could be entertained against the said judgment only if the Judge who decided the second appeal granted leave to appeal. If leave to appeal is refused by such Judge no appeal lies from the order refusing leave to appeal: (*Case law considered.*) [P 78 C 1, 2]

Ch. Raghava Rao—for appellant.

P. Venkataramana Rao, A. Lakshmayya and *D. Krishnaswami*—for Respondents.

Judgment.—This is an appeal purporting to have been preferred under S. 15, Letters Patent, against the refusal by a learned Judge of this Court of leave to appeal from the judgment passed by him in a second appeal.

A preliminary objection is taken by Mr. Venkataramana Rao, the learned advocate who appeared for the respondent that no appeal lies from such orders of refusal of leave to appeal.

Clause 15, Letters Patent of this High Court, was recently amended on 3rd November 1927, and on 12th December 1928. The effect of these amendments is to declare that no appeal shall lie to the High Court from the judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the super-

intendence of the High Court (and not being an order made in the exercise of a revisional jurisdiction or in the exercise of criminal jurisdiction) of one Judge of the High Court, or of one Judge of any Division Court pursuant to S. 108, Government of India Act, made on or after 1st February 1929, unless the Judge who passed the judgment declares that the case is a fit one for appeal. The second appeal in question was heard by the learned Judge after 1st February 1929 and the learned Judge when moved by the present appellant has declined to grant leave to appeal under Cl. 15 of the Letters Patent. The appellant has preferred this appeal against the said refusal by the learned Judge to grant leave to appeal. The question is whether this appeal is maintainable.

As remarked by the Privy Council in *Minakshi* v. *Subramanya* (1), at p. 27:

"it is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law or equivalent authority."

The Privy Council made a similar observation in the case reported in *Mayor & Co. of Montreal* v. *Brown and Springle* (2), at p. 184:

"The rule of law in this country is that an appeal does not lie unless given by express legislative enactment see also *Lane* v. *Esdaile* (3) at p. 211 Lord Halsbury, L. C."

That being so, the appellant must point out the provision of law under which he claims this right of appeal. The rule would apply with equal, if not with greater force, when it is sought to prefer appeal against the decision of one learned Judge of a Court to a Division Court of that Court. Under S. 108, Government of India Act, the Chief Justice shall determine what Judge in each case is to sit alone and what Judges of the Court are to constitute the several Division Courts. The decision passed by such Judge or Division Court would be final unless a right of appeal be specifically given. Cl. 15 of the Letters Patent is the only provision which has been brought to our notice, and it is under that clause that the present Letters Patent Appeal has been preferred. On a reading of Cl. 15 as amended, it is clear to us that no appeal would lie to the High Court from a judgment passed by one Judge of the High Court in second appeal, after 1st February 1929. No further appeal to the High Court is available except where the Judge who passed the judgment declares that the case is a fit one for appeal.

When a right of appeal is given subject to any condition, it is clear that the said condition should be strictly complied with before the right of appeal could be taken advantage of. As stated in Maxwell's Interpretation of Statutes, Chap. 12 S. 3:

"Where it was provided that no appeal should be entertained unless certain rules were complied with, the neglect of the statutory requisites would obviously be fatal."

Mr. Raghava Rao, the learned advocate for the appellant argues, however, that what Cl. 15 prohibits is only an appeal from the judgment of one learned Judge on the merits of a second appeal, and that the clause does not prohibit a right of appeal from the refusal of one learned Judge to declare that the case is a fit one for appeal; in the case of such refusal, he argues, there is right of appeal, and if the appellate Bench also agrees with the learned Judge on the question that the case in not a fit one for appeal, then only is there an end of right of appeal. In other words, if we understood his contention correctly, he argues that while there is no right of appeal against the judgment passed on the merits in the second appeal, there is a right of appeal from the refusal in such a case to grant leave and the appellate Bench should decide, as best as it could, whether the refusal to grant leave to appeal was right or not. He did not hide from us the fact that the appellate Bench may have for this purpose to go into the merits of the case itself, to such extent as it thought necessary.

He also argued that the question now is not in respect of a decree or order, made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, but that it is with reference to a judgment passed by the High Court itself, and that the restrictions referred to in Cl. 15 do not apply to a judgment of the High Court.

(1) [1888] 11 Mad. 26=14 I. A. 160=5 Sar. 54 (P.C.).
(2) [1876] 2 A. C. 168.
(3) [1891] A. C. 210=60 L. J. Ch. 644=40 W. R. 65—64 L. T. 666.

We are clear that the arguments of the learned advocate for the appellant are untenable and that the present appeal is not maintainable.

The practice of providing a right of appeal subject to conditions, though comparatively new to India, has been prevailing for a long time in England; sometimes leave of the Judge who decided the case or of the Court is made the condition precedent for the entertainment of an appeal; in other cases leave of either a Judge or the Court on the one hand or of the Court of appeal on the other is made a condition precedent. An instance of the former is furnished by S. 45, Judicature Act of 1873, and an instance of the latter is furnished by the Judicature Act of 1894 S. 1 (5). In India we have got an instance furnished by S. 75, Cl. 3, Provl. Insol. Act where a right of appeal to the High Court is given on obtaining leave of the District Court or of the High Court, in respect of certain orders mentioned therein. English Courts had to consider the very question raised in this appeal before us, namely ; whether there is any right of appeal from the refusal of a Judge to grant leave to appeal.

In *Kay* v. *Briggs* (4), the Court of appeal held :

" where a Divisional Court has refused special leave to appeal under S. 45, Judicature Act, 1873 from their decision given in an appeal from a county Court, the Court of appeal has no jurisdiction to hear an appeal from such refusal. "

The following passage occurs in the judgment of Lord Esher, M. R. :

" If this Court could overrule the discretion given by that section to Divisional Courts, the practical effect would be to allow an appeal here in every case, because the facts of each would be brought before us in order to enable us to decide whether or not we ought to overrule that discretion. I think that the real meaning of S. 45 is to confine the power to give leave to appeal absolutely to the Divisional Courts. I am of opinion therefore that we have no jurisdiction to interfere with the exercise of their discretion. "

Fry, L. J., observes as follows in the same case.

" If an appeal from the refusal of the Divisional Court to grant leave to appeal could be brought to this Court, our order would not satisfy the only contingency upon which the section provides that the decision of the Divisional Court shall not be final, because special leave to appeal would be given not by the Divisional Court, but by this Court. The decision of the Divisional Court would cease to be final, although the contingency remained unsatisfied.

In *Lane* v. *Esdaile* (3), the House of Lords decided that

" no appeal lies to this House from a refusal of the Court of appeal to grant special leave to appeal from a judgment of the High Court . . . . . such a refusal is not an order or judgment of the Court of appeal within the meaning of S. 3, Appellate Jurisdiction Act, 1876. "

At p. 215 Lord Herschell observed as follows :

" If the contention of the appellants were well founded I think it would follow that under this S. 45, Judicature Act (of 1873), there could be an appeal to the Court of appeal from a refusal by a Divisional Court, and an appeal again from the Court of Appeal to this House ; so that every county Court case might be brought up to this House upon the question whether an appeal should be allowed or not. "

Lord Field remarked at p. 216 ;

" it seems to me that if your Lordships were to say now ' we will give leave, ' and the Court of appeal must enforce that, it would be imposing upon them the duty of giving a leave, as their leave, which they in their own judgment think ought not to be given. "

We may refer to one more case, *Ex parte Stevenson* (5), where

" Judge at Chambers having refused to grant leave under Sch. 2, Cl. 26 (a), Housing of the Working Classes Act 1890, the Divisional Court held that no appeal lay to them from his decision. The Court of Appeal held that no appeal lay. "

Lord Esher, M. R. at p. 611 laid down the law in the following words :

" I am on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given . . . . The very nature of the thing really concludes the question ; for, if, where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity and the provision is made of no effect. If the contention for the claimant be correct it would follow that the case might be taken from one Court to another till it reached the House of Lords on the question whether there should be leave to appeal. That cannot be so. For these reasons, I think the appeal must be dismissed. "

Fry, L. J., gives some other reasons in support of the same position, at p. 612 :

" Is the order granting or refusing leave to appeal, subject to appeal ? In my opinion it is not. I do not come to that conclusion on the ground that the word " order B " is not properly applicable to it ; but from the nature of the thing and the object of the legislature in im-

(4) [1889] 22 Q. B. D. 343=58 L. J. Q. B. 182 =37 W. R. 291=60 L. T. 775.

(5) [1892] 1 Q. B. 609=61 L. J. Q. B. 492= 56 J. P. 501=40 W. R. 417=66 L. T. 544.

posing this fetter on appeals. The object clearly was to prevent frivolous and needless appeals. If, from an order refusing leave to appeal, there may be an appeal, the result will be that in attempting to prevent needless and frivolous appeals, the legislature will have introduced a new series of appeals with regard to the leave to appeal . . . . . It appears to me that that would be an absurd result in the case of a provision the object of which is to prevent frivolous and needless appeals. Therefore from the very nature of the thing, the decision of the Court which has the power of giving leave to appeal is, in my opinion, final."

It is perhaps useful to quote one or two sentences from the judgment of Lopes, L. J., at p. 612:

"Where an appeal is given that is made subject to the leave of the Court or a Judge, or any other legal authority, I think that the granting or refusal of leave by such Court, or Judge, or other legal authority, is final and unappealable. The object of making appeals subject to leave is to prevent unnecessary and frivolous appeals. If an appeal were allowed from granting or refusal of leave to appeal, the result would be that, instead of checking appeals, they might be multiplied to a most mischievous extent; for an appeal from the granting or refusal of leave might be carried from the Divisional Court to this Court and from this Court to the House of Lords. For these reasons I think that the preliminary objection must prevail."

It was argued that the order passed by the learned Judge refusing leave to appeal in this case should be taken to be a judgment within the meaning of the Letters Patent and in support of that position certain decisions of this Court were cited to us: *Tuljarama Row* v. *Alagappa Chetty* (6), *Sonachelam Pillai* v. *Kumaravelu Chettiar* (7), *Official Assignee of Madras* v. *Ramalingappa* (8), and *Maharaja of Pittapuram* v. *Rama Rao* (9). Having regard to the decision of the House of Lords in *Lane* v. *Esdaile* (3), already referred to, it is, to say the least, very doubtful whether such an order refusing leave could be said to be a 'judgment' for the purpose now under consideration, within the meaning of Cl. 15, Letters Patent. But we are clear, reading Cl. 15 as a whole, that the intention of the legislature is that a judgment passed by a single Judge in a second appeal after 1st February 1929, is final and not appealable, and that an appeal could be entertained against the said judgment only if the Judge who decided the second appeal granted leave to appeal. This, to our mind, is clear from the provisions of Cl. 15, Letters Patent. The learned Judge having in this case declined to grant leave to appeal, the judgment in second appeal is final. Whether the order refusing leave to appeal be a 'judgment' or not, it is clear that no leave to appeal that might be granted by a Division Court would satisfy the requirements of the clause which provides that an appeal would lie only when the Judge who heard the second appeal grants leave to appeal. The English cases fully support the above position. A decision of this Court reported in *Madhava Aiyar* v. *Muthia Chettiar* (10), referred to by the learned advocate for the respondent supports this view, though we think that the grounds for holding that no appeal lies in the present case are probably stronger than the grounds mentioned in the case in *Madhava Aiyar* v. *Muthia Chettiar* (10).

For the above reasons we are clear that no appeal lies from the refusal of leave to appeal by a learned Judge from a judgment passed by him in a second appeal after 1st February 1929, under the amended Cl. 15, Letters Patent, and we dismiss the appeal with costs of the Respondent (Plaintiff) 1.

P.R.S./P.R. *Appeal dismissed.*

(6) [1912] 35 Mad. 1=21 M. L. J. 1=8 I. C. 34=(1910) M. W. N. 697 (F.B.).
(7) A. I. R. 1924 Mad. 597=47 Mad. 316.
(8) A. I R. 1926 Mad. 554=49 Mad. 539.
(9) A. I. R. 1927 Mad. 846=50 Mad. 770.
(10) [1917] 5 M. L. W. 168=38 I. C. 818=21 M. L. T. 77.

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COUTTS-TROTTER, C. J., AND WALSH, J.

R. Rathnasabapathy Chettiar—Plaintiff—Appellant.

v.

Ammakannammal and *others*—Defendants—Respondents.

Original Suit Appeal No. 33 of 1928, Decided on 1st May 1929, from judgment of Kumaraswami Sastri, J., D/- 25th November 1927, in Civil Suit No. 595 of 1925.

(a) Civil P. C., O. 6. R. 4—Allegations of fraud or breach of trust—Pleadings must be particularized and specific.

The litigant ought to know, at any rate, in general terms what case he has got to meet, and especially in cases where there are allegations of fraud and breaches of trust. These matters ought to be particularized to a point at which he knows not merely generally but in detail what he has to meet. [P 79 C 2]

(b) Practice — Issues merely signed by Judge without knowledge of pleadings are useless—Civil P. C., O. 14, R. 1 (5).

Issues settled by a Judge who knows nothing about the case and who merely signs the issues drafted by counsel who know little more, are worse than useless and have a fictitious importance which they do not deserve. [P 79 C 2]

(c) Evidence Act, S. 101—Burden of proving misfeasance lies on party alleging it.

It is for those who attack the administration of the trustees to show that there was misfeasance. [P 80 C 1]

K. S. Krishnaswami Iyengar — for Appellant.

T. N. C. Srinivasa Varadachari, *A. Ramaswami Iyer*, *M. S. Venkatarama Iyer*, *E. V. Sundara Reddy* and *T. L. Venkatarama Iyer*—for Respondents.

Coutts-Trotter, C. J. — I have had the advantage of reading the judgment prepared by my learned brother in this case and I entire agree in the result. I only desire to say one thing in this connexion. There seems to me to be a grave defect in the method of pleading and still more in the method of drawing up the issues which appears to be finding favour in these Courts. It is a settled rule of English pleading that any charge involving anything of the nature of fraud should be set out specifically with particulars where necessary. For instance, if breaches of trust are alleged on the part of a trustee it is essential that they shall be particularised in precise detail, such as sums of money or other items of trust property alleged to have been misappropriated. Besides that safeguard we have the system in this country of having issues settled before the trial which is supposed to extract from the pleadings the matters which are really in dispute between the parties and to reduce them to a series of short propositions. That is not part of the English system. It is inherited from the Scottish system of jurisprudence. Not being familiar with that system I can express no opinion as to its merits or demerits in the country of its birth. But I do know this in a general way that a Scottish Judge who is settling issues treats it as a very serious matter and reduces his issues to a high degree of precision and exactitude even when full pleadings are demanded. In India I am afraid the system of settling issues is so perfunctory that the issues are really worse than useless as a guidance to the trial Judge. That, at any rate, was in the main my experience during the eight years in which I sat day by day on the original side. Sometimes the issues were vitiated by the fact that when one got into the case it was quite obvious that they put the onus on the wrong party; sometimes they were so vague as to be a less guide to what really was to be tried even than the pleadings. I could not take a better example than issue-settled in this case which runs as follows :

"Have the trustees been guilty of any, and, if so, what breaches of trust, misfeasance, malfeasance and non-feasance in respect of the trust estate ?"

That opens the door to allow the defendants to bring any sort of charge at the trial, unspecified and unparticularised, and gives the plaintiff whose conduct is impugned no sort of notion what charge and how many charges, all obviously of a very grave nature, he has to meet. I remember asking a very experienced and eminent county Court Judge in England whether he did not find difficulty from the absence of regular pleadings in the county Courts such as one would find in the High Court. He said :

"No; I find that the parties know perfectly well what they have come to have decided and at the time their case is opened their advocates know exactly what matters to direct my attention to."

Whether that be correct or no, of course, I am not in a position to say ; but of this, I am quite certain that, if one is to act on that principle not only issues but pleadings just as well be abolished tomorrow. That, I think, is not right especially in India because I think the litigant ought to know, at any rate, in general terms what case he has got to meet, and especially in cases where there are allegations of fraud and breaches of trust. I think that those matters ought to be particularised to a point at which he knows not merely generally but in detail what he has to meet. I would personally suggest that issues settled as they are now settled by a Judge who knows nothing about the case and usually signs the issues drafted by counsel who know little more, are worse than useless and have a fictitious importance which they do not deserve. I would far sooner see attempts made by better instruction in the Law College and above all in the Chambers where

the budding practitioner learns his business in the art of pleading with sufficient definiteness, to make it clear exactly what the Court is called upon to try. In every jury trial in England a junior counsel for the plaintiff before the case is opened summarises the pleadings giving the substance of them and concludes in these words ;

"On that issue is joined and those are the issues which you have to try.";

and a good junior will make it clear to the jury what exactly the issues are raised by the pleadings and takes a good deal of trouble to see that his summary is correct and omits nothing material. But, of course, with the laxity of pleadings which obtains in this country it is very difficult, it is almost impossible, that the issues settled on those pleadings should not partake of the same laxity. The remedy appears to me to teach the budding practitioner to plead properly and definitely. It should not be difficult to teach a young man how to plead. There is a very good work by Dr. Blake Odgers in England and for the student it is not really necessary to go to the larger work by Bullen and Leake except for proper forms of pleading in particular classes of cases. Two books on pleading have appeared in this country, one by Sir Cecil Walsh, K. C., who recently retired from the Allahabad High Court, and the other a bigger book which I looked through at the time but the name of the author of which I regret to say I have forgotten. Of course at one time English pleadings were overlaid with technicalities and plaintiffs were often nonsuited for some purely technical slip in the pleading and had to amend it and start all over again all that after witnesses have been summoned, briefs delivered and everything was ready for trial. That state of things was put an end to by Judicature Acts and I think the present state of pleading in England, though it leaves room for making it quite easy to distinguish between the work of a neat and slipshod pleader, really does enable the Judge to know exactly what the points at issue between the parties are. If a pleading is vague and leaves it obscure as to what precisely is the case intended to be set up, it is quite easy for the opposite party to take out summons for further and better particulars of this or the other paragraph of the statement of claim or defence and hundred of such summonses are disposed of after hearing counsel by the Masters every day in Chambers.

It is the rarest thing in the world to have applications for particulars of allegations in pleadings in an Indian Court. I think that what happens is that the juniors in charge of the cases trust to the settlement of issues to bring definitness into the case, a hope in which in my experience they have often been grievously disappointed and of course at that stage the leaders probably would not even have considered the case at all which may not come up for trial for months. Most Indian pleadings are overlaid with pleading the evidence in support of the particular facts alleged. That is useless cumbering of them but as a rule it does not do much harm. But in cases where there are allegations of fraud or kindred allegations more particulars are absolutely essential and I should like to see the Indian student and the young budding advocate put through a real course of proper instruction in the art of pleading. That would bear fruit in time if it is properly carried out, and I think it must be taught in the first instance by English Professors or English Barristers who worked under and know the English system. I am not gainsaying that in the hands of experienced advocates at the trial, the opening of the case of the parties gets rid of a lot of verbiage and focusses the attention of the Court on what is really material and really necessary. But in my opinion it is almost impossible to gather it from the issues even with the assistance of the pleadings, which I must honestly confess I think are less loose and vague in their terms than the majority of issues framed to-day.

The Indian system of pleading we have adopted is of course taken from the English system of jurisprudence just as the framing of the issues is taken from the Scottish system as I have pointed out; but unfortunately particularity and preciseness which are characteristic of all very ably drawn English pleadings are entirely absent from Indian pleadings for the most part. There are no doubt some well-drawn pleadings in India but almost invariably there are very often cases in which

summons has been taken out by the opposite party to compel the pleader on the other side to redraft his pleadings in a more specific form. I think it would be well worth while to have a committee of legal teachers and a few practitioners to go into this matter and consider what suggestions could be fruitfully made to bring about a better state of things. I think the present is a case in which vague pleadings and vague issues might have led to serious embarrassment or even to a miscarriage of justice.

Walsh, J. — This is an appeal by plaintiff 1 against two parts of the decree in C. S. No. 595 of 1925. The suit arose in the following circumstances. The appellant is the adopted son of one Rathnavelu Chetti who was a Dubash in Best & Co. This Rathnavelu Chetti was a wealthy gentleman and on 18th May 1919 he executed a deed of trust setting apart certain moveable and immovable properties for certain charities and for allowances to some of his relations. Effect was given to the deed of trust from July 1919 and the founder died in February 1922. His adopted son, the appellant, succeeded his father as President of the Trust Board. Owing to the fall in value of the trust properties, the trustees found themselves unable to meet the sums payable under the trust-deed from the income of the trust properties. They passed a resolution in March 1923, to cut down the allowances proportionately all round. This being objected to by some of the beneficiaries, an application was made on the original side asking for directions for the abatement of the provisions contained in the trust deed. Waller, J., ordered that a suit should be filed and consequently this suit was filed by the trustees. The materially contesting defendants were defendants 11, 12 and 18. Of these, defendant 11 is the sister's son of the founder of the trust. He is really responsible for any serious opposition to the suit scheme but he has not appeared in this Court to oppose the appeal. A commissioner was appointed by the Court to go into the accounts and submit his report. His first report was dated 15th March 1927 and a further report was called for to take accounts as to what a building known as "Kilton" cost for construction and how much of the total cost had been taken out of the trust funds. We are not concerned in this appeal with the matter of "Kilton." The decree states in para. 2 that the commissioner's two reports be and are hereby confirmed, but with regard to the two matters on which this appeal is preferred and which are dealt with in paras. 4 and 5 of the decree, the commissioner gives no decision on the first and on the second his report does not support the order passed in the decree.

The first is a matter of payment of Rs. 3,150 to plaintiff 1 between February 1922 and April 1923. According to the deed of trust, during the minority of plaintiff 1 the sum of Rs. 350 per mensem was to be paid to the wife of the founder which was to be for her own maintenance and that of plaintiff 1 and for the education of the latter. After plaintiff 1 attained majority, the founder's widow was to get Rs. 250 per mensem and plaintiff 1 Rs. 350 per mensem. Defendant 11 objected that the plaintiff 1 did not attain his majority until 7th April 1923, whereas the trustees had been paying him at the rate of Rs. 350 per mensem from February 1923 to April 1923, as if he had attained majority. Defendant 11, who as stated above, has been the person really raising objections to the suit, made no clear statement on the point in his written statement. He merely states in para. 10 that the allegations in para. 9 of the plaint are not quite correct. Para. 9 of the plaint states that, after the death of the founder, expenditure was considerably increased by the founder's wife and his adopted son becoming entitled to the monthly allowances of Rs. 250 and Rs. 350 respectively. All that defendant 11 does in para. 10 of his written statement is to recapitulate the exact terms of the trust deed. He does not state definitely that plaintiff 1 had not attained majority or at what stage he actually did attain majority. In the written statement filed by defendants 12 and 18, there is a definite statement that plaintiff 1 became entitled to a monthly allowance of Rs. 350 only on 7th April 1923, when he attained majority. There was no specific issue framed on the point and the only issue by which this matter can

be said to be covered is the general issue 7 :

" Have the trustees been guilty of any and if so, what breaches of trust, misfeasance, malfeasance, and non-feasance in respect of the trust estate ?"

The matters that were referred to the commissioner were to take the following accounts namely :(a) an account of the properties of the trust estate and (b) an account of the income that the said properties will fetch if proper and reasonable care is exercised. Before the commissioner, defendant 11 led evidence as to the minority of plaintiff 1. Plaintiff 1's advocate seems very properly to have objected on the ground that it was not a question referred to the commissioner. The commissioner, (while he took some evidence), probably in view of the fact that he was not asked to report on this matter, merely states:

" If the Honourable Court accepts the defendant's contentions the receipt of this item of money by plaintiff 1 would be unauthorized."

No evidence was led on the matter before the learned Judge whose only reference to it in the judgment is as follows:

" The next question is as regards the sum of Rs. 3,150 which was collected by the trustees after the death of Rathnavelu Chetty and taken by plaintiff 1 in his personal capacity as and for his allowance. So far as this is concerned, it is clear that he was not entitled to any allowance until he attained majority. Plaintiff 1 has not shown how he was entitled to his allowance. He will, therefore, bring back Rs. 3,150."

In our opinion, the learned Judge has thrown the onus on the wrong side in this matter. It was for those who attacked the administration of the trustees to show that they had committed misfeasance in this respect. As noted above, the question was not one referred to the commissioner and objection was taken by plaintiff 1 to his enquiring into it. The commissioner gave no opinion on the matter and as no evidence on it was led before the learned Judge, there is properly speaking no evidence on the point and, therefore, the alleged misfeasance has not been proved. The learned advocate for the appellant has, however, taken us through the evidence adduced on the point before the commissioner and in our opinion the evidence on plaintiff 1's side is much superior to that adduced by defendant 11. Defendant 11 was the only witness examined to prove that plaintiff 1 was not a major when his adoptive father died. Now plaintiff 1's adoptive father together with defendant 11 had filed a suit in 1922 of which the plaint is Ex. H. The date of the plaint is unfortunately not given in the printed portion extracted and the date put in the index, 15th July 1917, is obviously wrong for the suit was only one of 1922. In Ex. H, the present first plaintiff was defendant 5 and while, in the case of other defendant who were minors the fact is distinctly stated and their guardian named, the present plaintiff 1 is not described by his adoptive father (plaintiff 1 in that suit) or by the present defendant 11 (plaintiff 2 in that suit), as a minor.

This suit was, as regards his adopted son, a formal one by Rathnavelu and it is not alleged that there was any adverse interest between the plaintiff in that suit and present plaintiff 1. When defendant 11 was cross-examined on this point before the commissioner, he had no explanation to give and said he did not know whether the averment in the plaint was right or wrong and that he signed it because Rathnavelu Chetty asked him to sign it. On the other side, defendant 11 relied on Ex. 4. This purports to be a copy of a transfer certificate given when plaintiff 1 left the Lutheran Mission Secondary School at Purasawakam and the entry relied on in it is " date of birth as per admission register, 7th April 1905." In the first place, the document itself has not been properly proved. It is professedly a copy of the transfer certificate. Defendant 11 as D. W. 1 says, he did not get it from the Head Master but from defendant 7. The latter is not called nor is the Head Master called. Even if Ex. 4 be accepted as a correct copy coming from proper custody, it would not be evidence on the point of date of birth because it is a copy of a copy.

It is the admission register alone which would be evidence of the date of birth. As a matter of fact, Ex. 4 possesses very suspicious features. We find in it purporting to be part of the document itself and in such a position that it must be part of the document " No. 61/1922-23." These certificates have got to be given at the time the boy leaves the school for another school. How this No. 61/1922-23 could appear on a certificate that the boy left on 30th

April 1915 has not been explained. Another suspicious feature is that the pupil's name is given there as R. Rathnasabapathy. Plaintiff 1 had admittedly not been adopted at the time he left the school. His name was then Manickam, and his initial should have been " M " and it was only after his adoption that he would get the intial " R " of his adoptive father Rathnavelu. Defendant 11 filed Ex. 2 alleged to be a copy of a will executed by Rathnavelu Chetty on 3rd February 1922, in which plaintiff 1 is described as a minor. Notice was served on the plaintiff's vakil for the production of this will before the commissioner but he refused to produce it on two grounds: (1) as noted above that this matter of plaintiff 1's majority was not referred for enquiry to the commissioner and (2) that the pleader did not represent plaintiff 1 in his personal capacity but as a trustee. This is all the evidence about plaintiff 1's minority.

Not only was there no specific issue raised on the point but. assuming that such an issue was raised, the onus has been thrown on the wrong party. From a strictly legal point of view, there is no evidence at all and so the contention of plaintiff 1's minority fails. Even if the evidence tendered before the commissioner be taken into account the evidence afforded by Ex. H is much better than that of Ex. 4 which is really not admissible at all and Ex. H is certainly as good evidence as Ex. 2. We, therefore find that plaintiff 1 is not liable to restore the sum of Rs. 3,150.

As regards the second matter appealed against, this is dealt with in para. 5 of the decree. It concerns a sum of Rs. 10,713-8-0 expended for the repairs of the property known as " Rathna Villa," which the appellant has been ordered to restore. As stated by the learned Judge the trustees met and refused to allow a claim which plaintiff 1 had made with regard to this expenditure: vide Ex. Z. The learned Judge then proceeds:

" The further question, however, arises as to whether this sum of Rs. 10,713-8-0, which is now in dispute and which was claimed as having been spent for repairs was money taken out of the trust funds or money taken out of the private funds of Rathnavelu Chetty. On this part of the case the onus is on plaintiff 1, who claims this sum, to show that it was taken out of the private funds of Rathnavelu Chetty. It finds an entry in Ex. G-I which is the trust account book. I am not satisfied on the evidence before me that it has been proved that this amount which finds a place in Ex. G-1 was really spent out of the private funds of Rathnavelu Chetty."

The accounts, however, filed and exhibited prove clearly that the expenditure must have been out of the private funds. The commissioner's report contains nothing to the contrary and the only reference in the report itself to this sum is where it is merely quoted as a criterion for what would be reasonable expenditure on repairs and whitewashing of buildings. Turning to the accounts, Ex. A shows that the total receipts of the trust fund was Rs. 78,473-0-10, and the total expenditure was 1,10,378-6-8. Of this the trustees disallowed a sum of Rs. 10,713-13-8 on account of improvements, to Rathna Villa thus reducing the net expenditure to Rs. 99,664-9-0. Deducting from this the amount collected Rs. 78,473-0-10, the balance due to the founder's estate is Rs. 21,191-8-2. These are the accounts which the commissioner has found correct. It is obvious therefore that this amount of Rs. 10,713-13-8, which plaintiff spent for the repairs to Rathna Villa must have been taken out of the private estate of Rathnavelu Chetty, because even after disallowing it from the expenditure, there was still a sum of Rs. 20,000 and odd due to the estate. In other words, plaintiff 1 could not possibly have got the money out of the trust. He, therefore, is clearly not bound to make it good. The appeal must be allowed on this point also.

In the result, the appeal is allowed throughout. The costs will be as follows. The costs of respondents 25 and 26 to come out of the trust estate (Rs. 425). Respondent 11 to pay Rs. 350 as and for the costs of the appellant and the balance of the taxed costs to be recovered by the appellant from the trust estate. The respondent or each set of respondents who have appeared by their advocates, other than respondent 11, to be paid Rs. 50 each out of the trust estate.

P.R.S./M.N. *Appeal allowed.*

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ODGERS AND CURGENVEN, JJ.

(*Cherukuri*) *Venkataratnam* — Defendant and Plaintiffs—Appellants.

v.

Bola Guravayya and *others*—Plaintiffs 1 to 5 and Defendants 3 to 6—Respondents.

Appeals Nos. 281 of 1925 and 196 of 1926, and Civil Revn. Petn. No. 626 of 1925, Decided on 13th November 1928, from decrees of Addl. Sub-Judge, Masulipatam, D/- 22nd April 1925, in Original Suits Nos. 29 and 61 of 1924.

*** (a) Part performance—Possession taken by vendee in pursuance of an alleged contract for sale—Vendee failing to get sale-deed registered under Registration Act, S. 77—Vendee is not entitled in his suit for possession to claim part performance—Transfer of Property Act, S. 54.**

In a suit for declaration of title and possession, a vendee, who first relies on a sale-deed, which he has finally failed to get registered under Registration Act, S. 77 and next relies on an agreement of previous date to the sale-deed, plus his present possession, is not entitled to any relief by the application of the doctrine of part performance. There is nothing on the conscience of the vendor who has done all that he was required to do to carry out his part of the transaction. The vendee failed to carry out in failing to get, either through some fault or misfortune of his own, the sale-deed registered. Under these circumstances the vendee is not entitled to be put in the same position as if the sale-deed never existed and to insist on the doctrine of part performance. The vendee has no equities, nor has he an equitable title. (*Case Law discussed*). [P 90 C 1]

*** (b) Transfer of Property Act, S. 54—Contract for sale of immovable property creates fiduciary relationship between vendor and vendee—This relationship ends when registered instrument comes into existence or when vendee does something to absolve vendor from his promise—Trusts Act S. 91.**

A contract for the sale of immovable property creates no interest in the property, it creates a right in personam and establishes a fiduciary relationship. Such a relationship of trustee and cestui que trust endures only so long as some obligation remains undischarged by the trustee. A trust is extinguished when its purpose is completely fulfilled or when the fulfilment of its purpose becomes impossible. Accordingly the relationship created by a contract for sale of immovable property ends when a registered instrument comes into existence. It also ends as soon as the vendee does something, or something occurs, to absolve the vendor from his promise. [P 94 C 1]

In a suit for possession and declaration of title, the vendee put forward as genuine a sale-deed in respect of the suit lands. It was shown that the vendor had acquitted himself of his duty to execute a sale-deed, and the only duty remaining was to collaborate in its registration. But in a previous suit between the same parties instituted under Registration Act, S. 77, it had already been found that registration could not be effected on account of an allegation of vendee's forgery, in regard to the sale-deed.

Held: that the effect of that decision was clearly to declare that the vendor was under no obligation to assent to registration, and since no other obligation remained, the fiduciary relationship ceased and with the termination of that relationship disappeared the equitable right of the vendee to retain possession. He became a mere trespasser. (*Case law discussed.*) [P 94 C 1]

Ch. Raghava Rao and *N. Rama Rao*—for Appellants.

P. Satyanarayana Rao—for Respondents.

Odgers, J.—Appeal No. 281 of 1925 is by the defendant. The suit corresponding was O. S. No. 29 of 1924 and asked for possession of A and B schedule lands and for a declaration that the plaintiffs are entitled to lands in Schs. A, A-1 and B. The defendant was in possession of A and B scheduled properties and the suit was decreed. Appeal 196 of 1926 is by the plaintiff (defendant in O. S. No. 29 of 1924) corresponding to Suit No. 61 of 1924 which was for recovery of A-1 schedule properties of which possession had been awarded to plaintiffs (in O. S. No. 29 of 1924) by an order under S. 145 Criminal P. C. This was dismissed.

C. R. P. 626 of 1925 corresponds to O. S. No. 1 of 1925 which was a suit under S. 9, Specific Relief Act, for possession of A and B schedule properties. The plaintiff was defendant in O. S. No. 29 of 1924, and the suit was dismissed. Hence the defendant in O. S. No. 29 of 1924 is the appellant in both the appeals and the petitioners in the C. R. P. before us.

Appeal No. 281 of 1925 (O. S. No. 29 of 1924) had been argued as the main appeal. In the plaint the plaintiff alleged trespass by the defendant on A schedule lands in April 1916. Prior to that date plaintiffs had been in possession of all lands in Schs. A, A-1 and B. In 1918 defendant 1 forged a sale-deed which purported to convey all lands in Schs. A, A-1 and B to himself. There were registration proceedings in connexion with this document (which will have to be referred to in detail later on) and while these were pending the defendant had had possession awarded to him on B schedule lands by an order under S. 145, Criminal P. C. There was a similar

order with regard to A schedule lands. In the written statement defendant 1 alleges that the plaintiffs agreed to sell A and A-1 schedule lands for Rs. 21,000 and on 24th April 1916 put defendant 1 in possession of same, that money was required to pay plaintiff's creditors and when it was found that the debts exceeded Rs. 21,000 there was a fresh agreement whereby the lands in A, A-1 and B schedules were sold to defendant 1 and B schedule lands were delivered over to him. It should here be noted that the agreement to sell A and A-1 schedule lands is in writing (Ex. 1) and is dated 24th April 1916. Defendant 1 sets up an oral agreement to sell B schedule lands, whereas the plaintiff alleges that what was agreed to as regards B schedule was only to mortgage them for Rs. 8,000. In any case, the result seems to have been that defendant 1, got into possession of B schedule lands also during the registration proceedings. These proceedings arose from the presentation of the document, Ex. A-2 for registration which was refused by the District Registrar. Defendant 1, appellant then brought a suit O. S. No. 17 of 1920 for its compulsory registration under S. 77, Registration Act, which was decreed. On appeal to the High Court a division Bench differed, Phillips, J. holding the suit should be decreed and Devadoss, J. that it should be dismissed. The Letters Patent appeal came before a Bench of three Judges and is reported in *Guravayya* v. *Venkataratnam* (1). The allegation was that a valid sale-deed for A and A-1 schedule properties had been incorporated with the mortgage of B schedule properties, the signature and attestations preserved and part of the rest treated as a palimpsest, i. e., the original writing obliterated and a fresh writing superimposed thereon. The character of the alterations and the appearance of the document were commented on by the learned Chief Justice in the report. The Letters Patent Bench decided that all that the Registrar had to do was to look at the form and not the substance of the document and that in a suit under S. 77, Registration Act, the same considerations should guide the Court which guide the Registrar. The Chief Justice further says that the inference that the alterations in Ex. A-2 were made after the execution of the document in its original state by the defendants "is almost irresistible." I interpolate this expression of opinion by the learned Chief Justice here because it may have a bearing on the question hereafter to be considered though it is no part of my duty in this case to enquire whether defendant 1 had in fact forged Ex. A-2. To return to the written statement of the defendant in O. S. No. 29 of 1924, it was filed on 4th October 1921 after it is said, the decree in the District Court in O. S. No. 17 of of 1920 in favour of the defendant. There is no doubt that in the written statement defendant 1 takes his stand on the sale deed.

After the decision in the Letters Patent Appeal which was given on 10th April 1924, defendant 1 filed an additional written statement on 28th October 1924 in which he contended that the plaintiffs had put him in possession of the suit lands in pursuance of the "agreements recited in para. 3 of the written statement previously filed" referring to the agreement as to A and A-1 schedules and the "fresh agreement" whereby B was also sold. He pleaded that by virtue of this possession the plaintiffs are not entitled to claim it from him. In their reply the plaintiffs deny the "fresh agreement" i. e., to sell B lands and delivery of possession to plaintiffs in pursuance of it. They set out the agreement to mortgage B schedule lands to defendant 1 for Rs. 8,000 and assert that on 17th October 1918 two separate documents were executed by plaintiffs in favour of defendant 1: (a) sale-deed for Rs. 26,600 in pursuance of agreement (Ex. 1) and (b) a simple mortgage bond for Rs. 8,000.

Issues were framed and the parties went to trial. The learned Subordinate Judge has so far only decided as a preliminary issue, issue 2 of the amended issues raised, viz., whether defendant 1 can invoke the doctrine of part performance in answer to plaintiff's claim for possession of the suit lands, to any and what extent. He held that it was unnecessary to decide if defendant 1 took possession as he took his stand on the sale-deed (A-2), that there was merger of the contract or contracts to sell in the sale-deed, to which the rules in the Transfer of Property Act must apply, and

(1) A.I.R. 1924 Mad. 810=47 Mad. 833 (F.B.).

that defendant I could not fall back on the contracts which had thus become merged in the sale. He also held that a Court in equity would not and should not afford its assistance to one in defendant's position and decreed the suit.

There has been a very long argument before us on the law and the position requires careful examination. The appellant contends that his possession together with the agreement Ex. I gives him an equitable title which he can rely on not only in defence but also in attack (as he is plaintiff in O.S. 61 of 1924). If he has thus an equitable title, is it liable to be defeated by his failure to get Ex. A-2 registered? Can any relief be given to a party who may not have a right to specific performance?

The doctrine of part performance does not permit a party to plead the Statute of Fraud in certain cases after a part performance by the other party to an agreement. The reason is that where one party has stood by and allowed the other to perform his part of the contract, it would be fraudulent to allow him to plead the statute. In England at any rate it is clear that the doctrine is confined to contracts falling with the jurisdiction to decree specific performance and so has no application to contracts of service for more than one year or to contracts of guarantee. Further, acts of part-performance can only be relied upon if they are such as to be referable to no other title than such a contract as is alleged and such acts must further be of such a nature and done in such circumstances as to render it a fraud by the other party to refuse performance of the contract; hence the other party must have been aware that they were being done on the faith of the existence of a contract. The doctrine has only lately been judicially recognized in this Court. It was held by the Full Bench in *Veerareddi* v. *Bapireddi* (2), that in the face of the provisions of S 54, T. P. Act, which were imperative there was no room for importing the provisions of English Equity. In *Ramanathan* v. *Ranganthan* (3), a Letters Patent appeal, an unregistered deed of exchange was in question. Possession was taken under it and defendant began to expend money on his plot and completed a building on it. Plaintiff then brought a suit to recover possession. The majority held he was entitled to do so owing to the absence of a registered deed of exchange. Wallis, C. J., held the plaintiff estopped by his acquiescence. Seshagiri Ayyar, J., differed on the ground that when the law says that title can be acquired only in a particular way, there is no room for the application of the doctrine of estoppel. On the Letters Patent Appeal, Abdur Rahim, J., agreed with the Chief Justice, while Sadasiva Ayyar and Napier, JJ., agreed with Seshagiri Ayyar J. Napier, J., held that a defence based on acquiescence could not prevail and as to the doctrine of part performance, the contract was executed and that accordingly a total performance of an executed contract was alleged to operate to create legal rights in violation of a statute and that there was no room for the application of the English doctrine of part performance in this country.

The matter has, however, been decided as for as we as a Bench are concerned by a Full Bench ruling in *Vizagapatam Sugar Development Co.* v. *Muthurama Reddy* (4). The only judgment delivered (that of Schwabe, C. J.) is very short and if one may say so with respect, not explicit as to the limits of the doctrine. It is clear, however, that he founds his opinion on the 'trend of opinion' of the Privy Council in *Venkayamma Rao* v. *Appa Rao* (5) and *Mahamed Musa* v. *Aghore Kumar Ganguli* (6) and on the fact that all the other High Courts in India have taken an opposite view to that hitherto taken in Madras. The Full Bench overruled *Ramanathan* v. *Ranganathan* (3) and *Veera Reddy* v. *Bapi Reddi* (2). The learned Chief Justice points out that the Transfer of Property Act recognises unregistered contracts for the sale of land but that they create no interest in the land itself, but leave their contractual effect as between the parties unimpaired. Further the Division Bench on receipt of the Full Bench opinion decided that the application of the doctrine of part performance in this

(2) [1906] 29 Mad. 336=16 M.L.J. 395 (F.B.).
(3) [1917] 40 Mad. 1134=33 M. L. J. 252=6 M. L. W, 300=43 I. C. 138=(1917) M.W. N. 757.
(4) A. I. R, 1924 Mad. 271=46 Mad. 919 (F.B.).
(5) A. I. R. 1916 P. C. 9=39 Mad. 509=43 I. A. 138 (P.C.).
(6) A. I. R. 1924 P. C. 27=42 Cal. 801=42 I. A. 1 (P.C.).

country is not limited to cases where the right of specific performance is not barred. Under these circumstances, it is obviously useless to canvass the decision of the Full Bench or examine the judgments in *Ramanathan* v. *Ranganathan* (3) and *Veera Reddi* v. *Bapireddi* (2), to show that the law ought to be applied as there laid down—the Full Bench has decided they are wrong. We are therefore left with these facts—some of them assumed or admitted—since no evidence except certain documents has so far been taken. The plaintiff made an agreement (Ex. 1) for sale of A, A-1 schedule lands; and tendered a sale deed duly executed to defendant to whom they delivered possession. According to the plaintiffs they further tendered him a simple mortgage deed. These two now appear compounded as A-2. The defendant says that the mortgage was a sale and that a fresh agreement was entered into whereby all the mortgage properties A and A-1 and B were sold to him. He first relies on the sale deed A-2 which he has finally failed to get registered; he next relies on the agreement (Ex. 1) possibly coupled with an alleged oral agreement to sell B schedule lands, plus his possession. Is he entitled under these circumstances to rely on the doctrine of part performance? Has he been defrauded?

The two learned Judges who heard the appeal in O. S. 17 of 1920 in the first instance were divided as to the amount of purchase money paid; the respondent here says only Rs. 2,000 was paid. The Subordinate Judge has not decided the matter but has referred defendant to a separate suit after delivery to plaintiff of the property has taken place. We are therefore not in a position to say that the defendant has paid the whole consideration to plaintiff who according to him is now trying dishonestly to recover what he had practically already sold. Further, the English doctrine clearly excludes payment of consideration as one of the grounds for its application cf. per Lord Cotton, J. in *Britain* v. *Rosister* (7) and no Indian authority has been shown to us to the contrary. A number of cases have been cited to us—not all of them relevant after the Full Bench ruling. But some must be shortly referred to. In the leading case of *Maddison* v. *Alderson* (8) Lord Selbourne said at p. 475:

"In a suit founded on such part performance the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."

It seems to be the fact that the foundation of the doctrine is there regarded as a contract not completed by conveyance. So in *Rawlinson* v. *Ames* (9), Romer, J., quoting the passage from *Maddison* v. *Alderson* (8), set out above and Fry on Specific Performance, 6th Edn., p. 276, holds that the acts of part performance on the part of the plaintiff in altering her flat were solely referable to a contract of letting and also that they were such that it would be a fraud in the defendant to take advantage of the contract not being in writing, after the plaintiff had altered her position for the worse. It is very difficult to see how the appellant here has altered his position for the worse (apart from the question of payment of consideration) or has been defrauded. His attempt to get the sale-deed tendered to him by the other side registered has finally failed. Can he be heard to say under the circumstances that he has a right to invoke the doctrine of part performance? Mr. Ch. Raghava Rao, his advocate, contends that he is entitled to wholly disregard the registration proceedings and to treat them as

(7) [1879] 11 Q. B. D. 123=48 L. J. Ex. 362=27 W. R. 482=40 L. T. 240.

(8) [1883] 8 A. C. 467=52 L. J. Q. B. 737=47 J. P. 821=31 W. R. 820=49 L. T. 303.

(9) [1925] Ch. 96.

if they had never taken place and to say that by having taken possession under the agreement the appellant has acquired not only equitable rights but a good equitable title to the property only inferior to a full title of ownership under the Transfer of Property Act, and this equitable title has been recognized in India and various cases are quoted to substantiate this proposition. I confess I had always understood that one of the main objects of the Indian Law was to abolish as far as possible the distinction which prevails in English Law between legal and equitable ownership, cf., the Privy Council in *Webb* v. *Macpherson* (10 & 11), where they say:

"The law of India speaking broadly knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England."

It is perfectly true that in the Transfer of Property Act there are imbedded certain equitable doctrines and principle, and in fact a Full Bench of this Court in *Vizagapatam Sugar Co.* v. *Muthurama Reddi* (4), bases its decision partly on the fact that contracts for the sale of land are recognized by the Transfer of Property Act. Reference may also be made to the doctrines of priority, marshalling and contribution, and to the Specific Relief Act where the equitable rules speaking generally as to specific performance are codified so far as they are to be applied in this country. It is contended that S. 3, Ill. (g), illustrations to S. 13 and S. 27 (b), are examples of equitable titles recognized by the Spefic Relief Act, which was enacted in 1877. In the Trusts Act we have S. 91 corresponding to Ills. (g) and (h), S. 3, Specific Relief Act. In the Transfer of Property Act, we have S. 40, rights available against the transferrer previous to the transfer; S. 55 (4) (a) which enacts that the seller takes rents and profits till ownership passes to the buyer, i. e., under S. 54; S. 55 (1) (e) the seller is bound to take care of the property till delivery to the buyer; S. 55 (5) (a) where ownership has passed, the buyer bears the loss. There are many differences between the rights and duties of the buyer and seller after the contract for sale has been entered into in the Indian and English Law. cf., Dart on Vendors and Purchasers (12). But under the Indian Law it is observed that the buyer takes no risk till the ownership has passed and is entitled to no rents till the ownership has passed. He is not liable for charges etc., on the property until the ownership has passed. The following group of cases were quoted on one side or the other in connexion with this contention as to equitable title. *Karalia Nanubhai* v. *Mansukhram* (13) in which before the case was decided in the Court of first instance the title had been perfected by conveyance and was clearly a case under S. 91, Trusts Act, coupled with Ss. 40 and 55 (6) (b), T. P. Act. Furthermore the case is explained in *Lalchand* v. *Lakshman* (14) as not going the length of saying that a registered deed of conveyance is not necessary to pass ownership to the vendee and in this case *Lalchand* v. *Lakshman* (14) the Court held there was no equity in the defendant's favour, for he could have got the deed registered, the plaintiff having executed it.

The learned Judges then go on to decide that part performance cannot be admitted in face of the provisions of the Transfer of Property Act and as to this part of the case its authority is no doubt no longer law. *Salamatuzzamin* v. *Masha Allah Khan* (15), a case of exchange with no deed but long possession; the Court held that the transaction was binding relying on the Privy Council decision in *Mahomed Musa* v. *Aghore Kumar* (6). The Court felt no doubt it would be inequitable or perhaps fraudulent to disturb the transaction which was a very longstanding one. Everything had been done in that case as regards the property in suit and the shop, which it was agreed to exchange for it, as though the exchange had been formally carried out. The exchange ought to have been effected by a registered instrument. One of the learned Judges Piggott, J., held that the Privy Council decision *Mahomed Musa* v. *Aghore Kumar* (6) could not be applied to the facts of that case but that the parties were bound by their contract so far as it was carried into effect and by the equities arising from their own acts.

(10-11) [1904] 31 Cal. 57=30 I. A. 238=8 Sar. 554 (P.C.).

(12) 7th Edition Chap. 7 P. 287.
(13) [1900] 24 Bom. 400=2 Bom. L. R. 220.
(14) [1904] 28 Bom. 466=6 Bom. L. R. 510.
(15) [1918] 40 All. 187=43 I. C. 645=16 A. L. J. 98.

In *Desai Bhai Jorabhai* v. *Ishwar Jeshing* (16) it was held that a registered title could not prevail over a prior oral sale after payment of price and delivery of possession with notice to the subsequent buyer. No law is cited in the judgment. In my opinion it is a case which can be explained by the application of S. 91, Trusts Act and S. 40, T. P. Act. *Syamkisore* v. *Umesh Chandra* (17) was a case of fraud as the transferee was said to have been "lulled into security" by the transaction that had taken place.

Under these circumstances I find it very difficult to hold that a party in the position of appellant can give the complete go by to the existence of the document A-2 and is entitled to rely as an innocent and practically defrauded party on his possession under the agreement Ex. 1. It is not contended that he falls within any of the sections or illustrations of the Specific Relief Act, Trusts Act or Transfer of Property Act to which reference has been made.

Though I assume that the doctrine is incorporated from the English law and must be taken subject to its conditions and limitations as they are applied, the only reference to such limitations that I can find in the cases that have been cited to us is in *Deb Mal Jha* v. *Baldev Jha* (18), a case from the High Court of Patna where the learned Judges say that the essential conditions are: (1) final engagement and (2) actings unequivocally referable to the agreement. The other two limitations already quoted supra from Fry on Specific Performance are not referred to by the learned Judges; but I assume that they exist or that at least there must be some unjustifiable conduct in seeking to upset a transaction where the other party has on faith of the agreement altered his position for the worse. It seems to me that in this case the respondent has done all that he could be required to do. There is no standing by until the appellant altered his position for the worse and then seeking to take advantage of the Statute of Frauds or the Registration Act to upset the transaction. It may also be observed that there is no question here of a fresh document when the respondent has done everything in his power to convey the legal ownership to the appellant. *Venkataswami* v. *Krishtayya* (19) is a case where the plaintiff had a complete remedy under the Registration Act and not having chosen to follow it had "only himself to blame" that the efficacy of the document has not been completed by registration. The Court held he was not entitled to a decree for compulsory registration. This was followed in *Thayarammal* v. *Lakshmi Ammal* (20), where Oldfield, J., said:

"It is true that Courts of Equity would assist a plaintiff to effectuate an incomplete title if the default is due to act of God or conduct amounting to fraud on the part of the executant. But here no default is attributable to defendant 1. On the other hand, it is the default of the plaintiff in not paying the consideration that led to the document remaining unregistered."

They further held that an unregistered deed cannot be treated as an agreement to sell: cf., *Subbaraya Pillai* v. *Devasahayam Pillai* (21): see also the remarks of V. V. Srinivasa Aiyangar, J., in *Kuppuswamy Goundan* v. *Chinnaswnmi Goundan* (22) at pp. 231 and 239 (of 28 *M. L. W.*). In this connexion I may also cite the remarks of Coutts Trotter, C. J., in *Satyanarayana* v. *C. Venkata Rao* (23) at p. 314 (of 49 *Mad.*):

"And it must be remembered that although in this country the remedy of specific performance is a statutory remedy, it nevertheless is simply a crystallization into statutory form of an equitable remedy to which laches was, as it is to all equitable claims, an answer. How can it be said that a man who is given an express statutory remedy by an Act of legislature under S. 77, Registration Act, and has failed to take advantage of it, has not been guilty of laches and is entirely free from blame, passes my comprehension."

Mr. Raghava Rao attempted to strengthen his case by contending that there was a fiduciary relationship between the respondent and his clients as to the sale of this land. For our purpose it comes very near to the requisites for the application of the doctrine of part performance. As so often stated the latter

(16) [1920] 44 Bom. 586=57 I. C. 447=22 Bom. L. R. 764.
(17) [1920] 31 C. L. J. 75=55 I. C. 154=24 C. W. N. 463.
(18) [1920] 1 P. L. T. 354=56 I. C. 277=2 U. P. L. R. 100.
(19) [1893] 16 Mad. 341=3 M. L. J. 169.
(20) [1920] 43 Mad. 822=39 M. L. J. 181=12 M. L. W. 161=59 I. C. 417=(1920) M. W. N. 457.
(21) [1922] M. W. N. 70.
(22) A. I. R. 1928 Mad. 546.
(23) A. I. R. 1926 Mad. 530=49 Mad. 302.

doctrine is applied because there is some unfairness or fraud on the part of the party who insists on the voidability of the contract. Equity will not allow him to take advantage of the statute under certain circumstances. It acts in fact in personam as it always does and on the conscience of the party affected. So also in fiduciary relationships there is the same unfairness or unconscientious dealing which equity will take hold of and will correct. The Full Bench case in *Bapu Apaji* v. *Kashinatha Sadoba* (24), was cited which sums up the equitable doctrines to be found in the Indian statutes and which I have set out at some length already. In that case Scott, C. J., said :

"Once it is recognized that the plaintiff is violating his fiduciary obligation, it is clear that the Court cannot grant him the relief which he seeks, for it will not aid him in committing a breach of trust and his suit must fail."

Venkatesh Damodar v. *Mallappa Bhimappa* (25) decided that even if the remedy of specific performance was no longer open to the defendants the Court would in a proper case come to their assistance. A case in the Privy Council on appeal from the *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.* (26) ob- obviously contained an element of fraud and the equitable doctrine applied by the Court was in fact enacted in one of the Colonial Statutes.

To sum up it appears to me that a person in the position of the appellant is not entitled to any relief by the application of the doctrine of part performance. There is nothing on the conscience of the respondent who has done all that he was required to do to carry out his part of the transaction. The appellant has failed to carry out in failing to get, either through some fault or misfortune of his own, the document A-2 registered. Under these circumstances he is not entitled to claim to be put in the same position as if A-2 had never existed and to insist on the application of the doctrine of part performance in his favour. I am equally clear that he has no equities, nor has he an equitable title such as is recognized by any of the Indian Statutes or Case law. He obviously cannot sue for specific performance and it is impossible on the authority and on the assumption that the respondent is outside what I may call the statutory equities already referred to, to hold that he has an equitable title only less than full ownership to this property. The same remarks apply to his contention that the respondent is a bare trustee for him. The learned Subordinate Judge found that there had been merger i. e., that this agreement Ex. I had merged in the sale deed. The cases quoted above in *Venkataswami* v. *Krishtayya* (19) and *Thayarammal* v. *Lakshmi Ammal* (20), seem to support this and the latter case is authority for saying that an agreement for sale cannot be spelt out of the unregistered sale deed. Here of course we have an actual agreement to sell. Ex. I. How its force can be revived when it has become transformed into a regular conveyance I fail to see.

For these reasons I have come to the conclusion that the Subordinate Judge was right in his conclusion and it must be upheld. It is unnecessary for me to approve all the reasons given by him for his opinion. The two appeals must be dismissed with costs. The Civil Revision Petition will be dismissed without costs.

Curgenven, J.—These are respectively two appeals and one Civil Revision Petition arising out of three suits tried together by the Additional Subordinate Judge of Kistna at Masulipatam and relating to properties described as the A, A-1 and B schedule properties. The appellant in the appeals and petitioner in the revision petition is one Cherukuri Venkataratnam, whom I will refer to throughout as the appellant. Respondent 1 in the three proceedings is one Bolla Guravayya.

In March 1916, respondent 1, according to his version of the facts, wished to buy certain lands in Kottapalle village, and to obtain funds agreed to sell to the appellant the A and A-1 schedule lands for a sum of Rs. 21,000. The agreement which he executed on 24th April 1906 is Ex. I, and he confesses to having received a sum of Rs. 2,000 but no more, as advance payment. Thereafter nothing was done until 1918, when, after a remeasurement, the price of the lands was settled at Rs. 26,600 and odd. Respondent 1 wanted an additional sum of

(24) [1917] 41 Bom. 438=39 I. C. 103=19 Bom. L. R. 100 (F.B.).
(25) A. I. R. 1922 Bom. 9=46 Bom. 722.
(26) [1913] A. C. 491=82 L. J. P. C. 89=308 L. T. 467.

Rs. 8,000 as he had some debts to pay, and it was agreed that the appellant should furnish this amount upon a mortgage to him of some other property of respondent 1's, the B schedule lands. Accordingly on 7th April 1918 respondent 1 executed two documents: (1) a sale deed of lands A, A-1 and (2) a simple mortgage deed in respect of land B. After execution, these documents were handed over to the appellant. According to respondent 1, the appellant made use of these two deeds, by combining them and erasing some of the script and substituting other writing, to forge a sale-deed (Ex. A 2) for all the three properties.

This impugned document is dated 10th June 1918, and is for a sum of Rs. 30,000 it being recited that the whole amount had been paid. Upon being asked to cooperate in the registration of this document, respondent 1 denounced it as a forgery. When the appellant presented it for compulsory registration, the Sub-Registrar refused to register it, and an appeal to the District Registrar of Kistna, who held an inquiry under the Act, was dismissed on 26th February 1920. The appellant then filed a suit (O. S. No. 17 of 1920) in the District Court under S. 77 of the Act for a decree directing the registration of the deed. He obtained such a decree on 29th September 1921, and the document was, in pursuance of it, registered on 15th October. The respondents preferred an appeal (A. S. No. 300 of 1921) to this Court. The learned Judges who heard it differed in opinion. The appeal was accordingly dismissed, but in a Letters Patent appeal, reported as *Guravayya* v. *Venkataratnam* (1) and decided by the Chief Justice and Ramesam and Wallace, JJ., this decision was reversed, and the registration of the document was ordered to be cancelled.

Meanwhile on 18th April 1921, while the suit to compel registration was pending in the District Court, the respondents filed O. S. No. 21 of 1921 in the same Court for a declaration of their title to all the three properties, and for possession of the A and B schedule properties, alleging that upon certain false averments the appellant had obtained possession of them in proceedings under S. 145, Criminal P. C. The plaint did not mention the agreement to sell, Ex. 1, but characterised the appellant's sale deed as a forgery. The latter, in his written statement, which was filed a few days after the District Judge gave him a decree in the registration suit, relied upon this decision as making the genuineness of the sale deed res judicata, and, apart from that, asserted its genuineness. He further pleaded that he had been put in possession of the A, A-1 lands under Ex. I, and of the B lands under the sale deed. Issues upon these pleadings were framed on 4th October 1921, and the suit was subsequently transferred to the file of the Additional Subordinate Judge, being renumbered as O. S. No. 29 of 1924. While it was still pending trial, both the appeal and the Letters Patent appeal were heard in the High Court, with the results already noted. In consequence of the different situation created by the decision in the Letters Patent appeal, the appellant applied for and obtained permission to file an additional written statement. This, dated 28th October 1924, contended that, apart from any question relating to the sale deed, the respondents had put the appellants in possession of the suit lands in pursuance of agreements to sell, and that that circumstance together with payment in full of the purchase moneys, gave him a valid defence against the claims for a declaration and to recover possession.

Of the other two suits now before us, O. S. No. 61 of 1924 was filed by the appellant to recover possession of the A-1 schedule land, while O. S. No. 1 of 1925, by the same plaintiff, was under S. 9, Specific Relief Act, for the possession of the A and B schedule properties. The averments in these suits were similar in character to those in the respondent's suit.

The learned Additional Sub-Judge has decided the three suits in the respondents' favour, decreeing O. S. No. 29 of 1924 and dismissing the other two. His view is that the decision in the Letters Patent appeal is binding upon the appellant, and that it amounts to a finding that he fabricated the sale deed; and that in such circumstances it is not open to him to fall back upon the agreements coupled with possession under them as an equitable defence against the respondent's legal title. As I read the judgment, the learned Additional Subordinate Judge has sought to apply two separate

principles, the one that the appellant, not having come with clean hands, is not entitled to the equitable relief prayed for, the other that since upon his own showing matters had gone so far as the execution of a sale deed, his only remedy lay in enforcing the provisions of the Transfer of Property and Registration Acts.

With regard to the former of these two grounds, it is important to note, in the first place, that a Registrar holding an inquiry under S. 74 et seq of the Registration Act, has only to find, with regard to genuineness, "whether the document has been executed." His decision is not in the printed papers furnished to us; but presumably the onus was cast upon the appellant, and it was found that he had not discharged it. The sole issue tried in the suit ran thus:

"Was the document dated 10th June 1918 executed by defendants 1 and 2 for themselves and by defendant 1 as the guardian of minor defendants 3 to 5?"

The District Judge answered this question in the affirmative. Phillips, J., agreed in so answering it. Devadoss, J., considered that the document had not been proved to have been executed by the defendants. The learned Judges who decided the Letters Patent appeal certainly went no further than this. The learned Chief Justice, with whom the other two learned Judges concurred, observes indeed that "the document bears the most apparent traces of having been tampered with," and the inference that these alterations were made after the execution of the document in its original state by the defendant is almost irresistible. But he goes on to point out that in a suit under S. 77 the same considerations should guide the Court which should guide the Registrar in considering his duty to register or to refuse registration and that the Registrar:

"has to ask himself merely this: Is this document now tendered to me to be registered actually in the state in which it was executed by the parties to it"?

It need scarcely be added that a finding that the evidence will not support an affirmative answer to this question is not equivalent, as the Additional Subordinate Judge appears to think, to a finding that the document was forged by the appellants. In fact, the only relevance of these proceedings is to show that the appellants made an attempt, which the respondent successfully resisted, to get registered a document which he put forward as a genuine sale deed relating to the suit properties, and that it was found that the document was not registrable. Without further enquiry, therefore, the lower Court was not justified in concluding that the appellant had forged the sale deed.

There remains for consideration whether, leaving open the question of the appellant's conduct in relation to the sale deed, he has an equitable defence against the respondent's claim to recover lands A and B, and an equitable right to be restored to the possession of land A-1. Since the lower Court has decided this question without taking any evidence, we must proceed upon the averments in the written statements and assume that there as a valid agreement to sell land B in the case of lands A and A-1, this is not disputed and that the appellant was permitted to enter in pursuance of the agreements. We may assume too, if necessary, that the purchase money was paid in full.

The application of equitable doctrine to cases where there is an agreement to sell followed by delivery of possession but not by a registered conveyance may be considered from two fairly distinct points of view. These may be termed respectively the doctrines of a fiduciary relationship and of part performance. It has been contended that according to each of these lines of reasoning the appellant is entitled to resist dispossession.

The doctrine of a fiduciary relationship differs from that of part performance in that while the latter has been imported into India direct from English cases in equity, the former may be deduced from various of our statutory provisions, although indeed these are, perhaps necessarily, of an equitable character. There is a very clear exposition of this principle in a Bombay case decided by a Full Bench of five learned Judges *Bapu Apaji* v. *Kashinatha Sadoba* (24) and I cannot do better than outline the course which the reasoning takes there.

According to S. 54, T. P. Act, sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised, and such a transfer in the case of immovable property of the value of one hundred rupee and upwards can

be made only by a registered instrument ; a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. These provisions do not, however, exhaust the relations which flow from a contract for sale of immovable property according to Indian Statute Law. Though an agreement to sell creates no interest in the land it imposes an obligation upon the legal owner ; and it is this obligation which gives rise to such equitable rights as the other party may possess. As against a transferee with notice, or a gratuitous transferee, from the legal owner these rights are declared in three separate enactments : in S. 40, T. P. Act, in S. 91, Trusts Act, and in illustration (g) to S. 2, Specific Relief Act, under the definition of "trustee". The last named runs thus.

A buys certain land with notice that *B* has already contracted to buy it. *A* is a trustee, within the meaning of this Act, for *B*, of the land so bought.

This is in different terms the same proposition as is contained in S. 91, Trusts Act, that the transferee with notice must hold the property for the benefit of the person who has contracted to buy it, to the extent necessary to give effect to the contract. And S. 95 of the same Act lays down that a person so holding property :

" must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it."

Now it is clear that whatever rights may be enforceable against a transferee with notice, as a trustee, must be enforceable against his vendor, so that we reach the conclusion that a person who has contracted to sell immovable property is a trustee of his promisee.

" Where, then a vendor who has contracted to sell immovable property and has under the contract put the prospective vendee in possession, sues the latter in ejectment, he repudiates, if the vendee is willing to complete the purchase, the fiduciary obligation arising out of the contract, and annexed to the ownership of the property, and seeks to treat the vendee as a trespasser. Once it is recognized that the plaintiff is violating his fiduciary obligation, it is clear that the Court cannot grant him the relief which he seeks, for it will not aid him in committing a breach of trust and his suit must fail ; the defendant is no trespasser, but is in possession under the contract which the plaintiff has bound himself to carry out *Bapu Apaji* v. *Kashinatha Sadoba* (24)."

This doctrine, so stated, would appear to be unassailable ; and it has received recognition by the Judicial Committee in the case *Loke Vew* v. *Port Swettenham Rubber Co. Ltd.* (26) arising from the Federated Malay States, where the law applicable is in effect the same as here. A different view has been at times taken both by this Court and elsewhere. The Full Bench in *Veera Reddi* v. *Bapu Reddi* (2) held that an equitable defence of this nature offended against the provisions of S. 54, T. P. Act. Sir Arnold White, C. J., thought that it infringed "the strict letter of the law", and Subramania Ayyar, J., considered that

" to hold otherwise would be to ascribe to the contract the very effect (that it should create an interest in the property) denied to it by the statute in the most explicit terms."

So too in *Lalchand* v. *Lakshman* (14) it was held that the circumstance that the Transfer of Property Act says that no title of ownership can be created to immovable property of value Rs. 100 and upwards otherwise than by a registered conveyance :

" excludes all considerations of equity based on part or whole performance, and makes the law laid down in the Act applicable whether the vendee is suing or is sued.".

The alternative view is that the "strict letter" of S. 54 does not exclude such considerations. "Sale" is defined as a "transfer of ownership, "and "such transfer" can be made only by a registered instrument. Only therefore if recognition of these equitable rights entailed the conclusion that a transfer of ownership had taken place could it be said, in strictness, that this provision would be thereby violated? But it is not so. Ex hypothesi the " trustee, " whether he be the party to the contract to sell or a transferee with notice, remains legal owner of the property. There has been no " transfer of ownership, "—if there had been such a transfer, not even a subsequent transferee without notice would be protected. It is clear that the party in possession has no legal title, only the rights of a cestui que trust. These rights, I conceive, are not negatived by the further provision in S. 54 that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. It is true that in this respect Indian law differs from English.

law, and that under English law it may not be necessary to have recourse to such doctrines as those of a fiduciary relationship or of part performance. But although a contract of sale with us creates no interest in the property, it creates a right in personam, and it is as correlative to this right that the obligation arises not to go back upon the agreement so long as the other party is willing to complete.

This latter qualification raises the question of the limits of the theory of a fiduciary relationship. Such a relationship of trustee and cestui que trust, it is apparent, can endure only so long as some obligation remains undischarged by the trustee. A trust is extinguished when its purpose is completely fulfilled or when the fulfilment of its purpose becomes impossible: cf. S. 77, Trusts Act. Accordingly the relationship ends when a registered instrument comes into existence. It also ends as soon as the promisee does something, or something occurs, to absolve the promisor from his promise. To turn now to the facts of the present case, the appellant has put forward as genuine a sale deed in respect of all three properties. According to his own showing, therefore, respondent 1 has acquitted himself of his duty to execute a sale deed, and the only duty remaining would be to collaborate in its registration. But in a suit between the parties it has already been found that registration cannot be effected, and it is not contended that that finding will not be res judicata between the parties. The effect of that decision was clearly to declare that respondent 1 was under no obligation to assent to registration, and since no other obligation remains the fiduciary relationship ceases and with the termination of that relationship disappears the equitable right of the appellant to retain possession. He has become a mere trespasser.

We come then to the alternative defence put forward, based upon the equitable doctrine of part performance. The question whether, in view of the terms of S. 54, T. P. Act, there is room in this country for the doctrine of part performance, has given rise to much difference of judicial opinion, especially in this Court. I need only refer again to the Full Bench case *Veerareddi* v. *Bapureddi* (2) which has been regarded as a decision upon this subject, and in which it was held, as already noted, that the provisions of the statute are imperative and cannot be disregarded on equitable grounds, and to the Letters Patent appeal, *Ramanathan* v. *Ranganathan*(3) where of a Bench of three learned Judges two refused to recognize the principle, while the third was prepared to act upon equities arising out of the parties' conduct. Both these cases came under the consideration of a Full Bench in *Vizagapatam Sugar Co.* v. *Muthurama Reddi* (4), upon a question referred in the following terms:

"Do the provisions of the Transfer of Property Act or of the Registration Act preclude the application of the doctrine of part performance laid down by the Privy Council in *Mahomed Musa* v. *Aghore Kumar* (6) and *Venkayamma Rao* v. *Appa Rao* (5)?"

An answer was returned in the negative, the learned Judges intimating that this opinion was fortified by two considerations, the one that the two rulings of the Privy Council mentioned in the reference indicated the trend of their Lordships' opinion, the other that every other Court in India had taken the opposite view to that adopted in the two Madras cases cited above, which were accordingly held to have been wrongly decided. It will be observed that the question put, and the answer given, were in perfectly general terms.

Basing ourselves therefore upon the terms of this decision, the point that arises is whether in the particular circumstances of this case the plea of part performance should be allowed to prevail. We have heard an instructive argument as to the nature of the doctrine, and the limits within which it should be applied, considered both in England in its relation to the Statute of Frauds and in India in its relation to the Transfer of Property and Registration Acts. The law in England is thus stated in Fry on Specific Performance, 6th Edn., p. 276:

"In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; thirdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and fourthly, there must be proper parol evidence of the contract which is let in by the acts of part performance."

(It will be convenient to take this statement as a basis in considering the conditions in which the doctrine should be applied in this country.)

The first condition appears to me not to arise under our statutes. Under S. 4, Statute of Frauds, no action may be brought on any contract for the sale of lands unless the agreement upon which the action is brought is in writing. The cases in which equitable considerations have permitted a departure from this rule have been cases of parol agreements to convey followed by possession; and no such departure has been allowed unless the possession has been unequivocally referable to the contract. The reason for this rule is explained in the judgment of Lord Selbourne, L. C. in *Maddison* v. *Alderson* (8). The Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced. The object is to prevent fraud by requiring that an agreement to be enforceable, should be written and signed:

"Courts of equity will not permit the Statute to be made an instrument of fraud."

Accordingly they will not furnish an opportunity for fraud by admitting evidence of the alleged connexion between an equivocal act and an antecedent contract. "As to the acts done in performance," says Lord Hardwicke, quoted by Lord Selborne:

"they must be such as could be done with no other view or design than to perform the agreement."

The acts, in fact, must presuppose a contract of the kind set up, and no other. It is probably upon this ground that the payment of purchase money, in itself an equivocal act, is not enough to constitute part performance of the contract. In India, however, it is not necessary that an agreement to sell, to be enforceable, should be in writing, and I draw the inference that no such reason therefore would exist for excluding evidence where it was doubtful to which of two alleged contracts possession should be referred. And upon the same considerations I conclude that the fourth condition named in Fry is not in terms applicable, although it is of course necessary to prove the agreement under which part performance has taken place.

Of the remaining two conditions 2 and 3, I would deal with latter first. It should be noted that it stipulates that the contract must be such as "in its own nature is enforceable by the Court." This is not the same thing as to say that the defendant must possess a subsisting right to sue for specific performance. It refers rather to the nature of the contract. Both in England and in India it has been held that the doctrine is confined to transfers of immovable property, though in England, Kay, J., in *McManus* v. *Cooke* (27) was inclined to go a little further and to hold that it applied

"to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing."

It is of course necessary that the contract should be one which the promisor is capable of executing—where, for instance, as in *Gajendranath Dey* v. *Ashraf Hossein* (28) a mutwalli who could only grant a lease for a term not exceeding five years granted one for ten years with a covenant to renew, it was held that specific performance could not be decreed, and it would equally follow, I think, that the defence of part performance could not be successfully set up. It has been further urged before us that the right to enforce specific performance must be actually subsisting, but it seems impossible on general principles to maintain that when the bar of limitation arises any such change takes place in the equitable relationship between the parties as would bar the defence. The point arose in *Venkatesh Damodhar* v. *Mallappa Bhimappa* (25) and was decided in favour of the defendant upon the principles adopted in the Full Bench case *Bapu Appaji* v *Kashinatha Sadoba* (24). Reference may also be made to *Laxman* v. *Raoji* (29) and *Meher Ali Khan* v. *Aratunnissa Bibi* (30) and it may further be noted, although the point is not discussed, that the facts of the Privy Council case *Mahomed Musa* v. *Aghore Kumar* (6) were such that the remedy of enforcing specific performance must long have been barred. Indeed may it not be said that the longer the possession has lasted the stronger the equities have become in the defendant's favour.

A more debatable question is whether the defence may be set up after a convey-

(27) [1887] 35 Ch. D. 681—56 L. J. Ch. 662—51 J. P. 708—35 W. R. 754.
(28) A. I. R. 1923 Cal. 130.
(29) A. I. R. 1924 Bom. 150.
(30) [1920] 25 C. W. N. 205.

ance has been executed and where registration has not been effected. Difference of opinion has arisen whether in such circumstances a suit for specific performance would lie. In *Syam Kisor* v. *Dineshchandu* (17) and *Mt. Akli* v. *Mt. Daho* (31) ability so to sue appears to have been found, and adopted as a ground for accepting an equitable defence against dispossession. A contrary view has, however, been taken, as regards the maintainability of a suit for specific performance in such circumstances, in a series of decisions in this Court: *Venkataswami* v. *Krishtayya* (19), *Thayarammal* v. *Lakshmi Ammal* (20) and *Satyanarayana Rao* v. *Venkata Rao* (23). The reasoning followed is that to permit a person who holds an unregistered conveyance to sue for specific performance would be to permit him to evade the provisions of the Registration Act, which supplies him with the special remedy of enforcing registration upon special terms as regards limitation. In the case last cited, the learned Chief Justice has given reasons for his disagreement with decisions to the contrary, which

"take upon themselves by a side wind to get rid of the period of limitation strictly imposed by the express words of the statute."

I would add that the remedy given by the Registration Act is in itself a special mode of enforcing specific performance and that where a special mode is prescribed the general mode is by implication excluded. It does not necessarily follow, however, that even upon this view of the law a defence of part performance may not be maintained by one who holds an unregistered conveyance. There appears to have been no decision upon the point so that I must rely upon analogical reasoning. The objection that, since the defendant might have sued to enforce registration and so complete his title, and that therefore equity will not protect him, seems to me to have little if any greater force than it has where the transaction has not reached the stage of a sale deed, because there too the defendant could have sued for specific performance. If in the latter circumstances omission to sue, and allowing the claim to become barred, do not bar the defence, I am unable to see how in the former circumstances the equities are differently affected. I think accordingly that the mere fact that the appellant here had a sale deed, and even the further fact that he did endeavour to get it registered through the machinery of the Registration Act, do not of themselves destroy such equities as may exist in his favour.

Coming now to the second condition stated in Fry, viz., that

"the acts of part performance must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing,"

we may replace the last words by "to take advantage of the absence of a registered deed of coveyance." to bring the proposition into accordance with our law of transfer. For the leading English case which applies this test we have to go again to the judgment of Lord Selbourne in *Maddison* v. *Alderson* (8). "In a suit founded on such part performance," he observes:

"the defendant is really "charged" (the word taken from S. 4 of the Statute of Frauds) upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow."

This passage, with others from the same judgment, are cited by Romer, J., in *Rawlinson* v. *Ames* (10), which was an action brought for specific performance upon an oral contract to lease a flat in pursuance of which the plaintiff undertook extensive alterations to suit the taste of the proposed lessee. The defendant set up the Statute of Frauds as a defence, and the learned Judge had to consider therefore:

"whether there are here sufficient acts of part performance to take the case out of the statute."

The judgment contains an instructive review of earlier decisions, undertaken for the purpose of ascertaining the principles upon which the doctrine really rests. As to this, it is sufficient to say that the conclusion is reached that the law stands as laid down in Fry; and as to the special facts of the case the learned Judge says:

"It only remains to consider whether the acts of the plaintiff were such as to render it a fraud in the defendant to take advantage of the contract not being in writing. As to this I can feel no doubt. I am satisfied that had the plaintiff laid out the flat in the manner that she herself wished, it would, when constructed have differed materially from what it is at present. As a result of acceding to the requests and suggestions of the defendant she is now

(31) A. I. R. 1928 Pat. 44—7 Pat. 95.

possessed of a flat which is not likely to commend itself to tenants. It would cost her a sum of about Rs. 177 to alter the flat to a condition in which it would be possible for her to let it to other persons. She has, therefore, in carrying out her part of the contract, materially changed her position for the worse."

I do not think that the Indian Courts have applied the doctrine otherwise than in accordance with these principles. In the Privy Council case *Mahomed Musa* v. *Aghore Kumar* (6), already referred to, which may be said to have established the rule in this country, their Lordships quote with approval Lord Selbourne in *Maddison* v. *Alderson* (8), where he dwells upon the injustice which would be brought if the equities were excluded. In most of the cases decided by the High Courts in India, some of them before this Privy Council judgment, the question has been whether the doctrine is applicable at all rather than whether the circumstances justify its application: see for example *Salamatuzzamin* v. *Masha Allah Khan* (15) and *Lalchand* v. *Lakshman* (14). A marked feature of many of these cases is that comparatively rarely is the expression "part performance" used at all, and equity, in its quest for a basis, has wavered between that principle and the principle of a fiduciary relationship.

The truth seems to be, as that circumstance would suggest, that the two principles are really in essence identical. It is a condition of the application of each that the promisee should be ready to complete the contract, that the promisor should resist or neglect its completion, and that some wrong—whether its description as fraud, breach of faith, injustice, or unfairness—is thereby occasioned to the promisor. A necessary condition of this is that a trust should subsist between the parties; and having found that this condition is here absent, the foundation goes for a defence of part performance, equally with a defence based upon a fiduciary relationship.

To save the appellant from the consequences of this conclusion Mr. Raghava Rao has fallen back upon the theory of an equitable title or equitable estate. As soon as the appellant was put in possession under the agreements to sell, he argues, he acquired an equitable title to the property, and nothing that he might have done afterwards—even to the forging of a sale deed—could divest him of it. The contention is of course based upon the English principle that a contract for the sale of land creates such a title, which differs from our law, that such a contract does not of itself create any interest in the land.

This difference declares itself in the rules embodied in S. 55, T. P. Act, with respect to the rights and obligations of seller and purchaser upto the date of sale —rules which discountenance the theory of an equitable ownership in existence before that date. "The Law of India" say, their Lordships of the Privy Council in *Webb* v. *Macpherson* (11):

"speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England."

In *Sandu Walji* v. *Bhikchand Surajmal* (32), where the question of part performance arose, Fawcett, J. was able to concede the validity of that defence while holding that the English rule, that a contract for the sale of real property mrkes the purchaser the owner in equity of the estate, is clearly opposed to the express provisions of S. 54. For the latter proposition he referred to another Privy Council judgment *Maung Swe Goh* v. *Maung Inn* (33). The citation of further authority is unnecessary. The equitable rights arising out of an agreement to sell, even when followed by possession, are rights in personam, and it is as such and not otherwise that a Court applying principles of equity will enforce them.

I agree accordingly that the appeals should be dismissed with costs, and that the Civil Revision Petition should be dismissed without costs.

P.R.S./V.S. *Appeals dismissed.*

(32) A. I. R. 1923 Bom. 473=47 Bom. 621.
(33) A. I. R. 1916 P. C. 139—44 Cal. 542=44 Cal. 542=44 I. A. 15 (P.C.).

A. I. R. 1930 Madras 97

PANDALAI, J.

V. E. Rajabhadur Mudaliar—Petitioner.

v.

A. M. Viswanatha Reddiar and *another*—Respondents.

Civil Revn. Petn. No. 169 of 1928, Decided on 22nd April 1929, from judgment of Sub-Judge, Chittoor, in O. P. No. 16 of 1927.

(a) Madras Local Boards Act, S. 45—Mere nomination and election of the requisite number of members without President's election does not render special officer functus officio and he can adjourn meetings from one date to another.

The special officer had finished the election of elected members and the momination of nominated members was also done, but no President had yet been elected.

Held: that the Board was not fully consituted without electing the president and that therefore the special officer was not yet rendered functus officio and so could preside over meeting held before that time and was fully entitled to adjourn meeting fixed for a certain date to another : *Smith* v. *Paringa Mines Ltd.*, (1906) 2 *Ch.* 193 and *A. I. R.* 1925 *Mad.* 1152, *Dist.* [P 99 C 1]

(b) Election—Marking ballot paper with blue pencils does not invalidate election if it does not indicate the persons using them.

In an election two members by previous arrangement with a candidate used blue pencils to assure him that they had voted for him and election was sought to be cancelled on the ground that the secrecy of the ballot was violated:

Held: that unless it could be proved that the use of blue pencils indicated the persons who used them, the election would not be rendered invalid : 10 *C. P.* 733; *A. I. R.* 1925 *Mad.* 614 and *A. I. R.* 1924 *Mad.* 766, *Foll.* [P 99 C 2]

(c) Madras Local Boards Act,—Election enquiry Rules 4 (2) and 11—In lots, use of double system of slips wherein successful candidate is not necessarily first drawn does not invalidate election, being only bona fide variation.

Bona fide variation in the system of drawing lots does not invalidate an election. In an election in drawing lots use of double system of slips, one set being marked with the names of candidates and the other set having one paper marked with a cross to indicate the prize and the other a blank, had to be resorted to, the system being such that the successful candidate was not necessarily the first drawn.

Held: that this was not such a variation as to invalidate the election. [P 100 C 2]

K. Bhashyam Iyengar and *V. E. Viraraghavachariar*—for Petitioner

T. Krishnaswami Iyer—for Respondents.

Judgment.—The petitioner seeks to set aside the order of the Subordinate Judge of Chittoor, dated 31st October 1927, by which he dismissed the petitioner's objection petition to the election of respondent 1 as the President of the Union Board of Arkonam. By G. O. 4290 L. & M. dated 5th October 1926 the Local Government had in pursuance of S. 45 (1) of the Madras Local Boards Act dissolved the said Union Board and ordered it to be re-constituted and under Cl. (3) of the same section appointed Mr. Muthuswami Iyer, Sub-Magistrate of Arkonam (respondent 2) as special officer to exercise all the powers and duties of the Union Board and its President till it was properly re-constituted. The special officer was instructed to make arrangements for the election of the nine elected members, and the President, Taluk Board, Ranipet, was requested to nominate the three nominated members, and when that was done the special officer was to arrange for the election of the President so that the reconstituted Union Board might be brought into existence as early as possible. The special officer had got the nine elected members elected and the three nominated members nominated, Then he called a meeting of the members to elect a President for 20th April 1927. This date was by subsequent notice changed to 25th April 1927 as the special officer could not be present on the 20th owing to Easter. At the meeting held on 25th April under the presidency of the special officer, there was a tie, the petitioner and respondent 1 each securing five votes at the ballot. Thereupon the special officer proceeded to decide the question by casting lots which he did by using 2 sets of two slips each. One set contained the names of the candidates. Of the other set one paper bore a cross mark to indicate the prize or president; the other slip was blank. Both sets of slips were independently shaken and put aside and one slip from each set was drawn by the hand of a little boy aged under 10. At first the petitioner's name was drawn along with the blank slip. Then respondent 1's name was drawn along with the prize president's ship. Respondent 1 was declared elected.

The petitioner in his petition to the lower Court objected to respondent 1's election on various grounds of which four were pressed in the lower Court: (1) The special officer had no authority to preside over the meeting of 25th April, as he had become functus officio by the election and nomination of the full complement of members. (2) He had no power to adjourn the meeting from 20th to 25th April and so the meeting on the latter date was not validly held. (3) The secrecy of the ballot which resulted in a tie was violated by the use by two of respondent 1's supporters of a blue pencil to mark their votes. (4) The

drawing of lots was not done in the usual manner or according to the rules, and the petitioner's name having been first drawn he should have been declared elected. The lower Court rejected all these grounds of objection. The petitioner's learned advocate has pressed the same objections in this Court.

The contention that the special officer had no power to preside over the meeting at which the election of the new president was to take place is based on the theory, unfounded in my opinion, that the new Board had been fully reconstituted by the election of the elected members and the nomination of the nominated members, and that thereupon the duties of the special officer were at an end. By S. 12 (3) every Union Board shall elect one of its members to be a president to whom by various provisions of the Act most important functions of an administrative and executive character are assigned. In fact a Board without a president is unthinkable and unworkable under the Act, and it follows that till the president was elected, the Board was not fully constituted. The 12 persons who had been elected or nominated had not taken the oath or entered on their office and could not be left to shift for themselves at that stage. None of them had any authority to summon a meeting of his future colleagues or to administer the oath or to conduct an election for the president. It is in fact to prevent such an impasse that S. 45 empowers the Local Government to invest the special officer with all such powers of the Board and its president as it may determine between the dissolution and the re-constitution of a Loal Board and in the G. O. dated 5th October 1926 the special officer was expressly instructed to arrange for the election of the president. This was exactly what respondent 2 did and he did no more. This contention fails.

I do no not see how if it was competent to the special officer to convenue the meeting for 20th April he was incompetent when he found it impossible to attend on that date to postpone the meeting by previous notice to a more convenient date. There was no adjournment in the proper sense as the meeting of the 20th was not held but only a fresh date fixed for the meeting. There was nothing which required the meeting to be held on any particular date. The petitioner's advocate referred to *Smith* v. *Paringa Mines Ltd.* (1) and *Dwarkacharyulu* v. *Sri Krishnan*, A. I. R. 1925 *Mad.* 1152. The former case relates to the directors of a limited company, the articles of which did not give the directors power to postpone general meetings of shareholders once called. In the latter case which arose under the transitory provisions in Sch. 10, Local Board Act, at a meeting of the Union Boards Members called to elect their president by the President of the Taluk Board some members of the Union Board attended; but there was no quorum. The Taluk Board President instead of calling a fresh meeting purported to adjourn the meeting to a future date. It was enough for the decision of the case and all that was decided was that the President of the Taluk Board could not according to the meaning of the particular rule under which he acted dispense with the formalities of a fresh meeting and that an election of the Union Board President held at the so-called adjourned meeting was invalid. This has no bearing to this case. This contention also fails.

The next objection is that the secrecy of the ballot was violated because two of respondent 1's supporters used by previous arrangement with respondent blue pencils to mark their votes so as to assure him that they had voted for him. The law on the point is settled and will be found discussed in Rogers on Elections p. 112: see also *Woodward* v. *Sarsons* (2), *Xavier* v. *Joseph* (3); *Viswanatha Pillai* v. *Periaswami Pillai* (4). The question was really one of fact whether the use of blue pencils by two of the voters in this case did really indicate the persons who used them. The petitioner examined witnesses to prove the alleged arrangement. The learned Judge disbelieved the evidence and found that the marks being in blue pencil did not help to identify the voters and that one of those who use blue pencils could not be identified even after the enquiry. This objection also fails.

(1) [1906] 2 Ch. 193=75 L. J. Ch. 702=13 Manson 316=94 L. T. 571.
(2) [1875] 10 C. P. 733=44 L. J. C. P. 293=32 L. T. 867.
(3) A. I. R. 1925 Mad. 614.
(4) A. I. R. 1924 Mad. 766.

The last objection is that the method adopted by the special officer for drawing lots was not proper. According to the R. 4 (2) of the rules for election of President and Vice Presidents where there is a tie the election is to be determined by drawing lots and the person whose name is first drawn is to be declared elected. According to Webster's Dictionary in drawing lots each competitor may place his lot (marked) in a receptacle from which a disinterested person draws one, on the owner of which the chance falls, or each competitor may draw one of a series of lots the chance falling upon the person who draws one previously specified. In casting lots the lots are placed by the competitors in a receptacle which is then shaken until one falls out, the chance falling on its owner.

The rule refers to a method of drawing lots, in which the name first drawn is the successful one and this implies that only one set of lots is to be used. The reason why the special officer adopted the method of double set of tokens which according to Webster is another method of drawing lots is that he was provided with a copy of the old rules which had been superceded and which simply required that lots should be cast in the presence of the members. To this extent therefore there was a variation from the strict letter of the prescribed mode of drawing lots. The question is whether this variation vitiated the election. The special officer who was examined in the case explained that after the ballot resulted in a tie he explained to all present that he proposed to cast lots and how he proposed to do it. No one objected and there can be no question that the use of the double sets of slips instead of a single set was perfectly bona fide on the part of all present and that the petitioner and every one else concerned acquiesced in it. The petitioner's present objections are no doubt due to the fact that he was defeated and it is not too much to presume that if he had won, he would not object to the method. The petitioner's contention that his name having been first drawn though with a blank slip, he should have been declared elected is of course entitled to no weight as he cannot both adopt and disown the same method. If he adopts it as he and every one else did at the time, the successful candidate is not the one that drew a blank though it should be the first drawn, but the one that drew the crossed slip. Obviously under the method adopted the petitioner was not the successful candidate and he cannot claim to be successful, except by distorting the method into one which it was not meant to be either by him or by any one else. The only question is whether the use of a double system of slips in which the successful candidate is not necessarily the first name drawn was a violation of R. 4 (2) as to invalidate the election. In view of the fact that the violation, if any, was a perfectly bona fide one on the part of the special officer and that the petitioner and every one else present thought it the proper course and acquiesced in it and that the use of double slips or lots is after all merely a method of drawing lots which is the essence of the matter. I am of opinion that the matter is covered by R. 11 (c) of the rules governing election enquiries which enacts that no election should be set aside by any non-compliance with the provisions of the Act or rules unless the result of the election had been materially affected by the same. In this case there is no foundation for saying that the method of double slips affected the chance of the petitioner's success any more than his rivals'. The election itself having to be determined by chance (drawing of lots) and the method adopted not having affected either candidates' chance of success at the expense of the other it cannot be said that that method affected the election materially or at all. On this ground, this objection also fails. This petition is dismissed with costs.

P.R.S./P.R. *Petition dismissed.*

A. I. R. 1930 Madras 100

RAMESAM AND JACKSON, JJ.

Sukratendra Tirtha Swami—Defendant—Appellant.

v.

N. N. Prabhu — Plaintiff—Respondent.

Appeals Nos. 382 and 383 of 1924, Decided on 3rd April 1929, from decree of Sub-Judge, South Kanara, D/- 8th May 1924, in Original Suit No. 109 of 1921.

(a) Civil P. C., S. 9—A Brahmin excommunicated by recognized spiritual tribunal—Order of excommunication passed in good faith, without malice, and in exercise of spiritual authority—No negation of natural justice—Suit by the Brahmin for declaration for being in caste and for damages is not cognizable.

A Konkani Brahmin had been excommunicated by order of spiritual tribunal which was the recognized authority in all such matters the order having been passed in perfect good faith, without malice and in due exercise of spiritual authority. There was no negation of natural justice, on which ground alone such private quarrels could have been recognizable by law Courts.

Held: that the suits by the Brahmin for declaration that he was in caste as well as for damages, on the ground that the order of the spiritual tribunal was illegal and libellous ought to be dismissed as uncognizable. [P102 C 1]

(b) Tort—Defamation — Malice alleged—Overwhelming proof is required in case of tribunal.

Once it is found that a tribunal has exercised its function in a legal manner when condemning an admitted offence it requires overwhelming proof to sustain a charge of malice, in a case of defamation. [P 101 C 2, P 102 C 1]

T. Rangachariar and *B. Sitarama Rao* —for Appellant.

Advocate General—for Respondent.

Judgment.—The plaintiff, a Konkani Brahmin of Mangalore, dined on 24th October 1920 in company with members of various communities, including three panchamas. This was reported as a caste offence by members of his caste to the defendant the Swami of Kasi Mutt, who is the recognized tribunal for deciding such matters. The defendant took care to discover the true facts of the case (Ex. 18, 20th November 1920) and interviewed several persons on behalf of the plaintiff; Sreenivasa Pai and Venkata Rao first on 11th November, and again on 15th November, two Bhandarakars at about the same date; and, after 20th November a regular deputation with full instructions of all that had to be said on the plaintiff's behalf. There is some suggestion that these persons instead of stating plaintiff's case merely applied for an adjournment and fuller inquiry. This is very improbable, but the point need not be laboured because plaintiff himself sent to the defendant a document Ex. G, which is obviously the statement of his case. He admitted the defendant's right to take prompt and immediate action in the matter and did not deny the truth of the complaint made against him; but he detailed several instances of other persons infringing the rules of the caste, and evidently meant to confront the defendant with the alternatives of condoning or of condemning all the offences that were set forth.

After receipt of this document the defendant excommunicated the plaintiff by his order Ex. J. of 23rd November 1920 "until further orders." Thereupon the plaintiff attempted to enter the temple frequented by his caste, and on admission being refused, launched a suit on 6th May 1921, for a declaration that the order of the defendant was illegal and the plaintiff was "in caste" (O. S. No. 52 of 1921) and another suit 22nd November 1921 for Rs. 7,500 damages on the ground that the order was illegal and libellous (O. S. No. 109 of 1921.)

The lower Court dealing with both suits in one judgment, decreed that the defendant's order was null and void (O. S. No. 52 of 1921) and plaintiff was was entitled to full damages (O. S. No. 109 of 1921.)

The defendant appeals against both decrees.

From the above recital of fact it is difficult to see how the plaintiff's private quarrel with his caste can concern the public Courts of law. The defendant's order is denounced in the plaint of O. S. No. 52 of 1921 as illegal because no opportunity was given to plaintiff to offer his defence; in other words because the fundamental principle of alteram partem audi was violated. But obviously not only was defendant offered, but he availed himself of the opportunity of presenting his defence. To urge that a charge must be framed, that a personal interview is essential, or that the Guru must sit at the feet of his disciple and learn the correct interpretation of the sacred law, is idle embroidary of the main principle. The defendant who received the various deputations sent by the plaintiff, and perused Ex. G cannot by any stretch of imagination be said to have offended fundamental principle.

Then in both suits an issue of malice was raised. Once it is found that the recognized tribunal has exercised its function in a legal manner, when condemning an admitted offence, it requires overwhelming proof to sustain a charge

of malice. In these suits the proof adduced is meagre beyond description. Quite possibly the persons who formally brought the matter to the notice of the defendant may have been actuated by malice; but unless he is proved to have conspired with those persons, that cannot affect the defendant. There is no evidence of conspiracy. Plaintiff's witness 9, a respectable vakil and Bank president, candidly admits that in the several interviews which he had with the defendant he did not appear to him to be actuated by malice. The learned Subordinate Judge (para. 53) finds that the defendant wished to make an example of the plaintiff for presuming to address to his Holiness a lawyer's letter Ex. F and Ex. G. This opinion he bases upon a detailed summary of evidence in the same paragraph, under fourteen heads, none of which afford the slightest justification for his view. In such circumstances to impute is to exhibit malice.

And this is the whole relevant content of a case which contains a printed record of four hundred pages, and occupied fifty-seven days in the hearing alone. It is a crying scandal. A law Court is not a hall of entertainment, and any Judge alive to his proper responsibilities would have disposed of this case in two sittings.

We find in O.S. 52 of 1921 that the only ground which could have rendered the suit cognizable, viz., the negation of natural justice, is not established. The order in question was issued without maice and in good faith in the exercise of the defendant's spiritual authority. In O. S. No. 109 of 1921 we find that there is no proof of malice, and no legal ground for damages. Reversing the decrees of the lower Court we dismiss both suits with costs throughout.

P.R.S /P.R. *Order accordingly.*

A. I. R. 1930 Madras 102

CURGENVEN, J.

Subbayya Pillai—Complainant—Petitioner.

V. Sesha Iyer and *others*—Accused—Respondents.

Criminal Revn. No. 140 of 1929, and Criminal Revn. Petn. No. 120 of 1929, Decided on 21st August 1929, against order of Town Sub-Magistrate, Trichinopoly, D/- 1st February 1929.

Criminal P. C., S. 239 (6) — Joint trial—Complaint against five accused the first being abettor—Abettor discharged being unidentified — Charge framed against others and prosecution witnesses cross-examined—Further inquiry against accused 1 directed on revision—Joint trial of abettor with others was not ordered—Criminal Trial.

A complaint was filed against five persons under S. 325, Penal Code, the 1st being included as an abettor. Accused 1 was discharged on the ground of not being identified and charge was framed against the other four accused. On revision further inquiry was directed which was to give further opportunity to the prosecution witness to identify accused 1. Meanwhile proceedings against the other four accused had proceeded and prosecution witnesses had been cross-examined after the charge.

Held: that though ordinarily the correct course is to try an abettor with the primary offender yet in this particular instance the proceedings had reached such a stage that a joint trial could not be ordered: *A. I. R.* 1926 *Mad.* 638, *Ref.* [P 103 C 1]

K. S. Jayarama Ayyar and *S. Nagaraja Ayyar*—for Petitioner.

K. N. Ganapathi—for the Crown.

T. R. Venkatarama Sastriar for *K. S. Sankara Ayyar* and *M. S. Vaidyanatha Ayyar*—for Respondents.

Order.—The petitioner is the complainant. He filed a complaint against five persons which was taken on file against accused 2 to 5 as voluntarily causing grievous hurt under S. 325, I.P.C., and against accused 1, who is a pleader, as abetment of that offence, under Ss. 325 and 114, I. P. C. The Town Sub-Magistrate of Trichinopoly who tried the case discharged accused 1 on the ground that he had not been identified, and framed a charge against the remaining accused of the offence stated. The complainant then applied to the Sessions Judge of Trichinopoly to revise the order discharging accused 1 and the application was granted, the learned Sessions Judge directing further inquiry which was to include affording several of the prosecution witnesses an opportunity of identifying accused 1. In Criminal Revision Case No. 952 of 1928 Reilly, J., refused to interfere with this order.

Meanwhile, as I have said, a charge had been framed against the other accused and the first prosecution witness had been further cross-examined after charge. The question then arises as to the correct procedure to be adopted, whether, as the petitioner urges, the joint trial of all the accused could be resumed or whether the trial of accused 1 must be conducted separately.

The parties appear to have been canvassing this question before the local courts, for I find an application by accused 1, disposed of by the Sub-Divisional Magistrate on 5th January 1929, in which it is said that there can be no question of a joint trial, and another application by the complainant to the Sub-Magistrate insisting that a joint trial is necessitated by the circumstances. The Sub-Magistrate is, however, of a contrary opinion. I think that the views taken by these Courts are correct.

No one disputes the general principle, to which Spencer, Offg. C.J., gave expression in *Sogaimuthu Padayachi* v. *Emperor* (1), that ordinarily the correct course is to try an abettor with the primary offender or offenders. Where no reason to the contrary appears, the enabling provisions of S. 239, Criminal P.C., should be availed of. In the present case, however, it is I think only necessary to consider what a joint trial would involve to be satisfied that it cannot now be had compatibly with observing the rules of procedure.

Suppose, then, that accused 1 is reinstated in the dock, along with the remaining accused. The proceedings against those accused, as I have said, have extended to the framing of a charge and to the further cross-examination of a witness after charge. One of two courses must then be pursued. Either that part of the proceedings against accused 2 to 5 which took place after the order discharging accused 1 was passed must be expunged, so as to restore them to that point in the inquiry which has been reached in the case of accused 1, or inquiry must be conducted solely into accused 1's case until it reaches the stage at which it stands against the other accused. For adopting the former alternative I can find no justification. It is not to be found in the order directing further inquiry against accused 1. Cancellation of the charge could only be justified on the ground that it had been improperly framed, and no such ground can be alleged. We are left then with the second alternative, and that presents even greater difficulties. Assuming that the inquiry is taken up against accused 1 at the point where it was dropped, the next step would be the examination of P. Ws. 6 to 9 touching their identification of accused 1, and their cross-examination upon this question. Their statements would be evidence against accused 1, but although what they said might bear upon the case against the others, it would not be evidence against them. The Court would have to distinguish in its mind between what was admissible against one of the accused and what was admissible against the others. It need scarcely be said that such a position would be at variance with the principles upon which a joint trial should be connected. It would in effect be no joint trial at all, because while the inquiry preceding charge was being conducted against accused 1, proceedings against the remainder would be at a standstill.

I conclude then that the Sub-Magistrate is taking the only practicable course in deciding to try accused 1 separately. Since the statements of the prosecution witnesses already recorded must be appropriated to one or other of the inquiries, and cannot, as to any part of them, be made to serve for both, this will involve a de novo inquiry into the case against accused 1. The Criminal Revision Petition is dismissed.

P.R.S/.P.R. *Petition dismissed.*

(1) A. I. R. 1926 Mad. 638=50 Mad. 274.

A. I. R. 1930 Madras 103

CURGENVEN, J.

Subba Naicker and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Cases Nos. 214 and 513 of 1929 and Criminal Revn. Petns. Nos. 186 and 465 of 1929, Decided on 30th July 1929, against order of Sess. Judge, Tinnevelly, in Cr. R. C. 44 of 1928.

Criminal P. C., S. 437—Accused charged under Penal Code Ss. 457 and 380—Trying Magistrate discharging them under Criminal P. C., S. 209—Sessions Judge cannot pass order under S. 437 but can order inquiry under S. 436.

Section 437 relates only to cases triable exclusively by the Court of Session. Where, therefore, the accused, charged under Penal Code, Ss. 457 and 380, have been discharged by the trying Magistrate under Criminal P. C., S. 209, the Sessions Judge, acting under S. 437, cannot pass an order against the accused directing that the order of discharge be set aside and that the trying Magistrate do commit the accused to take their trial at the Sessions. The correct procedure is to order further inquiry under Criminal P. C., S. 436 : 15 *M. L. J.* 373. *Rel. on.* [P 104 C 1]

M. C. Sridharan—for Petitioner.

K. Venkataraghavachariar — for the Crown.

Order.—The petitioners in this case were discharged under S. 209, Criminal P. C., by the Sub-Magistrate of Koilpatti, the complaint against them being one of house breaking by night and theft in a building under Ss. 457 and 380, I. P. C. The learned Sessions Judge of Tinnevelly, taking the matter up suo motu, issued notice to the accused and passed an order on 14th January 1929, against which this petition is presented, directing that the order of discharge be set aside and that the Sub-Magistrate do commit the accused to take their trial at the Sessions. No section of the Criminal Procedure Code is quoted as authority for this order but I must take it that it purported to be passed under S. 437, Criminal P. C., because that is the only section under which a revising Court has power to order commitment. If that be so, the learned Sessions Judge appears to have overlooked the circumstance that the section relates only to cases triable exclusively by the Court of Sessions, and the offences of house breaking by night and theft in a building do not fall within that category. The same error was dealt with in a case *Thammanna* v. *Emperor* (1), referred for orders. The correct procedure was to order further inquiry under S. 436.

It has been pressed upon me that the Sub-Magistrate had valid grounds for his order of discharge, and that further proceedings should not be taken against the accused. After reading and considering the judgments, I think the best course is that I should make an order setting aside the order of the Sessions Judge directing commitment and restoring the case to his file for disposal according to law. Since there has been a change of officers, it will be open to the present Sessions Judge freshly to consider whether further enquiry into the complaint is justified. I order accordingly.

P.R.S./V.S. *Order accordingly.*

(1) [1905] 15 M. L. J. 373.

A. I. R. 1930 Madras 104
Special Bench

KUMARASWAMY SASTRI, WALSH AND CURGENVEN, JJ.

In the matter of Firm, P. L. S. K. R. —Petitioner.

O. P. No. 166 of 1928, Decided on 9th October 1929.

(a) Income-tax Act (1922), S. 26—Branch and older firm at Ipoh, a place outside British India—Older firm wound up—Assets in shape of outstandings divided between partners—Part falling to share of assessed firm—During the year of assessment remittance from Ipoh assessed to income-tax to extent of profits made there—Accounts did not conclusively prove remittance to be outstandings—Assessment held good.

An assessed firm had a branch or agency operating at Ipoh in Federated Malay States. There had been an older firm there but this was would up and the assets in the shape of outstandings divided between the partners. Part of these assets fell to the share of the partners in the assessed firm and were shown as credit in its general balance. During the year for which the firm was assessed Ipoh branch remitted Rs. 1,20,000 in all to British India. Income-tax Department acting upon the presumption that to the extent profits were made at Ipoh this remittance was composed of these and declined to accept the contention that the remittance was derived from realization of the old firm's outstandings and so was mainly capital. The assessed firm did not prove by means of accounts which were duly examined that the remittances were not composed of profits liable to tax.

Held : that the assessment was good in law. [P 105 C 1]

(b) Income-tax Act (1922), S. 66—High Court cannot scrutinize evidence.

When a reference is made to High Court under S. 66, High Court is not entitled to scrutinize evidence, as Commissioner's decision upon the evidence is final. [P 105 C 1]

K. S. Rajagapalachari — for Assessee.

Patanjali Sastry—for Commr. of Income-tax.

Judgment.—In this application under S. 66, sub-S. 3, Income-tax Act, 1922, the Commissioner of Income-tax has been given notice to show cause why he should not refer certain questions of law for the determination of this Court.

The facts are in brief that the assessed firm had a branch or agency operating in Ipoh, Federated Malay States. There had been an older firm there, but this was wound up and the assets, in the shape of outstandings, divided between the partners. One half of these assets in this way fell to the share of the partners in the assessed firm and were shown as a credit in its general balance. Dur-

ing the income-tax year 1926-27 the Ipoh branch remitted four sums of Rs. 30,000, Rs. 1,20,000 in all, to British India. The contention which the firm raises is that these remittances were derived from realizations of the old firm's outstandings, and were therefore mainly capital. The Income-tax department has declined to accept this explanation, and has acted upon the ordinary presumption that, to the extent that profits were made at Ipoh—about Rs. 53,000—the remittances were composed of these.

The learned Advocate General, who appears for the applicants, virtually has to argue that the Comissioner of Income-tax must accept as conclusive accounts and statements produced by the firm showing the source from which these remittances were derived; any less qualified proposition will not serve his purpose, because the matter becomes then one of evidence, and the Commissioner's decision upon the evidence is final. It will be seen from the Commissioner's order dated 16th July 1927 declining to state a case for the determination of this Court that the claim was disposed of on the ground that the petitioners had not proved by means of their accounts, which the Income-tax Officer had duly examined, that the remittances (to the extent referred to) were not profits liable to tax. That being so, there is no question but that the assessment is good in law. It is not our business to scrutinize the evidence, but in view of certain aspects of it which have been brought to our notice during the arguments we may add that the collections of old outstandings, as made, appear to have been added to the general balance of the firm, and that the remittances were made from that general balance; further, that, upon the applicants' own showing (statement 4) when the first remittance was made on 31st July 1925, a sufficient sum had not yet been realized from the old outstandings to meet it. These circumstances suggest that the accounts themselves are not conclusive of, if indeed compatible with, the applicant's case.

We dismiss the application with costs. Advocate's fee, Rs. 150.

P.R.S./V.B. *Application dismissed.*

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* A. I. R. 1930 Madras 105

WALLACE AND WALSH, JJ.

Rasan Chettiar—Defendant—Appellant.

v.

Rangayan Chettiar—Plaintiff—Respondent.

Appeal No. 516 of 1928, Decided on 5th April 1929, against order of Sub-Judge, Madura, D/-24th November 1928.

*** (a) Civil P. C., O. 34, R. 3—Adjustment made out of Court between preliminary decree and final decree cannot be pleaded against passing of final decree.**

An adjustment made out of Court between the dates of preliminary decree and final decree cannot be pleaded against the passing of final decree under the new Code though payment to mortgagee was allowable under the old Code under Ss. 88 and 89, T. P. Act: 2 *Pat. L. J.* 533; 25 *C. L. J.* 553; 42 *Mad.* 61 and 12 *P.R.* 1913, *Ref.* [P 107 C 2]

(b) Civil P. C., O. 34, R. 5—Want of notice of application for final decree does not make decree illegal—Civil P. C., O. 9, R. 13.

While a notice should issue on an application for final decree, the failure to issue such notice is not an illegality which ipso facto renders the decree void and by itself necessitates the setting aside of the decree. Person concerned must show that he has a prima facie case on merits: 32 *Cal.* 253; 35 *M. L. J.* 375; 44 *Cal.* 454; 10 *C. L. J.* 91; *A. I. R.* 1929 *Mad.* 393; 25 *Mad.* 506; 27 *Mad.* 40; 4 *C. L. J.* 317; *A. I. R.* 1926 *All.* 757 and 17 *C. W. N.* 862, *Ref.* [P 107 C 1]

(c) Civil P. C., S. 141—Application of S. 141 doubtful where procedure is clear—Civil P. C., O. 34, R. 5.

It is doubtful whether S. 141 which says that "the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction" should be applied where procedure is clearly laid down as in a matter under O. 34, R. 5. [P 107 C 2]

(d) Civil P. C., O. 23, R. 3—Adjustment of decree outside the Court cannot be enforced under O. 23, R. 3 which relates to satisfaction of suits—Civil P. C., O. 34. R. 3.

Order 23, R. 3 relates to the satisfaction of a suit and not to the satisfaction of a decree and to hold that parties can adjust a preliminary decree between themselves out of Court and get such adjustment enforced under O. 23, R. 3, would render the whole scheme of O. 34, R. 3 nugatory. [P 108 C 1, 2]

K. V. Sesha Iyengar—for Appellant.

P. R. Ganapathi Iyer and *K. P. Panchapagesa Iyer*—for Respondent.

Walsh, J.—The facts out of which this appeal arises are as follows: The plaintiff obtained a preliminary decree in a mortgage suit on 23rd March 1928. Three months' time was given for the payment of the mortgage debt. An application was put in by the plaintiff on 28th June 1928 and a final decree was

passed. Notice of this application was not sent to defendant 2 in the suit. The appellant who is defendant 2 put in a petition on 19th October 1928 to have the ex parte final decree set aside and to stay execution of the proceedings on the ground of an adjustment made between himself and the plaintiff some time during April 1928. The Court passed an order as follows:

"I think therefore that the grounds for setting aside the final decree are not strong. But I think I may in the interest of justice give the petitioner a chance of proving the so called adjustment, if he shows his bona fides to satisfy the decree by paying half the decree amount in two weeks."

Defendant 2 not having paid the amount on the date fixed, his petition was dismissed. Against this order of dismissal, he has appealed.

The learned advocate for the appellant takes as his main ground that notice is required for the passing of the final decree and that if such a notice is not given, the application to set aside the final decree falls under O. 9, R. 13, Civil P. C., and the Court has no option in such a case but to set aside the decree. He also urges that an adjustment out of Court can be pleaded against the passing of the final decree in a suit for sale. The rulings as to whether a notice is or is not necessary have been conflicting mainly due to a difference of opinion as to whether an application for a final decree is a proceeding in execution or not. Turning to the Code itself in O. 34, R. 5 we find nothing which directs a notice to the other side on an application for final decree. The following cases have been relied on to show that notice is required: *Bibi Tasliman* v. *Harihar Mahto* (1), *Kanakasundaram Pillai* v. *Somasundaram Pillai* (2), *Rajendra Lal Sur* v. *Atal Bihari Sur* (3) *Bachu Singh* v. *Bicharam Sahu* (4) and *Maruthiswamiyar* v. *Subramania Ayyar* (5). The other side quotes *Krishna Ayyar* v. *Muthuswami Apyar* (6), *Pandu Prabhu* v. *Juje Lobo* (7) and *Mahomed Taki Raza* v. *W. A. Thomas* (8), and *Mahadeo Pandey* v. *Somnath Pandey* (9). There is a similar conflict of decisions as to whether O. 9, R. 13, applies to an application made to set aside a final decree in a suit of this sort. Turning to the authorities quoted for the appellant, it may be observed that *Bibi Tasliman* v. *Harihar Mahto* (1) merely lays down:

"that a Court has inherent power to deal with the application to set aside the order made ex parte and can set it aside upon a proper case being substantiated."

This ruling as pointed out in *Mahomed Taki Raza* v. *W. A. Thomas* (8) does not support the contention that a notice is required. In *Kanakasundaram Pillai* v. *Somasundaram Pillai* (2), it was held that O. 9, R. 13 applied and that it made no difference that the rule talks of a summons and not of a notice. Rule 32 of the Civil Rules of Practice says that notice of an interlocutory application shall be given to the other parties to the suit or matter or their pleader not less than three days before the date appointed for the hearing of the application. But it cannot be maintained that the non-observance of the Civil Rules of Practice is an illegality unless such a rule can be found in the Code. The learned Judges in *Kanaka sundaram Pillai* v. *Somasundaram* (2) no doubt remarked:

"the Code provides certain procedure to be followed in the proceedings for a final decree; an application has to be made by the preliminary decree-holder and notice has to be given to the judgment-debtor to show cause why such a decree should not be passed."

But the learned counsel for the appellant has not been able to show us anything in the Code which requires such a notice. In *Maruthi Swamiyar* v. *Subramania Ayyar* (5) the learned Judges following the decision in *Bibi Tasliman* v. *Harihar Mahto* (1) and *Kanakasundaram Pillai* v. *Somasundaram Pillai* (2) state: "we think that notice has to be given." As pointed out *Bibi Tasliman* v. *Harihar Mahto* (1) is not an authority for that contention. As regards *Rajendra Lal Sur* v. *Atel Bihari Sur* (3) all it decided was that the Court could interfere. Emphasis is laid upon an observation in that case quoted from *Ajant Singh* v. *Sundarmall* (10):

(1) [1905] 32 Cal. 253=9 C.W.N. 81 (F.B.).
(2) [1918] 35 M. L. J. 375=48 I. C. 71.
(3) [1917] 44 Cal. 454=39 I. C. 969=25 C.L.J. 455.
(4) [1909] 10 C. L. J. 91=1 I. C. 677.
(5) A. I. R. 1929 Mad. 393.
(6) [1902] 25 Mad. 506=12 M. L. J. 62.
(7) [1904] 27 Mad. 46.
(8) [1906] 4 C. L. J. 317.
(9) A. I. R. 1926 All. 757=48 All. 828.
(10) [1913] 17 C. W. N. 862=16 I. C. 567.

"It is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard."

This clearly cannot be taken to mean that such an order is inherently illegal from the start and that all that a party wishing to set aside such an order has to show is that he had no notice. For instance, in the case of a temporary injunction passed in cases of emergency without hearing the parties under O. 39, R. 3 such an order is certainly one which can be made and it is not sufficient for the party wishing to set it aside merely to show that it was made ex parte and without notice. *Bachu Singh* v. *Bicharam Sahu* (4) only lays down that a notice should ordinarily issue and the most recent decision of the Madras High Court *Sri Maruthi Swamiar* v. *Subramania Ayyar* (5) does not state more, than that a notice should go. While therefore it may be true that a notice should issue on an application for final decree I cannot find any authority which goes the length of holding that the failure to issue such a notice is an illegality which ipso facto renders the decree void and by itself necessitates the setting aside of the decree. In this connexion I may notice an argument attempted for the respondent that the Court put the appellant upon terms and that as the terms were not complied with the petition had to be dismissed but it appears from a reading of the order that what the Court put the appellants on terms about was not the setting aside of the decree but the hearing of his petition at all.

Finally it is argued that even if it may be held that the suit is not pending after the preliminary decree in such a sense as to make O. 23, R. 3 applicable, yet S. 141, Civil P, C., has to be applied, and the procedure to be followed should be the same as in suits wherein notice is necessary. S. 141 merely lays down that:

"the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction."

Here we have got the procedure actually laid down which applies to this particular matter under O. 34, R. 5, and it makes no mention of notice. Under the circumstances it cannot be held that S. 141, Civil P. C. makes want of notice an illegality. It is doubtful if it applies to a matter were a clear procedure is laid down.

The second question which arises is whether an adjustment made out of Court between the dates of the preliminary decree and the final decree can be pleaded against the passing of the final decree. Under the old Code a payment could be made either into Court or to the mortgagee under Ss. 88 and 89, T. P. Act, but the new Code has deliberately done away with that option of making payment to the mortgagee out of Court. The provisions of O. 34, R. 3, show that the money must be paid into Court. The only case which the learned advocate for the appellant has been able to quote suggesting that adjustment out of Court can be pleaded is *Jogendra Prasad Narain Singh* v. *Gouri Shankar Prasad Sahu* (1). The facts of that case are not fully set out in that judgment nor the actual arrangement made and it is not certain from the language whether the agreement between the parties was before or after the preliminary decree. It states that the appellants put in a petition to the effect that the decree had been satisfied in part by an arrangement out of Court this arrangement being that the value of an elephant taken by the decree-holders from the judgment-debtors before the making of the decree absolute should be credited to the accounts to be taken on the mortgage. It is just possible to read this sentence to mean that the agreement was made before the preliminary decree with a stipulation that it should not be recognized till the account was taken. In any case it is difficult to understand without further details what happened in that case. There appears to have been a preliminary decree for the taking of accounts but what exactly happened then is not clear. The learned Judges then go on to state:

"it is true that under O. 34 R. 5 it is contemplated that all payments made upon a preliminary decree should be paid into Court. There is nothing in the rule to justify the view that O. 23, R. 3 does not apply to adjustments of account made between the date of the pre-

(11) [1917] 2 Pat. L. J. 533=40 I. C. 138=2 Pat. L. W. 66.

liminary decree and the date on which the accounts between the parties are finally settled."

An entirely contrary view is taken in *Linga Raja* v. *Pethu Raja* (12) which follows *Piran Bibi* v. *Jitendra Mohan* (13). The learned Judges make a cautious reference to *Jogendra Prasad Narain Sing* v. *Gouri Shankar Prasad Sahu* (11) as follows :

"it may be that if between the passing of the preliminary decree and the passing of a final decree for sale the defendant obtains a certificate under the provisions of O. 21 R. 2, he can take advantage of that to reduce the amount for which the property is to be sold."

But they do not state that he can obtain a certificate under O. 21, R. 2 or how he is to do it. The general trend of the decisions under the present Code is that an application for final decree is not a proceeding in execution and therefore O. 21, R. 2 will not apply at all. It is unnecessary to discuss whether if in an execution proceeding the judgment-debtor had by some means obtained a certificate between the date of the preliminary decree and the final decree he could claim a deduction on the amount of the final decree. In *Banarsi Das* v. *Nattu Mal* (14), the Punjab Chief Court lays down that the Court has no option under O. 34 R. 5, except to pass a final decree for sale of the property if the money has not been paid into Court. In *Rama Goundan* v. *Vellappa Goundan* (15), the Court held that even where money has been deposited under O. 9, R. 13 and the ex parte decree set aside this was not to be regarded as money paid into Court under the preliminary decree, that the decree-holder was guilty of no fraud in not bringing it to the notice of the Court and that the Court was bound on his application to pass a final decree for the full amount.

One other argument may be noticed, that O. 23, R. 3, applies and the Court is bound to recognise such adjustment out of Court. But O. 23 R. 3, relates to the satisfaction of a suit, not to the satisfaction of a decree, and to hold that parties can adjust a preliminary decree between themselves out of Court and get such adjustment enforced under O. 23, R. 3 whould render the whole scheme of O. 34 R. 3 nugatory. As stated above this procedure of paying into Court the amount due under the preliminary decree in a mortgage suit for sale was a deliberate restriction of the previous privilege of paying the mortgagee out of Court under the Transfer of Property Act. The orders under the code must be construed reasonably with reference to each other. I hold that O. 23, R. 3 is not applicable.

In the result it appears to me that mere want of notice does not per se render the decree liable to be set aside. Even assuming that it does, as the adjustment sought to be pleaded is not one which the Court can recognise even if we were to hold that the Court should have passed an order setting aside the ex parte decree the result would be exactly the same, namely, that we would have to dismiss the petition on the ground that the adjustment pleaded was not one which the Court can recognise even if true. The decree would then have to be restored. In these circumstances, the appellant would gain nothing by a decision in his favour as regards the necessity for setting aside the decree and the relief granted would be nothing but a form of words. The ultimate result would be the dismissal of the appellant's petition which is exactly the final order appealed against.

In the result therefore the appeal fails and is dismissed with costs.

Wallace, J.—I agree generally.

With reference to the question whether notice must, as a matter of law, go before a final decree can be passed in a mortgage suit for sale, all that can be said in the present state of the law and the authorities is that, while such a notice is not prescribed by law, it is in practice advisable, and that, if it is not issued, it is open to the party aggrieved, if he can show that he has been aggrieved, to come up under O. 9, R. 13 and have it set aside. This is the effect of the Full Bench decision in *Bibi Tasliman* v. *Harihar Mahto* (1), and the ruling in *Sri Maruthi Swamiar* v. *Subramania Ayyar* (5), to which I was a party, does not go further than that. The appellant therefore has to show, in the words of the *Bibi Tasliman's* case (1), that he has

(12) [1918] 42 Mad. 61=35 M. L. J. 579=8 M. L. W. 497=48 I.C. 196=(1918) M. W. N. 839.
(13) [1917] 25 C. L. J. 553=40 I. C. 845=21 C. W. N. 920.
(14) [1913] 12 P. R. 1913=276 P. L. R. 1914=16 I. C. 987=281 P. W. R. 1912.
(15) A. I. R. 1926 Mad. 1069.

substantiated a proper case. This does not in my view mean merely that he substantiated a proper case by showing that he had no notice but he must also show that he has a prima facie case on the merits, which makes it worthwhile for the Court to spend further time on issuing a notice and hearing him. If he does so, then the Court will take it as a point of law that a notice ought to have been issued to him, the absence of which will bring O. 9, R. 13 into operation.

That raises the second question whether it is worthwhile to interfere in this case. The only contention which the appellant wants to put before the lower Court is the plea of adjustment of the preliminary decree by payment out of Court between the dates of the preliminary and the final decree. I agree with my learned brother for the reasons given by him that such an adjustment cannot be pleaded when the Code distinctly lays down that payment must be into Court. I can see no reasons for allowing adjustment out of Court to be pleaded, a plea which, as often as not, is based on false or flimsy ground and yet requires considerable amount of enquiry before it can be finally settled. It was, I have no doubt, for the purpose of avoiding such enquiries, that the right of payment out of Court, permitted under S. 89, Transfer of Property Act, was taken away. O. 23 R. 3 cannot be read to override the clear terms of O. 34, Rr. 3 and 4.

P.R.S./P.R. *Order accordingly.*

A. I. R. 1930 Madras 109

WALLACE AND JACKSON, JJ.

Palaniappa Chettiar (died) and *another*—Defendants—Appellants.

v.

V. N. S. Chockalingam Chetti—Plaintiff—Respondent.

Appeal No. 142 of 1925, Decided on 6th September 1929, against decree of Sub-Judge, Sivaganga, in O. S. No. 100 of 1922.

(a) Hindu law—Custom—Custom is not founded on reason—One custom is no evidence of existence of another.

Custom cannot be said to be founded on reason, for no reason, even the highest whatsoever, would make a custom or law. Custom cannot therefore be enlarged by any parity of reasoning. Customs may be similar or contradictory, probable or improbable, and the existence of one custom is no evidence for the existence of another. The only proof of custom is the evidence of that custom and not other evidence that given certain data certain results follow with the force of law: 37 *Cal.* 322, *Rel. on.* [P 110 C 2]

(b) Hindu law—Stridhanam—Succession—Among Nattu Kottai Chetti caste, stridhanam does not revert to parent's family when daughter dies leaving female issue.

There is a custom, in the Nattu Kottai Chetti caste, having the force of law that, if the daughter of the family dies issuelsss, the stridhanam will revert to her parents, but there is at present no clear custom having the force of law, by which such reverter occurs when the daughter has a female issue and dies leaving such issue. [P 111 C 2]

S. Varadachariar for *K. S. Champagesa Iyengar* and *S. Singam Iyengar*—for Appellants.

M. Patanjali Sastri and *K. Ramanathan Chettiar*—for Respondent.

Wallace, J.—The question for decision in this appeal is whether the plaintiff has proved the caste custom set up by him in derogation of the Hindu law of inheritance. The plaintiff is of Nattu Kottai Chetti caste. It is a custom in that caste, when the daughter of a house is married, for her parents to present to her jewels, vessels and money which become her stridhanam. There is also a custom which has been recognized by this Court in A. S. No. 196 of 1923 that if that married daughter dies without issue, that stridhanam reverts to the donors, her parents. The plaintiff before us contends for a custom that that stridhanam reverts to the parents even when the woman has had a female issue and that female issue herself dies without issue. Under ordinary Hindu law a female issue would on the death of the mother inherit her stridhanam holding a limited interest therein, and on her own death without issue it would revert to her father, the husband of the original donee. The plaintiff contends that there is in his caste a custom having the force of law which diverts the inheritance from the father to the family of the original donors of the stridhanam.

Now it is essential in a case where a custom is pleaded in derogation of Hindu law that that custom should be clearly defined and proved; so that given the facts of the case, there will be no vagueness or obscurity as to the application of the custom. The facts of the present case are the plaintiff's sister, Minakshi, was married to the defendant in 1891; her parents gave her the usual stridhanam; she died in 1908 leaving one child

a daughter Visalakshi, who inherited her mother's stridhanam; she died in 1921 without issue. It may be noted also that at the time of her birth Visalakshi also received stridhanam presents from her maternal grandfather's family. Now the custom contended for in the plaint is that on the death of Visalakshi, both these stridhanams, the one given to her and the one given to her mother, belong to the plaintiff's family "according to law and justice and according to the custom of the caste of both parties." The plaintiff asserts that the capital sum of both stridhanams has been left intact and has been accumulating interest; so that what was originally a sum of about Rs. 4,000 has now swelled to over Rs. 50,000 and the original claim was for that sum. If we confine ourselves to what is involved in the present appeal, which relates only to the stridhanam conferred on Minakshi, the amount originally stood at Rs. 1,672 and has now swollen to Rs. 28,616 and it is that sum which the plaintiff now claims. The plaint was not clear as to whether custom demanded that each stridhanam should be kept intact from the moment of donation until reverter. It was claimed, however, in this case that both have been kept so intact and therefore were available.

It is of course settled law that the evidence of a custom pleaded to have the force of law must prove it to be continuous, uniform and specific. We have to examine the evidence to see if it satisfies that test.

It will be convenient here to dispose of a contention of the plaintiff that he could establish a custom by evidence of what he calls an analogous custom. He contends, for example, that the recognized custom by which the stridhanam of a woman dying issueless reverts to her family is analogous to the one now pleaded. He contends again that a custom, to which some of his witnesses speak, by which the stridhanam of a woman dying leaving a son who himself dies without issue reverts to her family, is an analogous custom. And he pleads that such analogous customs give by considerations of common sense and parity of reasoning, a probability in favour of the custom alleged in the plaint. Such a contention seems to us inadmissible. Common sense and reasoning have nothing whatever to do with custom. As stated in *Arthur* v. *Bokenham* (1), quoted at p. 326 of *Pradyote Kumar Tagore* v. *Gopikrishna Mandal* (2), it cannot be said that a custom is founded on reason:

> "for no reason, even the highest whatsoever, would make a custom or law, and therefore you cannot enlarge such custom by any parity of reasoning, since reason has no part in the making of such custom."

Customs may be similar or contradictory, probable or improbable, and the existence of one custom is no evidence for the existence of another. The only proof of custom is the evidence of that custom and no other evidence that given certain data certain results follow with the force of law. It therefore appears to us that no evidence of analogous custom is relevant in proof of the plaint custom. This rules out the evidence of P. Ws. 4 and 6 for the plaintiff.

For the rest, P. W. 1's evidence is very vague. The only instance of the plaint custom to which he speaks is one which occurred two months before he gave his evidence, in the house of M. M. P. L. Palaniappa Chetti of Nemathanpatti. Now no one from that house has been examined. According to the witness also the stridhanam was repaid in that case by a hundi, but no hundi has been filed nor any accounts produced. P.W. 2 instances a case in his own family in which on the advice of his elders he returned his wife's stridhanam and paid it by a hundi "1½ years ago," that is just about the time when the present plaint was filed. That hundi is not filed. But what is more important P.W. 2 does not say that the reverter was in response to his feeling that it was a matter of caste law. He says himself that he did not know what the caste rule was. None of those who advised him is examined. It may be noted that the custom he speaks of is not exactly that alleged in the plaint since he does not speak of any reverter of stridhanam paid to his daughter. P.W. 3 only speaks of the plaint case and says that according to Chetti custom, the stridhanam, it is not clear if he is speaking only of Minakshi's stridhanam and not of Visalakshi's also, "belong" to the parents of the girl. He speaks of a

(1) [1708] 11 Mod. 148=88 E. R. 957.
(2) [1910] 37 Cal. 322=11 C.L. J. 209=5 I.C. 243=14 C. W. N. 437.

correspondence about the matter but no letters are filed. P.W. 5 says vaguely that if a woman dies "leaving a son or daughter who also dies subsequently," that is, in every case, since every one dies, it will again revert to the parents of the woman. He does not say what happens when the woman's issue dies issueless. A witness who makes such a statement is entitled to no weight. His knowledge is shown in cross-examination to be mere hearsay.

Thus the evidence gives us one definite instance and one vague instance of a very modern date and neither of them prior to the date of the suit. Obviously this is inadequate to discharge the onus which lies on the plaintiff to prove a custom, uniform definite and specific and having the force of law: see the observations of the Privy Council in *Chandika Baksh* v. *Munna Kunwar* (3) at p. 281. None of the plaintiff's witnesses in fact deposes that the allèged custom has among them the force of law or that the obligation to return the stridhanam is of the nature of a legal obligation. Most of them seem to agree that the stridhanam need not be kept intact although caste etiquette does usually keep it intact. It is difficult to gather from their evidence what custom lays down about that, and here undoubtedly the custom is to the last degree vague and indefinite. No case has been cited as settled by a caste panchayat, and, if the custom had been in vogue, there must have been cases of this kind. The evidence therefore appears to us wholly insufficient to justify this Court in putting on one side the ordinary rule of inheritance under Hindu law. The alleged custom is not proved by cogent evidence or by well authenticated and ancient instances, nor is it in all respects specific and definite.

The plaintiff in argument sought to support his weak case by quoting the evidence of two of the defendant's witnesses, D.Ws. 2 and 3. D.W. 2, when the plaint custom was put to him in general terms, said that the property "will go" to the donor's family. In cross examination he said he did not know personally of the custom. Here again is lacking the essential element, namely, the conviction that the stridhanam will go as a matter of obedience to custom having the force of law. D.W. 3's evidence is much vague and he speaks merely of a demand and not even of a payment. We do not think that this evidence is sufficient to fill the gap in plaintiff's evidence.

It seems clear that there is a custom having the force of law that, if the daughter of the family dies issueless, the stridhanam will revert to her parents, but there is at present no clear custom having the force of law, by which such reverter occurs when the daughter has issue and dies leaving issue. There is no certain custom in such a case governing the destiny of the stridhanam, and that destiny is apparently being decided by mutual arrangement sometimes one way, sometimes another. This is the evidence of a witness examined on commission for the defendant Ex. 2 (a) and it appears to us to represent the probable state of affairs.

It is argued for the plaintiff that granted a custom that where the woman dies issueless the inheritance would go to her parents, Hindu law would avail to send that inheritance in the same track when she has a daughter who dies issueless because under Hindu law that daughter will not be a full owner. But obviously such an argument is untenable. The plaintiff cannot appeal to Hindu law to support a custom which has its foundation in the derogation of Hindu law. The manner of inheritance must be wholly either one way or the other, either according to custom or according to Hindu law. This contention of the plaintiff has no support in the evidence of any witnesses; nor does any witness distinguish the manner and the reason of the reverter in the case of Minakshi's stridhanam and in the case of Visalakshi's stridhanam, or suggest that Visalakshi held hers by custom merely as a limited owner; nor is the contention even found in the plaint itself.

The conclusion therefore we come to on the evidence is the opposite of that come to by the learned trial Judge. We should have been more reluctant to differ from him if he had given any reasons for his conclusion, but his judgment is merely a setting out of the evidence and the argument on both sides with a leaning, it appears to us, on the whole against the plaintiff's case, and

(3) [1902] 24 All. 273=29 I. A. 70=8 Sar. 233 (P.C.).

then one sentence in para. 18 that on a careful consideration of the evidence, he has come to the conclusion that the plaintiff is entitled to recover. For that conclusion, he gives no reason except that Minakshi's and Visalakshi's amounts are kept distinct in the accounts, but this seems to us no reason at all, since, as they were donated at different times and no doubt invested at different times, it is natural that they should find separate entiry in the family accounts.

We therefore, on our conclusion, reverse the decree of the learned trial Judge and dismiss the plaintiff's suit with costs in both Courts.

P.R.S./V.S. *Decree reversed.*

✻ A. I. R. 1930 Madras 112 (1)

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Kottapali Bapayya—Appellant.

v.

Official Receiver Guntur and *others*—Respondents.

Appeal No. 45 of 1928, Decided on 3rd October 1929.

✻ **Provincial Insolvency Act, S. 35—S. 35 contemplates payment of debts in full—Admission that all creditors gave him complete and full discharge does not avail insolvent under S. 35.**

Where it is admitted that the debts of the insolvent have not been paid in full, but it is stated that all his creditors gave him a complete and full discharge, that admission is not enough for the annulment of insolvent's adjudication, for what S. 35 contemplates is payment of the debts in full : *A. I. R.* 1926 *All.* 289, *Foll.* [P 112 C 1]

B. Somayya—for Appellants.

N. Rama Rao—for Respondent.

Judgment.—The question is, does the case fall within S. 35, Provincial Insolvency Act ? The insolvent applied under that section for the annulment of his adjudication. The section runs thus :

"Where, in the opinion of the Court a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication."

It is admitted by his counsel that the debts of the insolvent have not been paid in full, but it is stated that all his creditors gave him a complete and full discharge. That is not enough, for what the section contemplates is payment of the debts in full. This is the effect of the numerous decisions on the point. In *Mahmammad Ibrahim* v. *Ram Chandra* (1) which we follow, the authorities are set forth and we do not propose to refer to them in any detail. The appeal fails and is dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

(1) A. I. R. 1926 All. 289=48 All. 272.

A. I. R. 1930 Madras 112 (2)

WALLACE, J.

Govindaraja Mudali — Defendant — Appellant.

v.

Samarapuri Chettiar and *another*—Plaintiffs—Respondents.

Second Appeal No. 477 of 1927, Decided on 4th April 1929,

Limitation Act, S. 20—Payment by principal gives no fresh starting point against surety.

The liability of the surety is not saved from the bar of limitation by the payment by the principal: 28 *Bom.* 248 and 21 *M.L.J.*455, *Foll.*; 105 *P. R.* 1919, *not Foll.*; 24 *M. L. J.* 66, *Ref.* [P 112 C 2]

W. S. Krishnaswami Naidu—for Appellant.

S. Ramachandran — for Respondents.

Judgment.—The only direct authorities on the point of law cited before me are three, *Gopal Daji* v. *Gopal Sonu* (1), *Sami Aiyangar* v. *Laxmi* (2) and *Harbans Lal* v. *Nathu* (3). Of these the two former are against the view taken by the learned District Judge and the latter is in his favour, relying, however, on a decision of this Court in *Velayudan Pillai* v. *Vythilingam Pillai* (4), which deliberately refrains from deciding the point at issue here. So the weight of authority is against the lower appellate Court's view, and I see no reason why I should take a different view from that taken by this Court, already in *Sami Aiyangar* v. *Laxmi* (2). The liability of the surety is, therefore, not saved from the bar of limitation by the payment by the principal.

I reverse the decree of the lower appellate Court and restore that of the District Munsif. Appellant will get his costs here and in the lower appellate Court.

P.R.S./P.R. *Appeal allowed.*

(1) [1904] 28 Bom. 248=5 Bom. L. R. 1020.
(2) [1911] 21 M.L.J. 455=9 I.C. 8=9 M.L.T. 260.
(3) [1930] 105 P. R. 1919=53 I.C. 586.
(4) [1912] 24 M. L. J. 66=17 I.C. 619=12 M. L.T. 610.

** A. I. R. 1930 Madras 113
Special Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

Commissioner of Income-tax, Madras —Petitioner.

v.

S. M. Perianna Pillai—Respondent.

O. P. No. 77 of 1929 Decided on 23rd October 1929 on a reference by Income-tax Commissioner, Madras.

****(a) Income-tax Act (1922), Ss. 23 (4), 23 (2), 63 and 22 (4)—Assessee asking adjournment by post or telegram —Adjournment granted—Letter intimating adjournment is not notice under S. 23 (2) or requisition under S. 63—On default on adjourned date assessment can be made under S. 23 (4).**

Where an assessee applies for an adjournment by post or by a telegram of an enquiry in respect of which he has been required by notice under S. 23 (2) to produce evidence and the Income-tax Officer grants an adjournment, the letter (or the telegram where it is a telegram) intimating the fact of the adjournment to the assessee is neither a notice under S. 23 (2) nor a requisition within the meaning of S. 63. It is merely an act of consideration and supererogation, the omission of which will not entail any legal consequence and therefore, an assessment under S. 23 (4) in default of assessee's appearance on the adjourned date cannot be objected to : 2 *Indian Tax Cases* 3, *Dist.* [P 114, C 2, 115, C 1]

*** (b) Income-tax Act (1922), S. 23 (3)—Income-tax Officer has power to adjourn proceedings—General power of adjournment discussed—Adjournment.**

The power of an officer entrusted with an enquiry to adjourn the proceedings, as occasion requires, is so necessary, convenient and universally conceded that unless it is expressly withheld by statute or rule having the force of law, it must be taken to vest in him. An Income-tax Officer has, therefore, the power of adjournment in an enquiry under S. 23 (3). [P 114 C 1]

(c) Civil P. C. O. 17, R. 1—Adjourned date need not be intimated to an absent party.

It is not the practice much less a rule of procedure even in a Court of justice that an adjourned date is intimated to an absent party. No doubt if a party chooses to apply in person or by representative at the Court or office he can learn what orders have been passed but he cannot insist upon a telegram or a letter by post any more than he can insist upon a letter by special messenger : (1915) *A. C.* 120, *Rel. on.* [P 114 C 2]

T. R. Venkatrama Sastri, N. S. Vaidyanadha Aiyar and *M. Subbaraya Aiyar*—for Assessee.

M. Patanjali Sastri — for Commissioner of Income-tax, Madras.

Curgenven, J.—In this case the Commissioner of Income-tax refers the following question for the decision of this Court :

"Where an assessee applies for adjournment by post or by telegram of an enquiry in respect of which he has been required by a notice under S. 23 (2) to produce evidence and the Income-tax Officer grants an adjournment, is the letter (or the telegram where it is a telegram) intimating the fact of the adjournment to the assessee either a notice under S. 23 (2), or a requisition within the meaning of S. 63 of the Act ?"

To understand precisely the nature of this question, it is necessary to look at the circumstances out of which it arose.

The assessee made his return on 19th June 1928, and on 22nd September a notice under Ss. 23 (2) and 22 (4) was issued to him requiring him to produce his accounts on 4th October. On 3rd October he sent a telegram pleading a private engagement and asking for an adjournment for two weeks. If this has been granted in full it would have entailed a postponement of the hearing until 18th October. The Income-tax Officer did not grant it in full, but he did adjourn the case until the 12th. This he intimated to the assessee by means of a postcard despatched on the 4th. The assessee did not appear or cause the production of his accounts on the 12th, and since he had thereby failed to comply with the terms of the notice the Income-tax Officer, under S. 23 (4), made the assessment to the best of his judgment.

The argument addressed to us upon these facts by Mr. T. R. Venkatarama Sastri may be set forth as it stands in the Commissioner's letter of reference:

(1) That the postcard communicating the grant of the adjournment should itself be taken to be the notice under S. 23 (2) ; the fact that the original notice was under S. 22 (4) as well as under S. 23 (2) may for the moment be ignored as default in compliance with notice under either entails assessment under S. 23 (4),

(2) That it should therefore have been served on the petitioner by registered post, and

(3) That as the postcard was not sent by registered post there was no valid service of notice to justify an assessment under S. 23 (4).

It might reasonably have been inferred, from the language of the question, that the power of the Income-tax Officer to grant an adjournment was to be presumed ; but in fact this line of

reasoning is founded upon a denial that he has, at least in circumstances such as the present, any such power. Not having it, it is said that his only course, when he desires to intimate to an assessee a change of date of hearing, is to issue a second notice in terms of the first (save as regards date), in accordance with the theory that the first notice becomes null and void so soon as the original date of hearing is past. Accordingly unless the post card in the present case can be regarded as a notice under S. 23 (2), which it clearly is not, the assessee received no such notice as he was obliged to comply with. It is sought to qualify the rigidity of this doctrine by the application of the theory of waiver. If the assessee allows his case to be adjourned to an agreed date, he cannot afterwards be heard to contend that he received no valid notice for that date.

I can discover no sufficient ground for denying to an Income-tax Officer the power of adjournment, independently of the doctrine of waiver. S. 23 (3) appears to contemplate it when it says :

"On the day specified in the notice issued under sub-S. (2), or as soon afterwards as may be."

and I can find no justification for restricting the latter words to any particular stage of the inquiry. It may be that the mode of expression used in S. 23 (3) is not so fully proof against criticism as the language, for instance, of S. 31 (1) relating to appeals, where it is said that the Assistant Commissioner "may from time to time adjourn the hearing." But if the Income-tax Officer, as is suggested, has no option but to hear the case "on the day specified in the notice" failure to do so rendering the notice inoperative, the words "as soon after as may be" are irreconcilable with the intention of the Act.

Apart from the presence of these words, I think that the power of an officer entrusted with an enquiry to adjourn his proceedings, as occasion requires, is so necessary, convenient and universally conceded that unless it is expressly withheld by statute or rule having the force of law it must be taken to vest in him. It is not possible to regard a question of this kind apart from consideration of practical expediency in its relation to the transaction of public business ; and it seems scarcely credible that the legislature, which may be supposed to have kept such considerations in view, would have intended to place this constraint upon an executive officer in the disposal of his work.

Accepting then that a hearing under S. 23 (3) may be adjourned, it follows that no second notice under S. 23 (2) for the adjourned date was required by law; and this in effect answers the first part of the question. Mr. Venkatarama Sastri, based his case entirely upon this position, but the question put to us also inquires whether the letter or telegram replying to the application for adjournment is a requisition within the meaning of S. 63 of the Act. Under S. 63 (1).

"A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a a Court, under the Code of Civil Procedure 1908."

Under S. 27, General Clauses Act, if such a document is sent by post, it must be registered. The question is whether in the circumstances stated, an unregistered communication will suffice.

So far as the express terms of the Income-tax Act go, there is no provision either for the manner in which an application for an adjournment should be made, or for the manner in which it should be replied to. It cannot therefore be said that any reply sent is a "notice or requisition under the Act" in the sense that the notice prescribed by S. 23 (2) is a "notice under the Act," i.e., such as the Act requires to be served upon an assessee. Accordingly, no statutory obligation lay upon the Income-tax Officer to issue any reply. He could have proceeded, it is not denied, to dispose of the case on 4th October under S. 23 (4). If he decided to put off disposing of it until the 12th it was open to him to do so. But even so, I cannot discover that the assessee had any legal right to a communication apprising him of the fact. It is not the practice, much less a rule of procedure, even in a Court of justice that an adjournment date is so intimated to an absent party. No doubt if a party chooses to apply, in person or by representative, at the Court or office he can learn what orders have been passed. But he cannot insist upon a telegram or a letter by post, any more than he can insist upon a letter by special messenger. Accordingly I think that the postcard sent to the assessee in

this case was not dictated by the terms of the statute but was merely an act of consideration and supererogation, the omission of which would have entailed no legal consequence. Upon this view it cannot be held that it amounted to a "requisition under the Act."

I reach this conclusion with the less hesitation because I cannot avoid the apprehension that if it were necessary to hold that the reply to a postal application for an adjournment must be by registered post a quite natural consequence would be a refusal on the part of Income-tax Officers to entertain any such applications, to the detriment rather of the assessee than of the officer. Something has been said in the course of the arguments about the requirements of natural justice, as applied to the proceedings of public officers and upon this topic the observations of Lord Haldane, L. C., and of Lord Shaw of Dunferline in (1915) *A. C.* 120 are not inapposite. I quote from the latter's judgment:

"The words "natural justice" occur in arguments and sometimes in judicial pronouncements in such cases. My Lords, when a central administration board deals with an appeal from a local authority it must do its best to act justly, and to reach just end by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative and executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded."

Where an executive officer, or a department of Government supplements the procedure laid down by statute, the principles formulated in this quotation afford a test whether the supplementary procedure is in accordance with natural justice and will not be interfered with. I think that the procedure in the present case answers to this test.

I would answer both the branches of the question put to us in the negative. The petitioner will pay the Commissioner's costs. Advocates' fee Rs. 250.

Walsh, J.—This is a question referred by the Income-tax Commissioner under the following circumstances:

The assessee submitted on 19th June 1928 a return of his income. On 22nd September 1928 the Income-tax Officer served on him a notice under S. 23 (2) and 22 (4) of the Act calling upon him to produce on 4th October 1928 certain accounts and the evidence he wished to rely on in support of his return. On 3rd October 1928 the assessee sent the following telegram to the Income-tax Officer, "Tomorrow my family Puja at Palni. Praying adjournment for two weeks." The Income-tax Officer gave an adjournment till 12th October 1928, sending the intimation by ordinary post. The assessee did not appear on 12th October 1928 and the Income-tax Officer made the assessment to the best of his judgment under S. 23 (4). The assessee then moved the Income-tax Officer under S. 27 of the Act to cancel the assessment. He alleged that he returned with his family to his house only on 16th October 1928 when he found the post-card there intimating the adjournment to 12th October 1928. In the course of the enquiry it was admitted that the assessee had not left any address at the office, nor made any arrangements to acquaint himself with any orders that the Income-tax Officer might pass on his telegram for adjournment. The post-card had been admittedly delivered at the assessee's usual address and in good time to acquaint him with the adjournment. The Income-tax Officer held that the assessee had placed himself out of communication by his own default and declined to reopen the assessment. An appeal against this decision to the Assistant Commissioner proved unsuccessful. The assessee then argued before the Commissioner:

(1) that the post-card communicating the grant of adjournment should itself be taken to be a notice under S. 23 (2);

(2) that it should therefore he served on the assessee by registered post;

(3) that as the post card was not sent by registered post there was no valid service of the notice to justify an assessment under S. 23 (4).

The Commissioner has accordingly referred the following question to the High Court:

" Where an assessee applies for adjournment by post or by telegram of an enquiry is respect of which he has been required by a notice under S. 23 (2) to produce evidence, and the Income-tax Officer grants an adjournment, is the letter (or the telegram where it is a telegram) intimating the fact of the adjournment to the

assessee either a notice under S. 23-(2), or a requisition within the meaning of the Act."

S. 63 (1) reads:

"A notice or requisition under the Act may be served on the person therein named either by post or as if it were a summons issued by a Court under the Code of the Civil Procedure 1908."

It is not denied that if this was a notice or a requisition under the Act it must be sent by registered post and if it were at the same time a notice under S. 23 (2) and not so sent, the Income-tax Officer could not in default of the assessee's appearance proceed to make an assessment to the best of his judgment under S. 23 (4). The second question as propounded becomes unnecessary if the fact is answered in the negative. It is clear that a notice under S. 23 (2) is necessarily also a requisition since the party is either required to attend in person or to produce his books or, as the notice form shows, to do both.

If a notice or requisition is issued under any other section, then though it may be necessary under the terms of S. 63 to send it by registered post, the failure to do so would not affect the power of the Income-tax Officer to act under S. 23 (4). I take it therefore, specially reading it with the arguments of the assessee set out by the Commissioner as the basis of his question, that the question before us really is this:

"Where an assessee applies for adjournment by post or telegram of an enquiry in respect of which he has been required by a notice under S. 23 (2) to produce evidence and the Income-tax Officer grants an adjournment, is the letter (or the telegram where it is a telegram) intimating the fact of the adjournment to the assessee either a notice or a requisition under S. 23 (2)?"

If it is held to be so, it will of course attract the terms of S. 63 (1) and if it is not so, while it might still attract the terms of S. 63 (1), it would be no ground for objecting to an assessment under S. 23 (4) in default of the assessee's appearance on the adjourned date, that the terms of S. 63 had not been complied with. The argument of the learned pleader is briefly this: If on the day appointed for the enquiry the assessee is absent or fails to comply with all the terms of the notice issued under S. 23 (2), the Income-tax Officer must at once proceed to assess him under S. 23 (4), or if he does not to so, but intimates to him a fresh date of hearing he must issue a fresh notice under S. 23 (2). In fact he would do so far as to deny the Income-tax Officer any inherent power of adjournment in cases where the assessee fails to appear even though the assessee should have asked for such adjournment himself (unless he complies with the date asked for by the assessee) and would read that part of S. 23 which runs:

"On the day spscified in the notice issued under Sub-S. 2' or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce ..... shall by an order in writing assess the total income of the assessee, "as if the words ran": 'On the day specified in the notice issued under sub-S. (2) or, provided the assessee has appeared in compliance with the terms of the notice as soon afterwards as may be, etc."

Now it would require very strong reasons to read into a section words like these which are not there and which deny to the Income-tax Officer a very ordinary and necessary power of granting adjournment even though the assessee may not have appeared or complied with the notice under S. 2. To support this contention he argues that in S. 23 (4) there is no allusion to any adjourned date. Apart from that being a very slight ground to read into S. 23 (3) words which are not there, it has been pointed out for the Crown that S. 23 (4) read with S. 22 (2) shows clearly that the penalty of an assessment under S. 23 (4) (which for the sake of convenience, though not quite accurately, may be called a random assessment) need not necessarily be imposed the moment the default is committed. One of the defaults entailing a random assessment under S. 23 (4) is failure to make a return under sub-S. 1, S. 22, but sub-S. 3, S. 22 provides that if the assessee having failed to submit a return or having found an omission or error in his return furnishes a return or a revised return as the case may be at any time before the assessment is made, any return so made shall be deemed to be a return made in due time under this section. Hence though S. 23 (4) does not mention any adjourned date, S. 23 (2) lays down that there is a locus penitentiae right up to the time when the actual assessment is made. No argument therefore can be drawn from the wording of S. 23 (4) to support the introduction of such words under S. 23 (3) as would deprive the Income-tax Officer of the power of granting an adjournment in case the assessee had not complied

with the terms of the order under S. 23 (2). The argument in the circumstances of the present case implies a further fallacy. The Income-tax Officer having granted an adjournment there was no default by the assessee on 4th October 1928, when he did not appear. The Income-tax Officer could not, therefore, on any fair or judicial principle of procedure have visited him with the penalty of an assessment under S. 23 (4) for his non-appearance on that date. If that is so, where was the point at which the Income-tax Officer had to start proceedings all over again under S. 23 (2)? Obviously this occasion could not, on the argument, have arisen till the assessee absented himself on 12th October 1928 but the basis of the learned advocate's argument is that the notice intimating the adjournment to 12th October was the fresh notice under S. 23 (2) which required registration. It may be thought that to deny the Income-tax Officer a power of adjournment in cases where the assessee is absent and even though the letter asks for it, is going further than is necessary to prove the assessee's contention in this reference, but I think the learned advocate is quite correct in arguing for this extreme position and that it is really essential to his plea, for otherwise the obvious answer that there is no necessity at all for the Income-tax Officer to send any reply to a letter or telegram asking for adjournment is almost fatal to his case. It has not and cannot be contended that any such duty of reply is cast on the Income-tax Officer nor can it be denied that if he has a power of adjournment he may, whether to suit his own convenience or that of the assessee, simply write on the file "adjourned to such and such a date," or post it on the board (if such a board is kept). Such an endorsement on the file or notice on the board he is not bound to communicate to the assessee if the latter is absent. It is for the assessee to bestir himself aud make enquiries or to look on the notice board or elsewhere. If this is so, and it cannot, I consider, be controverted, then the Income-tax Officer is neither bound to proceed under S. 23 (4) on the original date of hearing, nor to begin matters all over again by fresh notice under S. 23(2) so that really the two arguments that he has no power of adjournment if the assessee does not appear and the corrollary that he must either act at once under S. 23 (4) or begin with a fresh notice under S. 23 (2) are absolutely essential to establish the contention that a notice of adjournment is a notice under S. 23 (2). I consider that the assessee has failed to make out either of these preliminary contentions. In my view and for the determination of the case it is not material to decide whether a notice or a requisition, if it is not one under S. 23 (2), has to be registered. By the terms of S. 63 if the notice is one under the Act it clearly must be registered, but if it is not a notice under S. 23 (2) the failure to do so will not make an assessment under S. 23 (4) invalid. That is why that part of the reference question which asks whether the letter in this case is a requisition under S. 63 has no bearing on the matter before us if the answer to the first question be in the negative. It raises a question with which we are not concerned. If I had to decide it I should say that it is not a notice under the Act at all. Again on the abstract and academic question whether a notice of adjournment made on the request of the assessee is a mere notice, or is also a requisition (which question really does not arise in this case) I do not feel bound to give an answer, once it is found that it is not a notice or requisition under S. 23 (2). If I had to express an opinion I should say that it must necessarily be a notice (by which I take it is meant an intimation which brings something to somebody's notice). I doubt that it is a requisition because a party is supposed by the original summons or notice to go on appearing till his case is finished, whether this is explicitly so stated in the original summons or not. Any other construction would mean that the assessee would have complied with the original summons in this case if he had merely gone to the office on the day in question, flung his books down before the Income-tax Officer and walked off. The words "attend at my office" must surely mean more than this and must mean:

"attend for as long as I shall require you on that day and also attend in the same way on subsequent dates to which the case may be adjourned."

But in fact nothing turns here on whether the post-card was a notice

or a requisition or a notice plus a requisition. If it was any of these things and was issued under S. 23 (2), then the assessee's contention is correct. If it was not issued under S. 23 (2), it does not affect the question of the right of the officer in case of default to proceed under S. 23 (4). Again I do not feel myself bound to deal with a case where an assessee attends on the due date and finds that the Income-tax Officer is not sitting and has fixed no date of adjournment. Such conduct by the Income-tax Officer would unless unavoidable, be a clear dereliction of his duties. I am rather inclined to think that if there were such a dereliction or if by "force majeure," say a sudden accident to the Income-tax Officer which incapacitated him from giving directions, or his sudden death, the enquiry were left in the air on the day fixed for it, it might very well be that proceedings would have to begin all over again. The Act does not expressly provide for any such break in the enquiry. A question of this sort may be decided when and if it arises. It is not before us to decide.

Although the contention in the present case is purely one of law, it is quite clear that if the assessee's argument is accepted that every notice of an adjourned date, even if made at the petitioner's request (if it is not the date required by the petitioner) necessitates a fresh registered notice under S. 23 (2), the result will simply be in practice that all such adjournments will be refused and the assessment will be decided under S. 23 (4) forthwith. That will work as a great hardship to assessees. The grant of an adjournment is a concession. It was argued that it is no concession if the date asked for by the assessee is not granted. I dissent entirely from this view. The request for an adjournment in these cases implies prima facie a request that the right to make an assessment under S. 23 (4) shall not be exercised. The mere granting of this is a great concession. Then the petitioner's wishes as regards the adjourned date are met partly though not in full. Let us suppose a telegram or letter for adjournment received as in this case either on the day before the hearing or on the date of hearing. The Income-tax Officer is not able to adjourn the enquiry for as long as the assessee wishes. He can grant an adjournment to the next day or the day after, but a registered letter, even if posted at once, cannot reach the assessee in time. In such cases on the contention raised he must refuse even the shorter adjournment which he was prepared to grant, or else start proceedings all over again.

It is also quite clear if the petitioner's contention is correct that the registered notice of adjournment must not only intimate the adjourned date but an entirely fresh list of the other documents or evidence required (admittedly joint notices under S. 22 (4) and 23 (2) are legal and the notice in this case is such.) If the Income-tax Officer does not go to all this trouble it will not be a valid notice. The facts in the present case make this clear. The assessee must and does contend that even if he had got and read the post-card in time to attend the hearing on the 12th he would not have been bound to attend it as the notice was not registered. So that even knowledge gained from a notice to him by the Court itself would not make the notice a valid one. It follows therefore that a mere reference in a fresh registered notice to the evidence required in a previous notice can and will be equally impugned as not constituting a valid notice of what evidence the assessee is required to produce. Ex hypothesi an entirely fresh proceeding under S. 23 (2) has been started and the terms of S. 23 (2) must be complied with fully and literally. This will certainly not be an inducement to the Income-tax Officer to spend trouble, time and money in granting requests by post or wire for adjournments which they are admittedly not bound to notice or answer at all. A decision in 2 *Indian Tax Cases p.* 3 has been referred to by the learned advocate for the assessee. I do not think it has any bearing on this case. It was held there that if the Income-tax Officer during an enquiry under S. 23 (2) required more evidence he can call for it and it might be advisable to do so by a fresh notice under S. 23 (2).

Now it is clear that such notice would be only one supplementary to the one already sent and it need not contain the particulars already given in the

previous notice. To hold that a supplementary notice can be sent under sub-S. (2) when the Income-tax Officer requires fresh evidence in a very different proposition from holding that a notice, which the Income-tax Officer need not send at all, intimating an adjournment made on a letter or telegram by the assessee asking for it, is a fresh notice or even a supplementary notice under S. 23 (2). I would answer the question (in the form in which I understand it is really intended to be put) thus : That where an assessee applies for adjournment by post or telegram of an enquiry in respect of which he has been required by a notice under S. 23 (2) to produce evidence and the Income-tax Officer grants an adjournment the letter (or the telegram where it is a telegram) intimating the fact of the adjournment to the assessee is neither a notice nor a requisition under S. 23 (2) and does not affect the power of the Income-tax Officer to assess under S. 23 (4) if the assessee fails to appear on the date of adjournment or commits any of the other defaults rendering him liable to be assessed uuder that section.

If an answer has to be given to the second part of the question referred to us, I would answer it also in the negative.

Kumaraswami Sastri, J. — I have had the advantage of reading the judgment of my learned brothers. I agree with them that the answer should be in the negative and have nothing useful to add. The respondent will pay Rs. 250 vakil's fee to Commissioner.

P.R.S./R.K. *Reference answered.*

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* * A. I. R. 1930 Madras 119
Special Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

S. L. S. Chettiappa Chettiar and *others*--Petitioners.

v.

The Commissioner of Income-tax, Madras and *others*—Respondents.

O. P. Nos. 169, 170 and 171 of 1928, Decided on 11th October 1929.

*** (a) Income-tax Act (1922), S. 2 (15)—Partner drawing money in course of business—It does not necessarily represent his share of the profits.**

Where a partner draws money in the course of business that will be taken into consideration at the end of the year and if there are any overdrawings by one partner they will be debited to the account of that partner or set off against his profits, and because a partner draws some moneys during the year of account it cannot be said at once that that represents his share of the profits. [P 120 C 2]

*** (b) Income-tax Act (1922), S. 4 (2)—Profits accruing without British India received by a firm—Firm should be taxed.**

Section 4 (2) is for the purpose of ascertaining the profits of a partner and got from business carried on outside British India and when such profits come into British India that will be taken into consideration in assessing him. If a firm receives such profits from another firm it is the firm that should be taxed. [P 120 C 2: P 121 C 1]

*** * (c) Income-tax Act (1922), S. 4 (2) (vii)—Money-lending business generally taking lands in satisfaction of debts due — Lands sold for profits—Such profits are profits derived from such business.**

No general rule can be laid down in cases where a money-lending business takes property in satisfaction of the debts due and sells them. But where, as a matter of fact, in a money-lending business, profits are generally got by taking lands in satisfaction of the debts due and selling them for profits later on, such profits must no doubt be considered as derived from such business, and cannot escape taxation by saying that the profits have nothing to do with the business of the firm which was merely money-lending. [P 121 C 1, 2]

K. S. Krishnaswamy Aiyangar and *R. Keshva Aiyangar* —for the Assessees.

M. Patanjali Sastriar – for Commr. of Income-tax, Madras.

Judgment.—The point referred to us for decision is whether there was any evidence before the Commissioner of Income-tax on which he could find that the $ 30,000 remitted from Ipoh to Madras during the year of assessment was remitted not in 'discharge of the debt owed by the Ipoh branch to the assessee but as the latters' share of the profits and (2) whether the sum of $ 48,460 $ 793, $ 1,225, $ 1,806 and $ 604 amounting in all to $ 52,888 can be held to be income derived from business and not merely accretions of capital?

The facts are shortly these: There was a firm in Madras and a firm in Ipoh carrying on money-lending business. The partners were the same. During the course of dealings moneys were due by the Ipoh firm to the Madras firm. The Ipoh firm was making profits in the accounting year 1925-26 the year of assessment being 1926-27. In the accounting year sums were remitted out of the Ipoh profits to this Madras firm, which

in the Madras accounts were appropriated to wipe off the debt due to the Madras firm. The partner in the Madras firm who was also a partner of the Ipoh firm wrote a letter to the agent of the Ipoh firm on 26th March 1926 the material portions of which run as follows:

"As the debt due by us (Ipoh) to Madras has mostly been discharged it will not be convenient to send moneys to Madras and debit it. You may, subject to the exigencies of the business there ascertain the income for the year ending Panguni 30th Krodhana 12th April 1926 and agreeable thereto debit the headquarters in the sum of $ 30,000 on Sena's account and in $ 30,000 on R. M's. account and to credit Madras therewith."

According to this letter a credit entry was made in the Ipoh accounts but not in the Madras accounts in the year of accounting. The assessee has been taxed on this $ 30,000 on the ground that it comes under S. 4, Cl. 2, Income-tax Act. S. 4, Cl. 2 runs as follows:

"Profits and gains of business accruing or arising without British) India to a person resident in British India shall if they are received in or brought into British India be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought) notwithstanding the fact that they did not so accrue or arise in that year provided that they are so received or brought in within three years of the end of the year in which they accrued or arose."

There is an explanation which is not necessary to consider for the purpose of this case. The effect of S. 4, Cl. 2, is that so far as the firm outside British India is concerned even though there may be a partner in British India he is not liable to pay income-tax on profits except in so far as any portion of the profits are brought into British India within the year of accounting.

What happened in this case was that moneys were sent from Ipoh to Madras and these were credited in the Madras firm's books. The net result was that the amount which Ipoh owed to Madras was wiped out leaving a balance. There is no suggestion anywhere in the records that when these moneys were sent to the Madras firm they were credited in the Madras firm's books as profits received by each partner individually. Prima facie the Ipoh firm owed the Madras firm large sums of money and receipts were credited in the Madras partnership account. The asseesee admits that the Madras firm will be taxable. In fact the assessee does not deny that this amount will be taxable as profits remitted to the firm and that it ought to be included in the next year's accounts. The Madras firm will be taxable irrespective of any drawings of the partners and that will be the ordinary state of affairs in the case of firms which are assessable under the Act.

Next as regards the applicant in the present case it is sought to make him liable for a portion of the money remitted to the Madras firm and the only ground on which he can be so taxed would be on the evidence of the letter referred to above. It is not suggested that any moneys actually came into Madras in pursuance of that letter during the year of taxation. The Income-tax Officer did not treat this letter as showing that any amount was received by the petitioner from Ipoh. It is used as evidence that the petitioner must have received the profits earned outside British India and they were debited in the firm's books. It is nobody's case that the entries in the firm's books were a mere blind for the purpose of enabling one partner to draw out the profits earned outside British India and thereby escape taxation. There is no question of any fraud suggested in any of the orders of the Income-tax Officers. What is said is that this letter evidences a receipt of $ 30,000 by the assessee.

We do not think that that letter shows anything of the sort. That letter was written asking the Ipoh agent to look into the accounts, ascertain the income for the year and debit the headquarters in the sum of $ 30,000 on Sena's account and $ 30,000 in R. M.'s account and to credit Madras therewith. This does not show that the entire profits for the year were ascertained and that the $ 30,000 represented the profits remitted to the partner during the year of account. Where a partner draws moneys in the course of his business that will be taken into consideration at the end of the year and if there are any overdrawings by one partner they will be debited to the account of that partner or set off against his profits and because a partner draws some moneys during the year of account it cannot be said at once that that represents his share of the profits. S. 4 (2) is for the purpose of ascertaining the profits of a partner got from business carried on outside British India and when such profits come into British

India that will be taken into consideration in assessing him. If a firm receives such profits from another firm it is the firm that should be taxed.

Further there is no evidence in this case that this letter showed either by itself or coupled with the other facts that any money remitted 'to the Madras firm during the cousre of that year were really remittances made to the assessee, and that it was sent to the Madras firm for the purpose of making the assessee escape liability to taxation. The reference is :

"Is there any evidence on which we can find that the $ 30,000 remitted from Ipoh to Madras during the year of assessment was remitted not in discharge of the debt owed by the Ipoh branch to the assessee but the latter's share of the profits."

When the remittances were made they were all credited and debited in the firm's accounts and were for the discharge of the debt owed by the Ipoh firm and under these circumstances we do not see any legal evidence to make the assessee liable for any drawing which he has made and which has been put down as in discharge of the debt owed by the Ipoh firm. In these circumstances we answer the first question in the negative.

Then as regards the second question, moneys realised by the sale of certain immovable properties, the finding of the Income tax Officer is that these transactions took place as a matter of fact in the course of the business, that the properties were taken over with the intention of selling them and that the profits derived from the transactions as a whole including the sales was as much a profit of the firm's business as that derived from its other money-lending transactions. The firm got these properties in discharge of debts due to it, resold the properties at a profit and the Income-tax authorities consider this as a profit derived from its business.

It is argued by Mr. K. S. Krishnaswami Iyengar, that the firm's business was only money-lending and no profit realized by the sale of the properties got in satisfaction of the debts due to the firm can be said to be profit made in the course of the firm's business and so it is not liable to be taxed. Reference is made to 5 *Tax Cases* 426. We do not think that any general rule can be laid down in these cases. One has to see what is the course of dealing and though the business is labelled as money-lending business, if as a matter of fact the profits were generally got by taking lands in satisfaction of debts due and selling them for profits later on, such profits must no doubt be considered as derived from such business and cannot escape taxation by saying that the profits have nothing to do with the business of the firm which was merely money-lending. The finding of the income-tax authorities is that the profits represented the profits of the business and are not, as was contended, accretions of the capital. Further this case is analogous to that of a pawn-broker who lends out moneys on articles received as pledges which he sells in satisfaction of the amount due to him and realizes profits. It cannot be said that the profits realised from such sales do not amount to profits derived in the course of the business.

In these circumstances we cannot say that the profits realized from the sale of the properties got by the firm in satisfaction of debts due to it were not got in the course of its business and that they were accretions of the capital. These were really profits which accrued in the course of the business and are thus taxable. The petitioner is entitled to costs which we fix at Rs. 250 on each of the petitions. The advance paid by him of Rs. 100 will be refunded.

O. P. No. 169 *of* 1928.

Our order on point 2 in the above case holds good in this also and we dismiss it. The assessee will pay Rs. 250 as costs of the Commissioner.

P.R.S./D.D. *Reference answered.*

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* A. I. R. 1930 Madras 121
Special Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

O. R. M. O. M. S. P. Lakshmanan Chettiar—Petitioner.

v.

Commissioner of Income-tax, Madras—Respondent.

Original Petition No. 179 of 1928, Decided on 15th October 1929, on reference by Income-tax Commissioner, Madras.

*** Income-tax Act (1922), S 4 (2) (vii) — Assessee in satisfaction of loan taking from debtor money debts, mortgage items and rubber plantations — Loss incurring in**

first two businesses — Rubber plantations sold at profit—Assessee getting deduction as business loss on the loss incurred on the first two items—Income-tax authorities assessing on the profit made in sale of rubber plantations—Assessment held to be correct.

The assessee was a money lender and in course of his business lent money to one *S. S.* failed in business and discharged his debt to the assessee and transferred certain properties to him consisting of moneys due on simple money debts, moneys due on mortgaged items and also some rubber plantations. As regards moneys due on simple money debts the assessee recovered a smaller sum than the amount for which they were transferred and got a reduction of income-tax on this deficit. As regards the mortgaged items also he was not able to recover the amounts for which they were mortgaged and got a deduction for that deficit. As regards the rubber estate it was sold at a profit. The Income-tax authorities treated this profit as made in the course of the business and assessed the assessee to income-tax thereon.

Held : having regard to all the facts there was ample evidence for coming to the conclusion that this profit must be treated as part of the business profit and the income-tax authorities were right in assessing the assessee for the same : *A. I. R.* 1924 *Mad.* 208 (*S. B.*), *Cons.* ; 7 *Tax. Cases* 125 ; 11 *Tax Cases* 297 and 2 *Tax Case* 8, *Rel. on.* [P 123 C 2]

R. Kesava Aiyangar—for Assessee.

M. Patanjali Sastri — for Commissioner of Income-tax, Madras.

Judgment.—In this case the facts are shortly these. The petitioner carried on business in money lending in Madras. In the course of business, one P L. N. K. Subramaniam Chetti owed him about Rs. 50,000. Subramaniam Chetti failed and to discharge his debt he transferred certain properties to the petitioner for 26,000 dollars. The items transferred consisted of moneys due on simple money debts, moneys due on mortgage items and also rubber plantations. As regards moneys due on simple money debts the petitioner recovered a smaller sum than the amount for which they were transferred and he wrote off Rs. 5,733 in the accounts and claimed that this was a business loss and got a reduction of income-tax. As regards the mortgage items, while a certain portion of the mortgaged property was recovered, he was not able to recover the amount for which they were assigned and he also claimed it as a business loss and got a deduction. As regards the rubber estate it was sold at a profit and the question is whether that profit is taxable as part of the profits made by him in the business.

The contention of the petitioner is that this was an isolated transaction, that it cannot be said to form part of his business, that any profits on resale was not profit made in the course of business and that therefore it is not taxable. The Income-tax Commissioner's view was that having regard to all the facts of the case, it should be treated as a profit made in the course of business. The questions referred to us are :

"(a) whether the Assistant Commissioner is right in holding that the present case is outside the principle of the decision in *Board of Revenue* v. *Arunachalam Chettiar* (1) and (b) whether on the facts of this case the assessment of the sum of Rs. 48,739 is legal?"

The decision in *Board of Revenue* v. *Arunachellam Chettiar* (1), was that it is a question of fact in each case whether certain stray transactions of a merchant are really part of his business so that the profits arising therefrom can be taxed as profits arising from his business. It was held there on the facts that profits that accrued to a banker and money-lender from certain stray speculative purchases and sales of dollars in the Straits Settlements were taxable as profits arising from his business and were not exempt from taxation as arising from occupation of a casual nature within the meaning of S. 3 (2) (viii), Income-tax Act of 1918. The facts which we have set out show that these rubber plantations were got by the petitioner in order to liquidate a loan made by him in the course of his money-lending business. So far as the items which went to liquidate this debt are concerned, they consisted, as already stated, of some simple money debts, mortgage items and this item of property and they were all clubbed together in an account called 'Thundu Kanakku." This account was part of the business account and only formed a separate ledger heading there. In dealing with this transaction of the re-sale of the rubber plantations we must take into consideration what he did in respect of all the three items which were taken together to discharge the debt. It does not appear that there was any separate treatment as regards this item. They were all brought into Thundu Kanakku ; as moneys were realized they were credited to the general account as moneys realized in the course

(1) A.I.R. 1924 Mad. 208=47 Mad. 197 (S.B.).

of the liquidation of the debt ; and they were brought in the business account. When there was a loss in two of the tranactions the loss was claimed to be a deduction out of the business accounts. So that, as regards the other two items, it is clear that they were treated as loss arising from the business and as a business transaction. There was nothing, so far as we can see, in the accounts which distinguished this item from the other two items which were got by the petitioner. On the contrary we find that the expenses of the rubber estate were debited in the business accounts, the income therefrom was also credited in the business accounts and the profits, the excess of income over the expense, was shown as business profit made outside British India in the return. So far as the contention that this was an isolated transaction is concerned, there is nothing in the authorities to show that the profits of such a single transaction cannot be treated as part of the business profits. On the contrary, there are cases where profits of a single transaction have been treated as part of the business profits. We may refer to the case in 7 *Tax Cases* 125, where the principles governing such cases have been enunciated. In that case, a company which was doing business as selling agents for colliery tompanies and also as commission agents, for purchase of trucks, purchased certain trucks for themselves and made a profit out of it. The question arose whether this was a profit made in the course of the business. Sankey, J., deals with the question raised and he puts the matter clearly as follows :

" In my view there is no question of law really in issue here. The law seems to me to be perfectly well :settled, and the only question one has to determine is which side of the line this transaction falls on. Is it, as Mr. Latter contends, in the nature of capital profit on the sale of an investment ? Or is it, as the Attorney General contends, a profit made in the operation of the appellant company's business. Now that is very largely, as I think, a question of fact again."

Then, the learned Judge refers to certain circumstances and gives reasons for holding that it is part of the business. The learned Judge observes :

" I do not think it is possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of chargeable property. I think in most cases an isolated transaction does not fall to be chargeable, but I think you have to consider the transaction and you cannot lay it down as a matter of law without regard to the circumstances that in this case the £ 2,500 is not chargeable."

This is also the effect of the decision in 11 *Tax Cases* 297 where also it was an isolated transaction, and this is also the principle laid down in 2 *Tax Cases* 8 where a cotton merchant happend to liquidate the affairs of another cotton merchant who failed and made a large profits as commission and it was held that it was profit made in the course of business. The question is not in this case whether the petitioner intended to sell it at a profit but, whether, having regard to all the facts and the way in which he treated this property and the other two items which were got by him in discharge of the debt and having regard to all the attendant facts, it can be said that this was part of the business.

We cannot say in this case there was no evidence before the Commissioner of Income-tax, having regard to all the facts set out, for coming to the conclusion that this must be treated as part of the business profits and, as there was evidence to justify his conclusion, it is difficult for us to hold that he was wrong in making the assessment. We therefore answer the reference by stating that the Commissioner was right in assessing the petitioner in the manner he had done. The petitioner will pay Rs. 250 the costs of the Commissioner.

P.R.S.R.K. *Reference answered.*

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* A. I. R. 1930 Madras 123

Special Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

R. M. V. R. M. Virappa Chettiar—Petitioner.

v.

Commissioner of Income-tax, Madras—Respondent.

Original Petn. No. 262 of 1928, Decided on 15th October 1929.

*** Income-tax Act (1922), S. 10—Firm purchasing lands and selling them after six years at profit — Income-tax Officer cannot tax profits, under business, unless there is legal evidence.**

Ordinarily profit arising out of an isolated transaction outside the scope of the business does not fall to be chargeable as a business profit. Where therefore firm a purchases property and sells it at profit after six or seven years, the Income-tax Officer cannot treat the difference in prices as a business profit and cannot

tax them in the absence of legal evidence that it is profit out of business: *Beynon & Co. Ltd.* v. *Ogg*. 7 *Tax Cases* 125, *Rel. on.* [P 124 C 1]

K. Rajah Iyer and *V. Ramaswami Iyer*—for Assessee.

M. Patanajali Sastri — for Respondent.

Kumaraswami Sastri, J.—The question referred to us is, whether there is any evidence to justify the finding that the purchase and sale of lands formed part of any business which the assessee was carrying on. The Income-tax Officer in this case proceeds on what he says is a well known fact that in the course of their business abroad and as a part of it Nattukottai Chettis purchase land and other properties when they are cheap and hold them until such time as they are able to sell them at a good price and that during the period these properties are in their possession the income derived, if any, on the one hand and the expense of maintenance, if any, on the other, are included in their business accounts. In the present case, there is no evidence afforded by the books that the income derived and the expense iucurred were included and made part of the firm's business accounts. All that appears is that these Chettis purchased one item of property in 1919 and another item of property in 1924 and that these were sold in 1926-27. On this fact and on this general presumption which the Income-tax Officer thinks fit to draw in these cases he has treated the difference in prices as a business profit.

There is no evidence about what was done with the income. The books are not before the Income-tax Officer and there is nothing to show that the income and expenses were, as a matter of fact, brought into the partnership accounts. There is nothing to show that the profits were made by the operation of the petitioner's money lending business and were not in the nature of capital profits on the sale of au investment. As pointed out by Sankey, J. in *Beynon & Co. Ltd.* v. *Ogg*, (1) ordinarily profit arising out of an isolated transaction outside the scope of the business does not fall to be chargeable as a business profit. On these facts we are not prepared to say that there is legal evidence on which the assessee can be assessed on the ground that it is part of the profits of the business carried on. The petitioner will be entitled to his costs, Rs. 250.

P.R.S./V.S. *Reference answered.*

(1) [1917] 7 Tax Cases 125.

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* A. I. R. 1930 Madras 124
Special Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

Commr. of Income-tax, Madras—Petitioner.

v.

A. Suppan Chettiar & Co.—Respondents.

Original Petns. Nos. 244 of 1928 and 16 of 1929, Decided on 18th October 1929.

*** (a) Income-tax Act (1922), S. 10 (2)(vi)—Assessee owning number of businesses *A*, *B*, *C* and *D*—Profits and gains of business *A* insufficient to cover full depreciation—Excess depreciation can be set off against profits and gains of other businesses in *B*, *C*, and *D*.**

Where the assessee owns a number of businesses *A*, *B*, *C* and *D*, and the profits and gains of business *A* are insufficient to cover the full depreciation admissible under S. 10 (2) (vi) of the Act on the machinery, plant, etc., used for the purpose of that business the excess depreciation can be set off against the profits and gains of the other businesses, *B*, *C* and *D*: (1911) 1 *Ch.* 92, *Ref.* [P 126 C 1]

(b) Interpretation of Statutes — Proviso cannot by implication withdraw main provision.

A proviso to a section should not by mere implication withdraw any part of what the main provision has given: (1897) *A. C.* 647, *Rel. on.* [P 125 C 2]

*** (c) Income-tax Act (1922), S. 10, Proviso. (b)—Meaning of "any business" and "profits or gains."**

If "any business" in S. 10 (1) means all the businesses put together, then in proviso (b) "profits or gains" will mean the aggregate profits or gains of all the businesses together: *A. I. R.* 1924 *Mad.* 474 and *A. I. R.* 1929 *Lah.* 556, *Rel. on.* [P 126 C 1]

M. Patanjali Sastri—for Petitioner.

T. M. Krishnaswami Ayyar for *M. Subbaroya Aiyar* and *T. P. Gopalakrishna Aiyar*—for Assessee.

Curgenven, J.—The question which the Commissioner refers to us is:

"Whether where an assessee owns a number of businesses *A*, *B*, *C* and *D*, and the profits and gains of business *A* are insufficient to cover the full depreciation admissible under S. 10 (2) (vi) of the Act on the machinery, plant, etc., used for the purpose of that business, the excess depreciation can be set off against the profits and gains of the other businesses *B*, *C* and *D*"?

The assessee is an unregistered firm carrying on the business of (1) grocery

and rice, (2) money lending, (3) Soda factory, (4) rice-mill, (5) foreign liquor shops, and (6) motor service, The profits of the last named, the motor service, for the year to which the assessment relates, amounted only to Rs. 253, whereas the firm claimed an allowance of Rs. 10,542 on account of depreciation. Under S. 10 (2) (vi) of the Act, in computing the profits or gains of a business allowance may be made, within certain prescribed limits, in respect of depreciation of buildings, machinery, etc., and the question we have to answer is whether, taking this case as an example of the general proposition addressed to us, the allowance may be set against not only the small profit of Rs. 253 earned by the motor service but against the profits earned by the other five businesses.

Section 10, which deals with the assessment of a business to tax, provides that the profits or gains shall be computed after making allowances in respect of charges classified into nine divisions, examples of which are rent, cost of repairs, interest on borrowed capital, etc. Admittedly in respect of each of these charges except depreciation it is open to the assessee to include the whole sum which it represents in his balance sheet, with the result, it may be, that a minus balance or loss on the business is shown. Then, if he has more than one business, or even more than one head of income, as described in S. 6, he is entitled under S. 24, to set off the loss in the business against any profits or gains received under another head. In other words, if the charge is any one of those named in S. 10, other than depreciation, the question which the Commissioner refers to us must, upon the plain terms of the Act, be answered in the affirmative. It is said, however, that allowance for depreciation stands upon a different footing from the other allowances, and, as an indication of this, our attention is directed to proviso (b) under Cl. (vi), S. 10 (2). It lays down that :

"Where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or, if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years."

Taking the words "profits or gains chargeable for that year" to refer only to the profits or gains of the business in which the depreciation occurs, it is contended that this proviso allows only one way of treating the charge; that so much of it as cannot be neutralised by profits must not figure as an actual loss, but must be carried forward into the next year's account. But neither from the language used, nor from any general considerations arising from the nature of the charge are we satisfied that this construction is correct. But for the proviso, depreciation stands upon the same footing, and should, so far as any intention to the contrary appears, be dealt with in the same way, as the other charges enumerated in the section ; and it is a well known principle of construction: see (1897) *Appeal Cases* 647 that a proviso should not by mere implication withdraw any part of what the main provision has given. We do not think therefore that upon the terms of the section an assessee is precluded from adding the whole charge for depreciation to his other business charges, even though the result is to show a loss, and then claiming under S 24, to set off the loss against profit from some other source. Nor have we been shown that there is anything in the nature of this allowance for depreciation to render such a course inadmissible. The learned advocate for the Crown argues that it is not a business expense or loss, but rather a sum set apart to make good a loss of capital. There is an observation in (1911) 1 *Ch*. 92 that depreciation is a business loss. That, however, was not an income-tax case, and no doubt there may be a business loss of capital as well as of profits. We do not propose to pursue this line of inquiry further, as we have heard nothing in any sense conclusive upon the point. But it may be observed that a close analogy exists between money spent upon repairs to buildings, machinery, etc., and money set apart in respect of depreciation of such things, and that so far as we can discover there is no reason to treat differently the allowances in respect of these two classes of expenditure.

We have dealt with the question on the footing that the words "business" and "any business" occurring in S. 10 (1) relate only to the business in which the depreciation occurred,—in this case the motor service. If, however, we construe "any business" as meaning all the businesses put together, which was the construction put upon it in *Commissioner of Income-tax, Madras* v. *Arunachelam Chettiar* (1), then in proviso (b) "profits or gains" will mean the aggregate profits or gains of all the businesses together, and we need look no further for an answer to the question proposed to us.

This construction has been adopted in a case recently decided by the Lahore High Court (*A. I. R.* 1929 *Lah.* 556), where the same question arose in a slightly more extreme form and was decided in the same manner.

Our answer to the question referred to us is in the affirmative. The respondent will receive the costs of this application. Vakil's fee Rs. 250. Deposit to be returned.

O. P. No. 16 of 1929 is not pressed and is dismissed with costs. Vakil's fee Rs. 100.

P.R.S./V.S. *Reference answered.*

(1) A. I. R. 1924 Mad. 474=47 Mad. 660 (S.B.).

A. I. R. 1930 Madras 126
Special Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

P. L. M. P. L. Palaniappa Chettiar—Petitioner.

v.

Commr. of Income-tax, Madras—Respondent.

Original Petn. No. 168 of 1928, Decided on 14th October 1929.

Income-tax Act (1922), S. 34, proviso—Rate sought to be raised—Determination of correct taxable income afresh is not necessary.

In a case where the rate is sought to be raised under S. 34 of the Act, an Income-tax Officer is not bound to determine afresh the correct taxable income of the assessee. [P 127 C 1]

R. Kesava Iyengar—for Assessee.

M. Patanjali Sastri—for Respondent.

Kumaraswami Sastri, J.—The question we are asked to answer is: When an Income-tax Officer takes action under S. 34, Income-tax Act, for the purpose of raising the rate of tax on the ground that the rate originally fixed was too low, is not the Income-tax Officer bound to re-assess the income, that is, to determine afresh the correct taxable income of the assessee? S. 34 refers to income escaping assessment and it provides that in such cases it may either be that the income has escaped assessment or has been assessed at too low a rate—the Income-tax Officer may serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included under sub-S. (2), S. 22 and may proceed to assess or re-assess such income, profits or gains and that the provisions of this Act shall, as far as possible, apply accordingly as if the notice were a notice issued under that subsection. Then there is a proviso that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment as the case may be. It is argued for the petitioner that under S. 34, where the rate at which the tax is levied is sought to be raised, the Income-tax Officer is bound to begin proceedings again as regards assessment and in fact proceed as if there is an enquiry in respect of not only of the portion which has escaped assessment but of all the other items also; and reference is made to Ss. 14 and 16. It is argued that, when there are various heads under which a person returns his income, if in respect of one of those heads, owing to an omission or under-estimation, he has been taxed at a certain rate which is subsequently found to be incorrect and notice is given to him under S. 34, the Income-tax Officer is not to confine himself to that portion which has escaped assessment but he is to begin again as if the notice sent was a first notice sent to the assessee to return his income. We do not think that S. 34 requires any such thing to be done. S. 34 refers to a specific case, namely, the case where an income chargeable to income-tax has escaped or has been assessed at too low a rate. It may escape assessment leaving the rate unchanged, in which case it is only the amount of the assessment that will have to be raised owing to the rise in the taxable income, or it may escape assessment in such a way that, if rectified, it would take the income beyond a certain

rate ; for example, it may give the figure to be over Rs. 40,000 in which case it will be assessed at 0-1-6 instead of 0-1-0 and the rate will therefore be higher. Where the rate is in question the enquiry need not, under S. 34, go beyond the facts on which the raising of the rate depends. When the assessee is given notice to show cause why the tax should not be raised because of an item having escaped assessment he is entitled to show that, as a matter of fact, there has been no omission and that the original rate is correct. We do not think that S. 34 requires the whole thing to be re-opened and every item under which income-tax is charged to be considered afresh and a fresh assessment levied. In one sense, of course, he must fix the taxable income to enable him to fix the rate, but he is not bound to re-open the items which are not in question or which have become final and start proceedings again. We think he is only bound to confine himself to the particular item which has been omitted.

Our answer will therefore be that, in a case where the rate is sought to be raised under S. 34, Income-tax Act, an Income-tax Officer is not bound to determine afresh the correct taxable income of the assessee. The petitioner will pay Rs. 250 the costs allowable.

P.R.S./V.S. *Reference answered.*

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* A. I. R. 1930 Madras 127
Special Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

Commr. of Income-tax, Madras – Petitioner.

v.

Rm. P. L. S. Sivaswami Chettiar— Respondent.

Original Petn. No. 121 of 1929, Decided on 17th October 1929.

(a) Income-tax Act (1922), S. 23 (4) — Combined notice under Ss. 23 (2) and 22 (4) is valid—Assessment under S. 23 (4) is justified on non-compliance of such notice.

A combined notice under Ss. 23 (2) and 22 (4) is a valid notice, and on a non-compliance of the terms of such a notice, an assessment under S. 23 (4) could be justified : *A. I. R.* 1928 *Cal.* 587 (*S. B.*); *A. I. R.* 1928 *All.* 283; *A. I. R.* 1929 *Rang.* 38 (*F.B.*) and 2 *Tax Cas* 324, *Rel. on.* [P 127 C 2]

*** (b) Income-tax Act (1922), S. 23 (4)— Assessee submitting return under S. 22 (2)— Assessment under S. 23 (4) is justified on non-compliance of notice issued under S. 22 (4).**

In respect of an assessee who has submitted a return of his income under S. 22 (2), a notice issued under S. 22 (4) is valid so as to justify an assessment under S. 23 (4) in the event of non-compliance of the terms of the notice : 52 *Mad.* 194, *Rel. on.* [P 127 C 2]

M. Patanjali Sastri—for Petitioner.

K. V. Krishnaswami Iyer, *V. Rajagopala Iyer* and *T. V. Ramiah*—for Assessee.

Kumaraswami Sastri, J. — The points referred to us for decision are, (1) whether a combined notice under Ss. 23 (2) and 22 (4) is a valid notice, and whether on a non-compliance of the terms of such a notice, an assessment under S. 23 (4) could be justified and (2) whether in respect of an assessee who has submitted a return of his income under S. 22 (2), a notice issued under S. 22 (4) is valid so as to justify an assessment under S. 23 (4) in the event of non-compliance of the terms of the notice ?

As regards the first point we think it is covered by authority. That a combined notice may be sent has been held in *In re, Harmukhrai Dulichand* (1), *In the matter of Chandra Sen Jaini* (2), *Commr. of Income-tax, Burma* v. *R. M. P. Chettyar Firm* (3) and *Ram Kissendas Bagri* v. *Commr. of Income-tax, Bengal* (4).

The second question has, we think, been practically answered in *Ramaswami Chettiar* v. *Commr. of Income-tax* (5) at p. 202 (of 52 *Mad.*). If a combined notice can be issued, there is nothing to prevent the Income-tax Officer from sending a notice, as he has done, in Form B, requiring the production of accounts which he wants to be produced and are specified on the back of his notice and also requiring the person to appear personally. Now, in cases where a person appears but does not produce the accounts he is asked to produce, we think the penalty under S. 23 (4) can be applied. It is not necessary that another notice should be sent under S. 23 (2) because under S. 23 (4) any one of the defaults is sufficient to attract the provision that the Income-tax Officer can assess on the best of his information. The argument of Mr. Krishnaswami

(1) A. I. R. 1928 Cal. 587=56 Cal. 39 (S.B.).
(2) A. I. R. 1928 All. 283=50 All. 589.
(3) A. I. R. 1929 Rang. 38=7 Rang. 26 (F.B.).
(4) 2 Ind. Tax. Cas. 324.
(5) A. I. R. 1929 Mad. 60=52 Mad. 194 (F.B.).

Aiyar, as we take it, is, where a return has been submitted and even in cases where the Income-tax Officer acts under S. 22 (4) and wants the production of accounts, he must still issue a notice under S. 23 (2) and act after issuing that notice. That is reading into S. 23 .(4) what is not there. An Income-tax Officer is not bound to make up his mind the moment he receives a return as to whether he accepts it or not: it is open to him before he deals with the question to call for the production of accounts and, as the accounts have to be proved by somebody, to call the assessee to appear in person. If the assessee appears in person but does not produce the accounts there is no reason to say that the penalty under S. 23 (4) is not attracted simply because another notice has not been sent under S. 23 (2) asking him to attend office and produce or cause to be produced any records which he may rely on in support of his return. This would presuppose that the Income-tax Officer must work up his mind at once one way or the other and then act and that he cannot suspend that judgment until he calls for the person assessed to substantiate his return or calls for the accounts to substantiate his evidence.

We think both these questions have to be answered against the petitioner that a combined notice is valid and that an assessee can be assessed under S. 23 (4) in the event of non-compliance with the terms of the notice requiring the production of accounts, which the Officer in law entitled to call upon him to produce. The petitioner will pay the costs of the reference, Rs. 250.

P.R.S./V.S. *Answered affirmatively.*

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CURGENVEN, J.

Kandasami Chetti and *others* — Petitioners—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 595 of 1929, and Criminal Revn. Petn. No. 542 of 1929, Decided on 9th August 1929, against judgment of Joint Magistrate, Dindigul, in Criminal Appeal No. 11 of 1929.

Madras Towns Nuisance Act (3 of 1889), S. 7—"Common gaming house" explained.

"Common gaming house" means a place of public resort where a number of persons are invited to congregate for the purpose of gaming: *A. I. R.* 1924 *Mad.* 729, *Rel. on.*; 15 *Hals.* 584, *Foll.* [P 128 C 2]

T. V. Ramanatha Ayyar and *T. S. Venkatarama Ayyar*—for Petitioners.

Order.—Petitioner 1 has been convicted under Ss. 6 and 7, Towns Nuisance Act, Madras Act 3 of 1889, of keeping a common gaming house and the remaining petitioners under S. 7 of gaming therein. The expression "common gaming house" has not been defined in the Act; and although a definition of the term occurs in S. 3, City Police Act, I think that following two decisions of this Court one unreported and the other reported as *Chinniah, In re* (1) the meaning to be attached is substantially that contained in 15 *Hals.* 584, namely a place of public resort where a number of persons are invited to congregate for the purpose of gaming. As regards the evidence of the prosecution witness P. W. 3, upon whose information the Sub-Inspector took action, states with reference to the place in question that he had seen the accused and others also always gaming with cards, betting money and gambling, that accused 1 was collecting Rangu Kasu (which is some kind of levy) for all such plays, that gaming went on there day and night and that whenever he passed by when going to work he saw the accused 1 and others gambling. Evidence to the same effect was given by P. W. 6, and the Sub-Inspector himself (P. W. 1) stated that he had information that accused 1 was keeping a common gaming house and that gambling was going on there. He made a raid with the result that all the accused were found inside the compound gambling with cards and money. As soon as they saw him they attempted to run away. I do not think that any other inference is possible on this evidence than that which has been drawn by the lower Courts, namely that accused 1 was keeping the gaming house and the remaining accused were actually caught when gambling there. In these circumstances I can find no reason to interfere with the conviction. I dismiss the petition.

P.R.S./P.R. *Petition dismissed*

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(1) A. I. R. 1924 Mad. 729=47 Mad. 426.

* A. I. R. 1930 Madras 129

KUMARASWAMI SASTRI AND WALSH, JJ.

(*Davuluri*) *Pitchayya* and *another*—Plaintiffs—Appellants.

v.

(*Divi*) *Venkatakrishnamacharlu* and *others*—Defendants—Respondents.

Appeal No. 418 of 1924, Decided on 13th September 1929, against decree of Addl. Sub-Judge, Bapatla, in Original Suit No. 8 of 1924.

(a) Civil P. C., S. 92—Scheme suit — No relief can be granted for prayers outside scope of sanction.

In a scheme suit if any prayers are outside the scope of the sanction given under S. 92, no relief can be granted with reference to them : 11 *Mad.* 148, *Ref.* [P 129 C 2]

(b) Civil P. C., S. 92—Object of S. 92 is to safeguard not only rights of public but also those of institution and trustees.

The object of requiring sanction or permission before suits are instituted under S. 92 is to safeguard not only the rights of the public but also the rights of the institution and the trustees. The suit being a representative suit, it is necessary to see that the persons who come forward are persons who have an interest in the temple and persons who can be safely entrusted with the conduct of the suit. It is also for the benefit of the institution and of the trustees because it affords a safeguard against impecunious improper persons coming as plaintiffs and involving the trust in litigation and expenses and it is also a safeguard that the persons are substantial persons from whom if the suit fails the costs can be recovered and not merely men of straw : 21 *Bom.* 257 and 38 *Mad.* 1192, *Rel. on.* [P 131 C 1]

*** (c) Civil P. C., S. 92—Status and position of those who come forward to represent community must be considered before giving sanction under S. 92—Notice should be issued to trustees or institution.**

The authority giving the sanction must consider the various aspects before giving the sanction and one important consideration should be as regards the status and position of those who come forward to represent the community. It would be more desirable, before giving the sanction that notice should be given to the institution or the trustees although it is not obligatory. [P 131 C 1,2]

*** (d) Civil P. C., S. 92—Suit by some only of persons to whom sanction is given does not lie.**

Where permission or sanction is given by name to more than two persons, that power should be exercised by them all ; and a suit by some only of the persons to whom sanction is given under S. 92 will not lie : 29 *M. L. J.* 231 and 38 *Mad.* 1192, *Rel. on.* [P 131 C 1]

Advocate General and *P. V. Vallabhacharlu*—for Appellants.

S. Varadachariar, V. Govindarajachari, K. Kameswara Rao and *K. Viswanatha Sastri*—for Respondents.

Judgment.—This appeal arises out of a suit filed under S. 92, Civil P. C., by two plaintiffs who obtained the sanction of the Collector. The Collector's sanction which is filed as Ex. A in the case runs as follows :

" Permission under S. 92, Civil P. C., is granted to the three persons named below to bring a scheme suit in respect of the affairs of the temple of Sree Varadarajaswami Varu of Pedapullivaru village, Repalle Taluk, which are reported to be mismanaged by the present trustees :

(1) Kavata Venkata Subramanyam
(2) Davuluri Pichayya
(3) Kosaraju Reddayya. Time six months.

The Tahsildar, Repalle, will please report the result at the end of the period."

This sanction was obtained without notice to the defendants but this makes no difference as regards the validity of the sanction. Having got the sanction, two out of the three persons namely, Pichayya and Reddayya filed the suit. Though the sanction was only given to bring a scheme suit, the prayers in the plaint were: (1) for a scheme to be framed for the general management of the temple ;

(2) for the removal of defendants 1 to 10 ;

(3) for the appointment of new trustees

(4) for an order vesting the temple properties in the trustees appointed by the Court ;

(5) for the appointment of a receiver and other reliefs.

Obviously, except the first prayer, all the other prayers are outside the scope of the sanction. No relief could have been granted with reference to them : see *Srinivasa* v. *Venkata* (1).

Venkatasubramaniam who was the first of the three persons to whom sanction was given did not join as a plaintiff and he was impleaded as defendant 11. It is alleged in para. 12 of the plaint that defendant 11 was added as a pro forma defendant as he is not at present available to join as plaintiff. An application is filed before us to transfer him as an appellant. In the affidavit by Venkatasubramaniam all that is stated is that after the sanction was obtained he was obliged to leave Pedapullivaru on private business and could not co-operate with the other two persons in filing the suit and that as he was not available even on the last day of limitation the suit had to be filed by the

(1) [1888] 11 Mad. 148.

other two persons. He says that he allowed the suit to go ex parte as he was willing that it should be prosecuted. The counter affidavit filed denies the fact that Venkatasubramaniam was not in Pedapullivaru on the date the suit was filed and states that the real reason was that the present appellants and Venkatasubramaniam applied for sanction to file scheme suits both in regard to the temple in question and a Siva temple in Peddapullivaru and that Venkatasubramaniam was interested in the Siva temple, that after obtaining the sanction the appellants refused to file a scheme suit in regard to the Siva temple, for the archakas of the temple were their friends and belonged to their faction and that as the present appellants refused to join him in filing the suit with regard to Siva temple, Venkatasubramaniam declined to join the appellants in filing the present suit.

Although the defendants took the objection in the lower Court that the suit was bad because only two of the three persons to whom sanction was given filed the suit and although issues were raised covering that contention, no application was made either by Venkatasubramaniam or by the other two plaintiffs to transpose Venkatasubramaniam as a plaintiff in the lower Court.

The Subordinate Judge dismissed the suit. He found on the facts that no misconduct was proved against the defendants (archakas) and he held that the suit as laid was bad as two alone out of the three persons to whom sanction was given could not file the suit. In para. 10 of his judgment the learned Subordinate Judge says :

"The plaintiff's witnesses themselves have admitted that the defendants have been doing the Nityanaivedya, Deeparathana, Tirunakshatralu, and Pakshotsava or Ekadasi Utsavams. They won't admit that the Masotsava and Sukravarlu sevas have been done. But these witnesses of the plaintiffs are either partisans of the plaintiffs or are relations of the plaintiffs and most of them have come forward without summons. There is ample evidence on the side of the defendants, which I believe to be true, that the Sukravara sevalu and the Mavotsvam or the seva on Sravana Nakshatra day in each month also have been done regularly by defendants 1 to 10 in addition to other sevas not referred to in Ex. 1 (original trust deed). I, therefore, find that defendants 1 to 10 have been doing regularly all the services and sevas referred to in Ex. 1."

He finds that the defendants are not liable to be removed even assuming that Ex. 1 creates a trust in favour of the deity.

So far as plaintiff 1 is concerned, it is clear from his evidence that he has instituted this suit because of his enmity with the defendants and although in para. 8 of the plaint various charges of misconduct have been made, his evidence shows that some at least of the main charges are false. He admits that he and all the defendants have not been on speaking terms for the last 16 years, that during this period he never asked the archakas why they were not properly doing the necessary things for the temple, that for the last 16 years the archakas have not been inviting the karnam and the other village officials for the festivals, that defendant 1 complained against him for making excess collections as the assistant karnam of the village and that he lost his branch postmastership on account of complaints made by the defendants. Plaintiff 2 did not venture to give evidence although he alleged several acts of misconduct in the plaint.

We are not satisfied that the non-joinder of Venkatasubramaniam as a plaintiff was due to his absence from the village. If his affidavit is true, he left the village after the sanction was obtained on private business and could not co-operate with the other two persons in filing the suit in the lower Court. He says that he was absent even on the last day when the suit had to be filed because the sanction enured only for six months. If this affidavit is true, beyond obtaining the sanction, he took no part in the preparation or the filing of the plaint. This fact would be material in dealing with the other question as to whether the suit is properly framed. The probabilities point to the reason given ay the archakas in the counter affidavit being a true one. We do not think that sufficient reasons have been made out for transposing defendant 11 as a plaintiff even assuming that such a transposition would cure the original defect in the institution of the suit. We can find little bona fides in the matter. Although the sanction was only for filing a scheme suit, various charges of misconduct were made in the plaint with a view to support the prayer for the removal of the archakas for

which no sanction was given and these charges have been found to be false. Even on plaintiff 1's own evidence some of the charges could not be sustained. Enmity with the defendants and not a bona fide desire to safeguard the interests of the temple seems to be the main motive for the suit. However, if the plaintiffs can have a good cause of action, motive would be immaterial but we refer to this only as a ground for not exercising our discretion in the matter.

As regards the maintainability of the suit we think that the suit by some only of the persons to whom sanction was given under S. 92 would not lie. The object of requiring sanction or permission before such suits are instituted under S. 92 is to safeguard not only the rights of the public but also the rights of the institution and the trustees. The suit being a representative suit, it is necessary to see that the persons who come forward are persons who have an interest in the temple and persons who can be safely entrusted with the conduct of the suit. Even though the whole public are technically parties, still the plaintiffs who file the suit have the conduct of the suit and very large powers in the shaping and the conduct of the suit. As a matter of general experience, the public leave it to the plaintiffs to conduct all the proceedings and to take the various steps necessary for its successful prosecution. It is also for the benefit of the institution and of the trustees because it affords a safeguard against impecunious improper persons coming as plaintiffs and involving the trust in litigation and expenses and it is also a safeguard that the persons are substantial persons from whom if the suit fails the costs can be recovered and not merely men of straw. If two out of three or more persons to whom sanction was given can file a suit, it may be that the substantial persons having got the order take no further part leaving the trustees and the institution remediless as regards the recovery of costs. The authority giving the sanction must consider the various aspects before giving the sanction and one important consideration should be as regards the status and position of those who come forward to represent the community. We may in this connexion state that it would be more desirable, before giving the sanction that notice should be given to the institution or the trustees although it is not obligatory.

In *Sayad Hussein Miyan* v. *Collector of Kaira*, (2), Jardin and Ranade, JJ., observed .

"Turning to India it is obvious that the requirement of sanction protects trust funds and the trustees also from vexatious suits, as so great an officer as the Advocate General will not sanction suits without enquiry about the motives, the merits, the expense, and such bars as limitation."

In *Venkatesh Mallia* v. *Ramaya Hegade* (3), Sankaran Nair and Spencer, JJ., observed :

"such sanctions for instituting suits against trustees have to be construed strictly without enlarging their scope, the object of requiring sanction being to protect managers from vexatious suits * * * * cases may occur in which it might be inadvisable to grant sanction to a particular individual either on account of his character, personal motives, or his solvency, and yet if he joined with some one whose very name would be a guarantee against the suit being improperly conducted, a Court would be justified in granting a joint sanction where it would have refused leave to the single applicant."

Having regard to these considerations we think that where permission or sanction is given by name to more than two persons, that power should be exercised by them all.

So far as the authorities go, they support this view. The question directly arose for consideration in *M. B. Narayanan* v. *V. Perumallacharyalu* (4) where Sir John Wallis, C. J., and Seshagiri Ayyar, J., held that where sanction is given under S. 92, Civil P. C., to more than two persons, two of them alone cannot sue. It appears from the facts of that case that four individuals obtained the sanction of the Collector under S. 92, Civil P. C., and that two of them alone brought the suit alleging that the other two have been gained over by the defendants and they refused to join in the suit. The contention was that sanction having been given by the Collector to four persons, two of them alone cannot sue without obtaining fresh sanction. The learned Judges after referring to the terms of S. 92 observed :

"we think the language used shows that the persons authorized to sue are all the persons to whom the consent has been given and not any

(2) [1897] 21 Bom. 257.
(3) [1915] 38 Mad. 1192=26 I. C. 202=27 M. L. J. 241.
(4) [1915] 29 M. L. J. 231=31 I. C. 236.

two of them. On the opposite contention, there might be competition between the various persons authorized as to who should sue. Besides, the provision for giving consent to two or more persons shows that the legislature considered that in some cases it might not be desirable for only two to sue. In this connexion it is worth mentioning that Romilly's Act, upon which this section was founded, enabled any two persons interested to apply, and that here the legislature has empowered any two or more persons with the consent of the Advocate General."

A similar question arose as regards the Religious Endowments Act where also sanction was necessary. In *Venkatesha Mallia* v. *Ramaya Hegade* (3) it was held that where sanction to sue is given to two persons under S. 18, Religious Endowments Act, one of them cannot sue alone and that the sanction granted under S. 18 was a condition precedent to the exercise of the right of suit. S. 14 of the Act empowers any person or persons interested in the institution to sue in cases of breaches of trust, etc. S. 18 requires previous leave to be obtained from Court. It appears from the report of the cases that when the suit came on for trial before the Judge who gave the sanction, though no issue was raised, a preliminary objection was taken that the suit was bad for the non-joinder of the other sanction-holder and the Judge upheld the contention.

Reference has been made by the learned Advocate General to cases of suits by trustees; but those cases have no application as in such cases it is the trust which has the right of action and is the plaintiff and it is sufficient if all the trustees are present before the Court as plaintiffs or defendants. We may mention that even in the cases of trusts where the act which gives rise to the cause of action is an act which has to be done by all the trustees together or in consultation with each other by putting an end to a lease, it has been held that one or more trustees cannot by simply joining the other trustees give rise to a valid cause of action where the other trustees have not been consulted before the suit was filed. Similarly cases where it has been held that there is no abatement where one of two plaintiffs who obtain sanction dies or cases where it has been held that you can transpose parties after the suit is filed or allow new persons to come on as additional plaintiffs would have no application to cases like the present where the question is whether the suit has been rightly instituted. It is only after a suit has been rightly instituted, the public become constructive parties to the suit. If the suit is not properly instituted, there is no question of the Court treating the suit as one which is properly instituted and then remedy any defects by the addition of parties.

We are of opinion that the suit was not properly instituted and should be dismissed on that ground.

In the view we take of the law on this question it is not necessary for us to consider the other question as to whether there is a trust in favour of the temple, the archakas being only trustees, or whether there is a gift to the archakas subject only to their performing the services mentioned in Ex. 1 and any surplus income can be appropriated by them for their own use.

The appeal fails and is dismissed with costs of defendants 1 to 10. In the Memorandum of Objections we allow Rs. 250 as vakil's fees in the lower Court.

P.R.S./V.S. *Appeal dismissed.*

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* A. I. R. 1930 Madras 132

MADHAVAN NAIR AND CORNISH, JJ.

Thangammal Ayiyar—Petitioner.

v.

Krishnan (*minor*) and *another* — Respondents.

Civil Revn. Petn. No. 1357 of 1927, Decided on 4th October 1929, against judgment and decree of Sub-Judge, Tanjore, in Small Cause Suit No. 293 of 1926.

*** (a) Legal Practitioners Act, S. 28 — Agreement void ab initio as contravening S. 28—Client deriving benefit from pleader's labour—Client is bound to compensate advantage gained under Contract Act, S. 65.**

Where an agreement is manifestly void from its inception as contravening the provisions of S. 28 and as such an agreement can be described to be one "discovered to be void" within the meaning of S. 65, Contract Act, as explained by Privy Council in *A. I. R.* 1923 *P. C.* 189 the client is bound to make compensation to the vakil for the advantage which he has received under the contract: *Case law discussed.*

[P 135 C 1, 2]

*** (b) Legal Practitioners Act, S. 28—S. 28 is not intended to make right of pleader to recover fees conditional upon agreement fulfiling requirements of S. 28.**

Section 28 gives the Court a control over agreements between pleaders and their clients with respect to fees and costs and is not intended to make the right of the pleader to recover his fees etc. conditional upon the agreement

fulfilling the requirements of the section. A sanction for this view is to be found in S. 29 which enables the Court to order an agreement otherwise in order "to be cancelled if the agreement is not proved to be fair and reasonable, and the costs, fees, charges, and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made." [P 135 C 2]

B. Venkataraman—for Petitioner.

S. Rangachariar—for Respondents.

Madhavan Nair, J.—The defendant is the petitioner. This Civil Revision Petition arises out of a suit instituted by plaintiff 1 for the recovery of Rs. 500 as vakil's fees due to him in respect of his appearance as pleader on behalf of the defendant's deceased husband, the Zamindar of Nagaram, in Summary Suit No. 559 of 1923, on the file of the Revenue Divisional Officer, Pattukotta. Plaintiff 1 died subsequent to the filing of the suit and his undivided sons were added as his legal representatives, plaintiffs 2 and 3. The case of the plaintiffs is that plaintiff 1 the deceased vakil Appasami Iyer, appeared in the above suit for 28 hearings and the late Zamindar of Nagaram agreed to pay him at a certain rate per diem, and that, even if the Court thinks that the agreement is not valid, the sum claimed should be paid on the basis of quantum meruit. The defendant pleaded that the contract set up by the plaintiffs is not true or valid, and that, even if plaintiff 1 is entitled to any remuneration, the sum claimed was excessive. The two main issues in the case were: (1) whether there was a specific contract as alleged in the plaint and (2) whether the plaintiffs can claim compensation on the principle of quantum meruit. On these issues the learned Subordinate Judge found in favour of the plaintiffs and gave them a decree for a sum of Rs. 390 according to the rate mentioned in the agreement.

In this Civil Revision Petition the only point urged before us is that, having regard to S. 28, Legal Practitioners Act, the agreement entered into between the petitioner's husband and plaintiff 1 is not valid and binding and therefore plaintiff 1 is not entitled to recover any sum as remuneration for his services. This argument is admittedly opposed to the decision in *Subba Pillai* v. *Ramasami Iyer* (1) which will be referred to presently. As the learned Chief Justice before whom the case came up for disposal doubted the correctness of that decision he has referred to a Bench with the following note:

"This case must be referred to a Bench. Sitting as a single Judge here I have no power to refuse to follow *Subba Pillai* v. *Ramasami Iyer* (1) although I take the liberty of saying that I think that it amounts to an absolute departure from the plain words of the section of the Statute. But that must be said if it is to be said with effect by a Bench and not by a single Judge.

Section 28, Legal Practitioners Act, is in these terms:

"No agreement entered into by any pleader . . . . with any person retaining or employing him respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done by such pleader . . . . shall be valid unless it is made in writing signed by such person and is within fifteen days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done.

It is argued that the contract in this case, being an oral one, contravenes the provisions of this section and is void and so the decree of the lower Court should be set aside. In support of this argument reliance is placed on the decision in *Kamakshya Narayan Singh* v. *Kalyan Singh* (2) and *Sarat Chander* v. *Chandra Kanta* (3), both of which support the petitioner's contention: but the trend of the decisions of this Court is to the effect that, even if the agreement is opposed to the provisions of S. 28, Legal Practitioners Act and is invalid the pleader is still entitled to recover remuneration for his services; either in full as under the agreement or a reasonable portion thereof. The leading decision on the question is the one in *Subba Pillai* v. *Ramasami Iyer* (1), which refers to *Rama* v. *Kunji* (4) and *Krishnaswami* v. *Kesava* (5). two earlier decisions of this Court. In *Rama* v. *Kunji* (4), remuneration for services was decreed to a pleader in the absence of an agreement under S. 70, Contract Act. In *Krishnaswami* v. *Kesava* (5), the plaintiff based his claim for fee on a promissory note which was not filed in Court in that suit and it was held that though the promissory note was invalid under S. 28, Legal Practitioners Act, as it was not filed in any Court within fifteen days of its

(1) [1904] 27 Mad. 512.

(2) A. I. R. 1927 Pat. 178=6 Pat. 614.
(3) [1898] 25 Cal. 805.
(4) [1886] 9 Mad. 375.
(5) [1891] 14 Mad. 63.

execution as required by that section, yet the plaintiff was entitled to recover the amount to which he was found to be entitled for his labour. A similar view was taken in *Anantayya* v. *Padmayya* (6). In *Sundararajachariar* v. *Pattanathuswami Thevar* (7), and *Narasimhachariar* v. *Sinnavan* (8), this Court held that S. 28 of the Act is no bar to a decree being passed for such reasonable remuneration as may be found due on the principle of quantum meruit. The question has been discussed at some length with reference to principle in *Subba Pillai* v. *Ramasami Iyer* (1), which was also a case where a claim for fees was made by a pleader based upon a promissory note which had not been filed in Court as required by S. 28, Legal Practitioners Act and was in consequence invalid. It was held in that case that though the contract was void, the pleader was still entitled to recover the outfees advanced by him. In holding so the learned Judges stated that the Legal Practitioners Act does not enact that no claim by a pleader for professional services rendered or for recovery of out-fees advanced shall be sustainable unless an agreement made in writing for the same has been entered into with the client and filed in Court, but only that an agreement, if any, in respect thereto, shall be void unless the same has been reduced to writing and filed in Court. This decision has been followed in *Natesa Mooppan* v. *Ramchandra Iyer* (9). The learned Judges in *Subba Pillai* v. *Ramasami Iyer* (1) seem to base their decision on the policy of Ss. 28, 29 and 30, Legal Practitioners Act, corresponding to Ss. 4, 9 and 6 English Attorney and Solicitors Act, 33 and 34, Vich. Ch. 28. The policy underlying those sections and their conclusion based upon that policy is thus stated by the learned Judges:

"The policy of Ss. 28, 29 and 30, Legal Practitioners Act, corresponding to Ss. 4, 9 and 6, English Attorney and Solicitors Act, 33 and 34, Vic. Ch. 28 is that whenever an agreement is entered into between a pleader and his client respecting his remuneration or payment for outfees, such agreement should be reduced to writing and not only so but also filed in Court and that when a suit is brought upon such agreement, the Court should have the power if, in its opinion, the agreement is not fair and reasonable to reduce the amount payable thereunder or order it to be cancelled, and in the latter case to award such amount only as would have been decreed in the absence of any agreement between the pleader and his client. S. 30, however, provides that a pleader shall not be entitled to claim anything beyond the terms of such agreement, except in respect of services, fees, charges, disbursements, expressly excepted from the agreement. It seems therefore clear that though an agreement entered into will be invalid unless reduced to writing and filed in Court, yet the pleader is not disentitled in absence of any agreement, to claim reasonable remuneration in respect of professional services or the repayment of out-fees advanced by him."

It is argued that this view amounts to an absolute departure from the plain words of S. 28 of the Statute and that

"if an oral agreement or a written agreement not filed in Court, being invalid under S. 28, Legal Practititioners Act, and therefore unenforceable, is void:" Vide S. 2, Cl. (g), Contract Act.

as pointed out by their Lordships, then, the plaintiff is not entitled to any relief. I am not inclined to accept this contention, in all its entirety but I agree with it to this extent, that I am prepared to say, with due respect to the learned Judges, that the reasoning on which their conclusion is based does not appear to me to be sound. Having held that the suit contract was void, i. e., unenforceable owing to the provisions of S. 28 of the Act, the learned Judges held that the pleader was entitled to recover the amount mentioned in the agreement, apparently acting on the policy underlying Ss. 28 to 30 of the Act, which they thought justified them in dealing with the case as if it was one in which there was "an absence of an agreement," i. e., in which no agreement was pleaded by the parties. It is open to question whether the policy underlying Ss. 28 to 30 of the Act is intended to enable the Court to deal with the case in this manner, when the agreement which is the basis of the suit is void under S. 28. These sections refer specifically to "such agreements" i. e., agreements valid under S. 28 and provide that in enforcing such agreements Courts may modify or cancel them and that such agreements shall exclude further claims of the pleader etc. I find it difficult to extract from these sections any policy of the legislature which would justify the Court ignoring the provisions of S. 28 when the plaintiff relies on an "agreement" as the basis of his claim. Thus far, I agree with the

(6) [1893] 16 Mad. 278=2 M. L. J. 247.
(7) [1894] 17 Mad. 306.
(8) [1837] 20 Mad. 365.
(9) [1914] 27 M. L. J. 728=27 I. C. 116=1 M. L. W. 1070.

contentions of the appellant; but having regard to the uniform course of decisions in this Court, I think it must be held that it is too late to give effect to the arguments now urged and to decline to give the plaintiffs any relief in respect of plaintiff 1's claim especially so, as I am prepared to hold that, though the contract is void, the respondent as in *Subba Pillai* v. *Ramasami Iyer* (1) is entitled to succeed having regard to the provisions of S. 65, Contract Act, which deals with the obligation of a person to restore any advantage received by him under an agreement which is "discovered to be void" or to make compensation for it. The section runs as follows:

"When an agreement is discovered to be void . . . . any person who had received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The expresssion "discovered to be void" in this section has caused some difficulty in its application. In *Sibkisor Ghose* v. *Manik Chandra* (10), Mukerjee, J. pointed out that

"an agreement which is opposed to S. 28, Legal Practitioners Act, being ab initio void cannot be said to be an agreement discovered to be void within the meaning of S. 65.',

Since then it has been held by the Privy Council that an agreement "discovered to be void" would include an agreement ab initio void. In *Harnath Kunwar* v. *Indar Bahadur Singh* (11) their Lordships held that an agreement "discovered to be void" within the meaning of this section:

"is one discovered to be not enforceable by law, and, on the language of the section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

This decision has been approved by the Privy Council in *Ananda Mohan Roy* v. *Gour Mohan Mullick* (12) in which their Lordships held that the time at which an agreement is dis covered to be void within the meaning of S. 65, Contract Act, is in the absence of special circumstances the date of the agreement. In the case before us, the agreement in question was manifestly void from its inception as it contravened the provisions of S. 28, Legal Practitioners Act, and as such an agreement can be described to be one "discovered to be void" within the meaning of S. 65, Contract Act as explained by the Privy Council. The defendant's husband was bound to make compensation to plaintiff 1 for the advantage which he has received under the contract. It has not been argued before us that the sum awarded to the respondents by the lower Court is excessive or disproportionate to the services rendered by plaintiff 1. The decree awarding the plaintiff Rs. 390 can be thus justified under S. 65, Contract Act.

I would uphold the decision of the lower Court and dismiss this Civil Revision Petition with costs.

Cornish, J.—I agree. The agreement made between the pleader and his client as to the pleader's remuneration was a verbal agreement, and, therefore, a compliance with the requirements of S. 28, Legal Practitioners Act was impossible. That, however, according to the construction put upon the section by the rulings of this Court: see *Rama* v. *Kunji* (4), *Krishnaswami* v. *Kesava* (5), *Anantayya* v. *Padmayya* (6) and *Subba Pillai* v. *Ramasami Iyer* (1) does not preclude the pleader from recovering the amount which he could properly claim for work done and disbursements made by him on behalf of the client in pursuance of the agreement. The above mentioned decisions make no distinction between a verbal agreement, which is incapable of being filed in accordance with the requirements of S. 28 and an agreement in writing which is invalid because it has not been filed. The view taken by this Court is that the purpose of S. 28 is to give the Court a control over agreements between pleaders and their clients with respect to fees and costs and is not intended to make the right of the pleader to recover his fees etc., conditional upon the agreement fulfilling the requirements of the section. A sanction for this view is to be found in S. 29 which enables the Court to order an agreement, otherwise in order

"to be cancelled if the agreement is not proved to be fair and reasonable, and the costs, fees, charges, and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made."

The Calcutta, Allahabad and Patna High Courts have placed a stricter interpretation upon S. 28, holding that

(10) [1915] 21 C. L. J. 618=29 I. C. 453.
(11) A. I. R. 1922 P. C. 403=45 All. 179=26 C. C. 223=50 I. A. 69 (P. C.).
(12) A. I. R. 1923 P. C. 189=50 Cal. 929=50 I. A. 239 (P.C.).

the object of the section would be defeated by allowing exceptions to its requirements. But even assuming the stricter interpretation to be preferable it is certainly too late now to resist the current of authority of this Court.

There is no doubt that the relations of the parties are contractual notwithstanding that the agreement is invalid by virtue of S. 28. In the cases where the question has arisen, although it has been recognized that the pleader is entitled to recover, the precise footing upon which he can do so has been left in some uncertainty. In *Rama* v. *Kunji* (4) it seems to have been considered by the Court that the suit by the pleader being for work and labour done, might lie under S. 70, Contract Act. The question was further considered in *Sibkisor Ghose* v. *Manik Chandra* (10) and it was there pointed out that S. 70 could not apply to a claim based on contract. The learned Judges in that case expressed the further opinion that S. 65, Contract Act, would be unavailing in aid of a claim arising out of an agreement void by S. 28, Legal Practitioners Act, for the reason that the agreement being void ab initio could not be aptly described as an agreement which has been discovered to be, or has become void. All doubt upon this point has, however, been resolved by the ruling of the Judicial Committee in *Karnath Kunawar* v. *Indar Bahadur Singh* (11) where their Lordships laid it down that an agreement discovered to be void is one discovered to be not enforceable by law and on the language of S. 65 would include an agreement that was void in that sense from its inception as distinct from a contract that became void. And in *Ananda Mohan Roy* v. *Gour Mohan Mullick* (12) their Lordships emphasise this principle that an agreement is discovered to be void from the date of the agreement. The claim of the plaintiff respondent before us was, clearly maintainable.

P.R.S./V.S. *Petition dismissed.*

A. I. R. 1930 Madras 136

KUMARASWAMI SASTRI AND WALSH, JJ.

Ramalinga Chetty and *another*—Defendants—Appellants.

v.

Vellore Mercantile Bank, Ltd.—Plaintiff—Respondent.

Appeal No. 5 of 1925, Decided on 5th August 1929, against decree of Sub-Judge, Vellore, in Original Suit No. 97 of 1922.

Hindu Law—Debts—Trade — Some members of joint family carrying on with strangers partnership business of speculative nature for benefit of family—Money borrowed to carry on such business—Suit on promissory note—Minors of family held not bound by promissory note.

In all joint-families if a person who is not the father has the power of management the criterion by which the binding nature of debts should be decided is whether they were borrowed for the benefit of the family and would bind the minors. [P 138 C 2]

A, *B* and *C*, the deceased father of suing minors, were undivided brothers and formed members of a joint Hindu family governed by the Mitakshara Law. *A* and the son of *B* who was the second executant of the promissory note in suit were the managing members. *A* and his deceased brother *D* had been carrying on a speculative trade for which the suit money was borrowed on behalf and for the benefit of the joit family including the minors along with their partners.

Held : that the business which was started by two members of the family in partnership with strangers was not a business which was of such a nature as would bind the minors of the family : *A. I. R.* 1922 *P. C.* 237; 42 *Cal.* 225; *A. I. R.* 1922 *Mad.* 236; *A.I.R.* 1922 *P.C.* 397 and 6 *C. W. N.* 429, *Rel. on.*; *A. I. R.* 1926 *Mad.* 323; *A. I. R.* 1927 *Mad.* 792 and *A. I. R.* 1929 *Mad.* 153, *Ref.*; (1928) *M.W.N.* 576, *Dist.* [P 138 C 2]

B.C. Seshachala Iyer—for Appellants.

K. S. Krishnaswamy Iyengar — for Respondent.

Judgment.—This appeal arises out of a suit filed by the plaintiff bank and the defendants for the recovery of Rs. 14,523-12-0 alleged to be due on a promissory note executed by defendants 1, 6 and 7 and one Venkatesa Chetti (deceased) son of defendant 2 for Rs. 10,000 payable with interest at Rs. 1-6-0 per cent per mensem. It is alleged that the defendants paid interest amounting to Rs. 262-8-0 and have not paid the balance. The plaintiff's case is that defendants 1 and 2 and one Ramakrishna Chetty, the deceased father of defendants 4 and 5 were undivided brothers and formed members of a joint Hindu family

governed by the Mitakshara Law, of which defendant 1 and the son of defendant 2 who was the second executant of the suit promissory note were the managing members and that defendant 1 and his deceased brother Venkatesa Chetti, had been carrying on a trade for which the suit money was borrowed on behalf and for the benefit of the joint family including defendants 2 to 5 along with their partners, and a decree is prayed for the amount on the ground that it has not been paid.

The appellants in this case are only defendants 4 and 5. They are minors. Their father died several years ago. The question is whether the promissory note executed by defendants 1, 6 and 7 and the son of defendant 2 is binding on the minors. The case for the minors is that the debt is not binding on them as defendant 1 and the deceased Venkatesa Chetti were not managing members of the family of defendants 1 to 5 but it was defendant 2 who was managing the family affairs, defendant 1 and Venkatesa Chetti have been carrying on the plaint-mentioned trade on their own account in partnership with strangers to the family, that the said trade was not an ancestral or family trade but a speculative one and that no ground is made out for charging these defendants with the liability. It is also stated that the interest is excessive and usurious.

The Subordinate Judge held that the family was undivided and the note was binding on the minors. He has given his reaaons in para. 9 of his judgment. It seems to us that he has not really met the various contentions urged and the evidence, oral and documentary.

The joint family referred to in the plaint consisted of Chinnasami Chetti, defendant 2 herein who was the eldest member, Narayanaswami Chetty, defendant 1 herein, and the last brother Ramakrishna Chetti (father of the appellants) who died some years ago. The family, according to the evidence, originally owned lands and then began to carry on a business in provisions. The accounts of the business have been filed as Ex. C. They show that the provisions business was carried on on a small scale, Ramakrishna Chetti, the father of the appellants, being interested in the business. That business according to the evidence was closed in 1912, and there was a settlement of accounts which is signed among others by Ramakrishna Chetti. Ramakrishna Chetti according to one witness died about two years after the close of the business, that is, about 1914 and one or two witnesses put it a little later 1915 or 1916. After the death of Ramakrishna Chetti we find that in 1917 two junior members of the family, which was still then trading in cloths and provisions on a small scale in Polur and an adjacent village, began to export groundnuts to England. The business, according to the plaintiff's own witness, P. W. 5 was carried on on a very large scale and they were sending goods to Marseilles and other places to the extent of seven or eight lakhs and the business was conducted entirely by borrowing money from the plaintiff bank. The evidence also is that the market was unsteady at the time. He says that the price of groundnuts was fluctuating every day and the business ended in a heavy loss.

It is clear from the evidence that whereas the family was before and during the lifetime of the father of the appellants carrying on a small provision business aud cloth busines in the village of Polur and its hamlets, in 1917, defendant 1 and his deceased brother's son Venkatesa Chetti who were the junior members of the family in partnership with others began this speculative business in groundnuts. It is not suggested that any portion of the family property was used for this business. According to the evidence it was carried on entirely out of borrowed capital. The promissory note was not executed by defendant 2 who was the eldest member but by defendants 1, 6 and 7 and by the son of defendant 2. The note does not purport to bind the minors nor does it state the purpose for which the loan was taken. On these facts the question is whether the minor appellants-defendants 4 and 5 are liable for the loss incurred in such business. In this case we are not concerned with the pious obligation of the son to pay off his father's debts in which case the question as to whether the trade was old or now does not arise: *Atchuttam* v. *Ratnaji* (1), *Rajagopala Pillai* v. *Veeraperumal Pillai* (2) and *Venkatasmami*

(1) A. I. R. 1926 Mad. 323=49 Mad. 211.
(2) A. I. R. 1927 Mad. 792.

Naicker v. *Palaniswami Chettiar* (3) are such cases, namely, cases of liabilty of the son, and the Court held that this liability was irrespective of the nature of the business started by the father. The present case we think is governed by the ruling of the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (4) and by the decisions in *Sanyasi Charan Mandal* v. *Asutosh Ghose* (5), *Tammi Reddi* v. *Gangi Reddi* (6), *Sadasiva Mudaliar* v. *Hajee Fakeer Mahomed* (7) and *D. Mclaren Morrison* v. *S. Verschoge* (8). We do not think it makes much difference in considering the liability of a minor in respect of a new trade carried on not by his father but by another member of the family whether the family is governed by the Dayabhaga or the Mitakshara Law, as the principles which govern the decision in this case are not based on any difference between the Dayabhaga and the Mitakshara Law as to the power of a manager of a joint family where coparceners other than his own sons are concerned.

Reference has been made by the learned advocate for the respondents to *Lakshmiah* v. *Official Assignee, Madras* (9), and it is argued that the appellants would be liable for the reason that the trade was carried on by the adult members of the family and consequently that it should be presumed that it was a trade carried on for the benefit of the family. Some of the important elements which the learned Judge noted are lacking in the present case. In the *Lakshmiah* v. *Official Assignee, Madras* (9) case the family property was being used without any objection for the trade and all the members acquiesced in it, and it was held that under those circumstances the minors were liable. The learned Judges take care to state that each case must depend on its own facts. We think that case was more a decision on the particular facts than a decision which laid down any general rule, much less any general rule that would override the principles which govern the ratio decidendi of the cases which we have already cited. The only observation about that case I wish to make is that the fact that the family was a Dayabhaga family for the purpose of this question does not seem to make much difference. In all joint families if a person who is not the father has the power of management the criterion by which the binding nature of such debts should be decided is whether they were borrowed for the benefit of the family and would bind the minors. It cannot be said in the present case that carrying on of an entirely new speculative business with borrowed capital on a scale which was totally incommensurate with any of the family estates, for we find that the family was carrying on only a small business before, by the other members is an act which would bind the minors. One other feature in this case is that the eldest member is not shown to have executed the promissory note or taken any part in the groundnut business. It is argued that the adult members executed two mortgage deeds F Exs. and F-1 and that it should be presumed that all of them carried on this speculative business in gound-nuts. But Exs. F and F-1 were executed in 1920 when the business practically ended in loss and so they would not afford evidence as to the state of the dealings anterior. We are of opinion that this business which was started by two members of the family in partnership with strangers was not a business which was of such a nature as would bind the minor appellants. We allow the appeal and dismiss the suit against defendants 4 and 5 and their share in the family property with costs in this and the lower Court.

P.R.S./V.S *Appeal allowed.*

(3) A. I. R. 1929 Mad. 153=52 Mad. 227.
(4) A. I. R. 1922 P. C. 237=49 Cal. 560=49 I. A. 108 (P. C.).
(5) [1915] 42 Cal. 225=26 I. C. 836.
(6) A. I. R. 1922 Mad. 236=45 Mad. 281.
(7) A. I. R. 1922 P. C. 397.
(8) [1902] 6 C. W. N. 429.
(9) [1928] M. W. N. 576.

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* A. I. R. 1930 Madras 138

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Gouriambal Achi—Appellant.

v.

P. Al. V. V. R. Ramanathan Chettiar—Respondent.

Appeal No. 346 of 1927, Decided on 1st October 1929, against order of Dist. Court, West Tanjore, D/- 29th July 1927.

(a) Civil P. C., O. 34, R. 14—Mortgagee obtaining simple money decree—He cannot

straightway ask to sell property in execution of money decree.

In execution of a money decree, the judgment-debtor's property cannot be sold without its being first attached. Even the contention of mortgagee that the mortgage in his favour can take effect as against the property acquired by the mortgagor subsequent to the money decree, does not enable the mortgagee to bring the property straightway to sale, when the decree he seeks to execute is an ordinary money decree. [P 140 C 1]

(b) Civil P, C., S. 73, Provisos (a) and (b)—Applicability.

Where the decree-holder and the mortgagee happen to be the same person and, the decree debt and the mortgage debt are not two distinct and different debts, S. 73. Provisos (a) and (b) are not applicable. [P 140 C 2, P 141 C 1]

*** (c) Civil P. C., O. 34, R. 14—Satisfaction of simple money decree by attachment and sale--O. 34, R. 14, is no bar.**

Where in a suit to enforce a mortgage it is decided that there is no mortgage at all and a simple money decree is passed in favour of the mortgagee, the decree, not being one for the payment of money in satisfaction of a claim arising under the mortgage, might be satisfied in execution by attachment and sale, and O. 34, R. 14 is no bar. [P 141 C 2]

S. Panchapagesa Sastri and *P. J. Kuppanna Rao*—for Appellant.

N. S. Srinivasa Iyer—for Respondent.

Venkatasubba Rao, J.—This case raises a point of some novelty. The respondent filed a suit to enforce a mortgage. He impleaded as defendants Gowriambal Achi, the present appellant, her son and grandson. I extract the following passage from the judgment in that suit in April 1924:

"It appears to me that as a suit to enforce a mortgage the suit must fail. Gowriambal Achi has no title to the property. The properties were left by will absolutely to Gowriambal's mother. It was recited that on the latter's death Gowriambal was to succeed to any of the properties which her mother had not alienated. Gowriambal's mother is still alive, and Gowriambal may never succeed to any of this property. I do not see how Gowriambal by her deed can create any charge on the property."

On this reasoning, Mr. Stodart, the District Judge, passed the following decree:

"I give the plaintiff a decree for the sum claimed Rs. 6,500, with simple interest at the contract rate, namely 12 per cent of Rs. 6,166, ... This is a simple money decree against defendant 1, Gowriambal alone. The suit as against defendants 2 and 3 is wholly dismissed." . .

We are not now called on to construe the will referred to in the passage above nor is it a part of the record before us. Nor are we at present concerned with the question whether the judgment is right or not; for the plaintiff submitted to it and it became final between the parties.

Subsequent to the passing of the decree, Gowriambal Achi's mother died and the plaintiff assumed (whether rightly or wrongly, it is needless to enquire) that she became absolutely entitled to the properties covered by the mortgage. In that view, he applied to execute the money decree passed in his favour by attachment and sale of those properties. The defendant (Gowriambal Achi) opposed the plaintiff's application, urging that it contravened the provisions of O. 34, R. 14, Civil P. C., and that the plaintiff's remedy was by way of a regular suit. This objection was overruled and the plaintiff was allowed to execute his decree. The order dated 10th November 1926, then made on Gowriambal Achi's petition requesting that the plaintiff's application might be rejected, may be reproduced:

"The decree is very clear. It was held that the mortgage was not enforceable, as the mortgagor, i. e., the judgment-debtor had no right to the property mortgaged. Only a simple money decree was passed. In execution of this simple money decree, the properties which were originally mortgaged and to which the judgment-debtor became entitled by inheritance subsequently are attached and are brought to sale. O, 34, R. 14, has no application. There is no mortgage subsisting and the claim did not arise out of the mortgage. Decree-holder need not file a fresh suit. Petition is dismissed with costs."

The plaintiff now conceiving that a higher right accrued to him and that he had been mistaken in applying for attachment, presented a petition to the Court stating that his execution petition was not pressed. Thereupon, the Judge recording that the petition was not pressed, made an order dismissing it. This happened on 15th January 1927.

The next step taken by the plaintiff is the one with which we are concerned. He presented execution petition No. 11 of 1927, on which the order under appeal was made. In Col. 7 of that petition, the plaintiff gives the reason for his abandoning his previous execution application:

"But the said execution petition did not correctly set out the charge which this decree-holder had obtained over the immovable properties mentioned hereunder after the death of judgment-debtor's (defendaut 1's) mother by virtue of S. 43, T. P. Act. So the petition was not continued."

He then prays in Col. 10 that the amount due to him under the money decree may " be realised by the sale of the judgment-debtor's immovable property." He adds a further prayer, which in truth is the same as the first, in different words:

" that the properties hereunder mentioned may be sold in satisfaction of the charge which the decree-holder has obtained over the properties since the judgment debtor became absolutely entitled."

Now, the basis of this application is the right which under S. 43, T. P. Act, the plaintiff conceived he obtained, by reason of the power to perform the contract, subsequently acquired by Gowriambal Achi. The learned Judge held that the execution could be granted in the form prayed for and made an order accordingly. It is this order that is attacked in this appeal.

The plaintiff's application was clearly misconceived. In execution of a money decree, the judgment-debtor's property cannot be sold without its being first attached. No doubt, the plaintiff's contention is that the mortgage in his favour can take effect as against the property acquired by the defendant subsequent to the decree. But this does not enable him to bring the property straightway to sale, when the decree he seeks to execute is an ordinary money decree. The order of the lower Court cannot, therefore, be sustained; nor, as I understand Mr. Sitarama Rao, the respondent's counsel, does he seriously contend that it is right.

He is, therefore, driven to present his case thus: He says in effect, treat my application as one for attachment but coupled with a prayer under S. 73 (1) (b), Civil P. C., I should be disposed to comply with this request if his application was legally competent. The reason for the present course he adopts is this. If the Court makes a bare order of attachment, the respondent thinks, in the circumstances it confers no benefit on him; and it is in that view he abandoned his previous execution application. The fact is, there are other creditors of the defendant who have either attached or threatened to attach these properties. That being so, the plaintiff's right, in the event of a sale taking place, is merely to share the proceeds rateably. The plaintiff, therefore, in order to obviate this result, has had to invoke the aid of S. 73 (1) (b), Civil P. C.

Clause 1, S. 73, lays down the conditions for rateable distribution. Then follow two provisos:

(a) Where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(b) Where any property liable to be sold in execution of a decree, is subject to mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold."

The plaintiff puts his case thus. The property he seeks to attach has become under S. 43, T. P. Act, subject to his mortgage. He agrees to its being sold free of that mortgage. In that event, his mortgage right becomes transferred to the sale proceeds which he can then draw out from Court. The argument is ingenious, but totally unsound. In my opinion, to a case like the present, these provisions do not apply at all.

It is first contended by Mr. Panchapagesa Sastri for Gowri Achi that these rules have not been enacted as independent or substantive provisions but only as provisos and unless, therefore, the case is one of rateable distribution under the main part of the section, these rules do not apply at all; in other words, when there are no rival decree-holders, a case cannot arise which calls into play the rules enacted in the provisos. I doubt if this contention is correct, though I express no decisive opinion on the point. Supposing there is a single decree-holder who attaches a property, why should a person holding a mortgage upon it not be entitled to the benefit of this proviso? By enacting 'the rule in the form of a proviso, is it intended to deprive such a person of this right? But, as I have said, I do not propose to pursue this enquiry.

The case now arises, however, in a different form. The provisos, of course, apply when there are several decree-holders; this is not disputed. It may be granted that they also apply when there is a single decree-holder and another person who is a mortgagee. I am also prepared to assume that 'they are applicable when the decree-holder and the mortgagee happen to be the same person, provided the decree debt and the

mortgage debt are two distinct and different debts. But in this case whether you refer the debt to the decree or to the mortgage, it is the self same debt. To such a case, the rules in question cannot be reasonably applied. Can the application by the plaintiff be termed in any sense an execution application at all? To execute a decree is to carry that decree into effect for obtaining satisfaction of it. In this case, the plaintiff, under the guise of executing his decree, gets his mortgage satisfied. This is just a pretence of execution, for if along with the mortgage the decree also gets satisfied, the result is but fortuitous and incidental. A case of this kind is of rare occurrence. The case that most nearly resembles this, is that which comes within the mischief against which O. 34, R. 14 is directed. *A* mortgages his property to *B* to secure repayment of a sum of money. *B* sues *A* to recover that sum and obtains a personal decree against *A*. *B* then applies for attachment and sale of *A's* interest in the mortgaged property in execution of the money decree and the sale must be refused under this rule.

The above mentioned case is of the usual kind ; but owing to the peculiar facts before us, as I shall show presently, that rule does not here operate as a bar and the sale can be allowed. But when the two debts are identical, in other words, when there is a single debt, does it make sense to say, that the decree-holder can sell the property either subject to his mortgage or free of it ? Let us suppose that he sells the property subject to his mortgage and that it fetches, say a Rs. 1,000 at the sale. Can he touch a rupee of this money ? Obviously not, for the decree debt springs from the mortgage and the sale being admittedly subject to it, he has no right to proceed against any part of the money. Let us next suppose that he sells the property free of his mortgage and that it realises a sum which exceeds the mortgage amount. Has he any right to any part of the excess sum ? The answer is again in the negative. In short, the decree-holder diverts the execution proceedings from their true object and turns them to a wrong end. This, the Courts will not permit, and I am therefore clearly of the opinion that the second proviso of S. 73 does not apply.

The question then remains : can the plaintiff merely attach the property and bring it to sale ? As I have already pointed out, he made a previous application to that effect and it was granted. That is a decision between the parties and is binding upon them. Apart from that, O. 34, R. 14, does not stand in the plaintiff's way. In the suit, it has been decided that there is no mortgage at all and it therefore follows that the decree is not :

"for the payment of money in satisfaction of a claim arising under the mortgage."

This decision, right or wrong, binds the parties and for the present purpose it must be conclusively taken that the claim is not one that arises under the mortgage. This point is conceded by Mr. Panchapagesa Sastri, and requires no further discussion. But the plaintiff, as I have already shown, is not satisfied with a bare order that he can attach and sell the property. But if he is so advised, he may apply to the lower Court for such an order and as the application cannot be opposed (as Mr. Panchapagesa Sastri concedes), that Court may grant it and direct attachment and sale in the usual course.

In the result. neither of the applications of the plaintiff (the one made to the lower Court or the one made to us), is competent and the appeal is allowed, but, in the circumstances, we make no order as to costs.

Before closing, I may add that in the view I have taken it is unnecessary to discuss whether S. 43, T. P. Act, applies to the facts or not. That is a point which must be left to be considered in any regular suit which the plaintiff may choose to file.

Madhavan Nair, J.—I agree.

P.R.S./V.S. *Appeal allowed.*

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ANANTAKRISHNA AYYAR, J.

(*Vatakkam Chirayil Parkum*) *Kurundaliammal*—Plaintiff—Appellant.

v.

T.P.E.N. Kunhi Kannan and *others*—Defendants—Respondents.

Second Appeal No. 603 of 1926, Decided on 9th October 1929, from decree of Sub-Judge, Tellicherry, in Appeal Suit No. 126 of 1925.

(a) Contract Act, S. 257—Good faith and utmost bona fides is required in dealing.

between working and sleeping partners when matters relating to accounts are concerned.

Partners who do not take an active part in the partnership are entitled to rely on the accounts produced by the working partners who are in charge of the same. Good faith is required in dealings between the partners, and when, as a result of the accounts produced by the working partners they induce the other partners to execute in their favour a promissory note in respect of the amounts so found to be due to the working partners according to the accounts produced by them, it is necessary for them to exercise the utmost bona fides in such matters. [P 143 C 2]

(b) Partnership—Fraud vitiates any agreement entered into on dissolution of partnership—Working partner producing false accounts and inducing sleeping partners to deliver promissory notes through fraud—Promissory note is vitiated by such fraud.

An agreement entered into on a dissolution will be set aside if it can be shown to have been based upon error or to have been tainted by fraud, whether in the shape of positive misrepresentation or of concealment of the truth. [P 144 C 2]

In a suit upon a promissory note it was found that the working partners of a firm prepared and produced accounts before the sleeping partners on the faith of which the latter took upon themselves the partnership business and sent off the working partners promising to pay them under a promissory note a sum of money after giving the former some cash and some logs of timber.

Held: that having regard to the fraud practised upon the sleeping partners as shown by the numerous instances of falsification of accounts by the working partners, the settlement was not binding upon the managing partners and that the promissory note was accordingly vitiated: 5 *M.I.A.* 372 (*P.C.*) and *Law* v. *Law*, (1905) 1 *Ch.* 140, *Ref.* [P 145 C 1]

(c) Negotiable Instruments Act, S. 9—Rights of ultimate holder in due course enunciated.

Unless a person proves that he is a holder in due course within the meaning of S. 9, he cannot have any higher or superior rights against the drawer than the intermediate holders themselves would have, and that, the person knows of the defect of title of the intermediate holders is enough to disentitle that person to the benefits of a holder in due course; 7 *M. H. C.* 271; 5 *Mad.* 103 and 33 *Mad.* 34, *Ref.* [P 145 C 1]

Advocate General and *P. Narayana Kurup*—for Appellant.

V. P. Karunakaran Nambiar—for Respondents.

Judgment.—The plaintiff as the endorsee of a promissory note, Ex.-C executed by defendants 1, 2 and 3 in favour of defendants 4 and 5 instituted the original suit against all the defendants to recover the amount due on the promissory note. The plea of defendants 1, 2 and 3 was that there was no consideration for the promissory note, that it was executed on account of fraud practised upon them by defendants 4 and 5 and that plaintiff was not a holder in due course as he knew the defect of the title of defendants 4 and 5 to the promissory note. Defendant 4 did not appear in the suit and defendant 5 supported the plaintiff. The trial Court came to the conclusion that there was no fraud and that the amount must be taken to have been due. It gave a decree in favour of the plaintiff against all the defendants for the amount due on the promissory note. Defendants 1, 2 and 3 preferred an appeal to the lower appellate Court. The learned Subordinate Judge came to the conclusion that the promissory note was executed by defendants 1, 2 and 3 as the result of fraud practised by defendants 4 and 5 and also that the plaintiff had knowledge of the defect of title of defendants 4 and 5 when he got endorsement of the note from them in his favour. On these findings he reversed the decision of the first Court and dismissed the suit against defendants 1 to 3. Hence this second appeal has been filed by the plaintiff against defendants 1, 2 and 3 only. We are not here concerned with the decree granted by the first Court against defendants 4 and 5 which has become final.

On behalf of the appellant the learned advocate raised two points before me. In order to appreciate the first contention raised it is necessary to state a few facts. There was a partnership in timber carried on by these defendants. Defendants 4 and 5 would seem to be working partners and defendant 1, 2 and 3 really the monied partners who provided the capital. There were misunderstandings between the partners with the result that they were anxious to have the partnership dissolved and the accounts taken. Two attempts were made for settlement, the first at a place called Chokli. Though no accounts were produced at the Chokli settlement it would appear that the parties were persuaded through the intervention of some arbitrator, to fix a particular amount as the amount due to some of the partners, and that after accepting the said settlement a release deed was executed by them in favour of the others. Immediately afterwards the said settlement was set aside by consent and the release deed was treated as cancelled. There were further negotiations

and at Kasargod there was another settlement. Defendant 5 was the working partner in charge of the actual partnership transactions. He produced certain account books at the settlement at Kasargod and he also produced two balance sheets, Exs.-B and I. According to these it appeared that defendant 4 was found entitled to a sum of Rs. 341-8-0 and defendant 5 to a sum of Rs. 4,885-5-6. The amount due to defendant 4 namely, Rs. 341-8-0 was treated as not really due, having regard to the state of affairs of the partnership and in respect of the amount due to defendant 5 some amount was reduced from the Rs. 4,885-5-6, appearing in the books as due to him and from the amount arrived at a sum of Rs. 1,385-0-0 was deducted on account of defendant 4 and 5's share of the loss. Rs. 215-1-0 was paid in cash and 22 logs of timber worth Rs. 570-15-0 were also given. It is in respect of the balance of Rs. 2,714-0-0 which was found to be due to defendants 4 and 5 that this promissory note, Ex.-C was executed on 30th October 1920. The finding of the lower appellate Court was that defendant 5 who was in charge of the business had tampered with the accounts and the balance sheets, Exs.-B and I, which he produced before defendants 1, 2 and 3 and on the basis of which the parties settled accounts were all tainted by fraud.

The lower appellate Court has discussed this question of the fraud practised on defendants 1, 2 and 3 at the time of the settlement. A commissioner was appointed to go into the interpolations and alterations made in the accounts by the partners in charge of the business. It is unnecessary for me to go into the details of the mistakes and frauds which the lower appellate Court finds proved. To take one instance, in para. 15 of the lower appellate Court's judgment, in considering item 166 of the commissioner's report, it is observed that the entry as it stood at first related to a debit of Rs. 15 on 15th November 1919 in the firm's books. The figures were subsequently changed into Rs. 715. The sum is said to have been sent to one Kamevadi .Chappa for meeting expenses in connexion with the partnership. The alteration of the figures "15" into "715" clearly benefits the working partners to the extent of Rs. 700. This alteration of the figure "15" into "715" in respect of a debit on 15th November 1919 is carried out both in the ledger and also in the fair day book. But unfortunatly for defendants 4 and 5, the rough daybook contains only the original entry "15", so that the lower appellate Court had before it a case where accounts had been tampered with by partners who kept the accounts and who produced those accounts as the accounts properly representing the affairs of the partnership at the settlement made by them with the other partners, defendants 1, 2 and 3. No doubt certain explanations were offered with reference to these entries. The lower appellate Court in para. 15 observed that it was unable to accept the explanation. My attention was drawn by the learned advocate for the respondent to other similar entries also where figures "100" was changed into "300" and various similar changes were made; for example, Rs. 20 changed into Rs. 320 and 7 annas 7 pies changed into Rs. 100-7-9. Sitting in second appeal it is not necessary for me to multiply instances.

What has been found by the lower appellate Court therefore comes to this. Defendants 4 and 5 working partners in charge of the accounts represented to the other three capitalists partners, defendants 1, 2 and 3 that the accounts produced by defendants 4 and 5 before defendants 1, 2 and 3 represented the real state of the transaction of the partnership. Further they produced for the purpose of the settlement two abstract balance sheets, Exs. B and I which represented the result of the accounts, according to the altered state of the accounts. Now it goes without saying that partners who do not take an active part in the partnership are entitled to rely on the accounts produced by the working partners who were in charge of the same. Good faith is required in dealings between the partners, and when, as a result of the accounts produced by these working partners they induced the other partners to execute in their favour a promissory note in respect of the amounts so found to be due to these working partners according to the accounts produced by them, it is all the more necessary for them to exercise the utmost bona fides in such matters. The plea

of defendants 1, 2 and 3 in the present case that the promissory note was executed by them owing to fraud practised by defendants 4 and 5 has been amply proved, and the materials on record warrant the finding of the lower appellate Court in their favour. It was, however, argued by the learned advocate for the appellant that the present case comes within the principle enunciated by the Privy Council in the case reported in *M. Kellor* v. *Wallace* (1). At p. 395 the principle is set out in the judgment delivered by the Right Hon'ble Pemberton Leigh. No doubt in cases where parties elect to proceed not on the basis of accounts but in spite of the same, if, for example, they say expressly or by necessary implication that whatever might be the state of accounts, the parties do not want to take the actual accounts but want to avoid the labour and trouble of going through the accounts, but voluntarily agree to have a particular amount fixed (really it is, in such cases, by way of compromise of their claims), then it is not open to one of them subsequently to say that if the accounts as subsequently gone into prove that the amount due by one party is much less than the amount which the parties mutually agreed that they are not bound by the agreement. That is it is no answer to say that the parties were not wiser in the first instance. It is open to parties to compromise matters in dispute, and questions relating to settlement of accounts are not an exception to this rule. That was the case which the Privy Council had to consider in the case reported in *M. Kellor* v. *Wallace* (1). I should just like to quote the passage on which great stress was laid by the learned advocate for the appellant in this case. At p. 395 it is stated:

"The law in cases of this kind I apprehend to be perfectly clear. Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that voucher should be produced, and that all the information which is possessed on one side and the other should be furnished in the settlement of those accounts; and, if it afterwards turns out that there are errors in the account it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance, a sum which one is willing to pay and the other is content to receive as the result of those accounts, it is obvious that the production of vouchers is entirely out of the question and errors in the account or so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled; therefore it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise."

Having come to the conclusion that the case before me is not a case of the kind put forward by the learned advocate for the appellant based on the second aspect mentioned in the judgment of their Lordships it follows that I am unable to uphold his contention for another reason also. It should be noticed that the Privy Council in the case in *M'Kellor* v. *Wallace* (1) proceed further to state:

"In either case (that is, in either of the two cases contemplated by his Lordship in the previous sentences) it may be vitiated by fraud; in either case it is good for nothing if either from the collusion of the parties upon the circumstances under which the settlement take place, it is proved in a Court of equity that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involvedor from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side."

It being thus clear that fraud is a ground for interference in both cases, the question is whether fraud has been legally found in the present case. In Lindley on Partnership, Edn. 9, at p. 591 there is a paragraph relating to agreements made between partners at the time of dissolution and based on false and incorrect accounts. It is stated that:

"notwithstanding the inability of a retiring partner and of those claiming under him to avoid an agreement fairly come to between him and his copartners, the good faith and open dealing which one partner has a right to expect from another never require to be more scrupulously observed than when one of them is retiring upon terms agreed to upon the strength of representations as to the state of the partnership accounts; and an agreement entered into on a dissolution will be set aside if it can be shown to have been based upon error or to have been tainted by fraud, whether in the shape of positive misrepresentation or of concealment of the truth."

A case is mentioned where in circumstances similar to the present case, a plaintiff gave a note for the amount of

(1) [1851—54]5 M. I. A. 372 (P. C.)

the balance and afterwards discovering mistakes be filed a bill for a new account. The defendant of course pleaded "accounts stated." The Court decreed that the defendant should give a new account. It is not necessary to quote other cases to which my attention was drawn by the learned advocate for the respondents. The case of *Law* v. *Law* (2), was also referred to in support of the same proposition. Here not only were the accounts produced by defendants 4 and 5, but two balance sheets, Exs. B and I, were prepared by them and produced before defendants 1 to 3 on the faith of which defendants 1 to 3 took upon themselves the partnership business and sent off defendants 4 and 5, promising to pay them under this note a sum of money after giving them some cash and some logs of timber. Having regard to the fraud practised upon defendants 1 to 3 as shown by the numerous instances of falsification of accounts by defendants 4 and 5, I think the lower appellate Court was entitled to come to the conclusion that this settlement was not binding upon defendants 1 to 3 and that the promissory note was accordingly vitiated.

The next question that was argued on behalf of the appellant was that, in any event, not being a party to the promissory note in the first instance but only an endorsee from defendants 4 and 5 he was entitled to protection and that his suit should not have been dismissed, whatever remedies defendants 1 to 3 might have against defendants 4 and 5 in respect of any fraud practised upon them. The answer to that is that unless the plaintiff proves that he is a holder in due course within the meaning of S. 9, Negotiable Instruments Act, he could not have any higher or superior rights against defendants 1, 2 and 3 than defendants 4 and 5 themselves would have. In this case there is the finding arrived at by the lower appellate Court in para. 28 of its judgment on p. 10 that the plaintiff knew of these disputes and that he took the note with notice of the defect of title of defendants 4 and 5. That finding is enough to disentitle the plaintiff to the benefits of a holder in due course. There was also another matter mentioned to me which would equally disentitle the plaintiff to relief on this footing. As I mentioned already, the promissory note is dated 30th October 1920. It was endorsed in favour of the plaintiff by defendants 1 and 5 on 27th July 1921. In the plaint it is mentioned in para. 5 that the due dates were 31st December 1920 and 31st March 1921. I understand that it means that the amounts became payable on these respective dates. The plaintiff's endorsement is dated subsequent to the second of the dates mentioned in the plaint and, that being so, on that ground also the plaintiff could not be said to be a holder in due course.

The learned advocate for the appellant, however, argued that in the case of promissory-notes payable on demand there is no such thing as the date on which the amount became payable, because he argued that in the case of every promissory-note payable on demand the amount becomes payable on the execution of the promissory-note and that the words "after the same became payable" should not be taken to apply to such promissory-notes. I need not express any opinion in this case on this question, as I have held against the appellant on the other point already mentioned by me; but my attention was drawn to the cases reported in *Communden Mohideen Sahib* v. *Oree Meerah Saib* (3), *Van Ingen* v. *Dhunna Lall* (4) at p. 110, and *Sankara Subban Pattar* v. *Mangalaseri Kunhu* (5) at p. 35, where this Court observed that if, after the execution of an "on demand" promissory-note, the holder of the promissory-note made demands on the maker, then a subsequent indorsee from such holder could not be said to be a "holder in due course" within the meaning of S. 9. However, as I said, it is unnecessary for me to decide in this particular case this point, as I have found that the lower appellate Court was entitled to come to the finding that the plaintiff had notice before he took endorsement of the defect of title of defendants 4 and 5 to the promissory-note in question.

It, therefore, follows that both the contentions raised by the learned ad-

(2) [1905] 1 Ch. 140=74 L. J. Ch. 169=53 W. R. 227=21 T. L. R. 102=92 L. T. 1.

(3) 7 M. H. C. 271.

(4) [1882] 5 Mad. 103.

(5) [1910] 33 Mad. 34 = 3 I. C. 428 = 19 M. L. J. 503.

vocate for the appellant should be overruled. with the result that the second appeal is dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

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* A. I. R. 1930 Madras 146

ODGERS AND WALLACE, JJ.

N. P. L. Palaniappa Chetty—Plaintiff—Appellant.

v.

N. M. R. Nagappa Chettiar and *others*—Defendants—Respondents.

Appeal No. 349 of 1924, Decided on 26th March 1929, from decree of Sub-Judge, Ramnad, in Original Suit No. 64 of 1922.

*** (a) Evidence Act, S. 45—Expert opinion on foreign law, where it is elaborately laid down in a Code, need not be called for—Court should itself interpret such law.**

An expert in foreign law is no doubt called to state what the law of a foreign country on a particular point is; but where the law is laid down in a particularly elaborate manner in any Code of the foreign country, the Court should interpret that Code as best as it can and it should not rely on any outside opinion however eminent as to the interpretation of that Code. [P 146 C 2]

*** (b) Civil P. C., S. 13 (b)— Mortgagee bringing suit in Colombo Court—Mortgagor not appearing—Mortgagee on filing affidavit getting decree in suit — Law existing in Ceylon not followed—Mortgagee is not entitled to have decree under Civil P. C., S. 13 (b).**

The mortgage brought a suit on his mortgage in the District Court of Colombo. From record it appeared that in that suit on the non-appearance of the mortgagor, the mortgagee's proctor filed an affidavit and the Court passed a decree nisi and a decree absolute under Ceylon Civil P. C., Ss. 85 and 86. But in doing so the Court did not strictly adhere to the provisions of Ceylon Civil P. C., S. 180, and Ceylon Evidence Act, S. 68; moreover, there was no judgment in the suit.

Held: that on a suit brought by the mortgagee in British Indian Court on the foreign judgment, the decision of the Colombo Court was not on merits so as to entitle mortgagee to have a judgment under Civil P. C., S. 13 (b): *A. I. R.* 1927 *Mad.* 265, (*F. B.*), *Foll.*; *A. I. R.* 1916 *P.C.* 121, *Rel. on.*; *A. I. R.* 1926 *Mad.* 615; *A. I. R.* 1925 *P. C.* 203 and *A. I. R.* 1928 *Mad.* 133, *Ref.* [P 148 C 2]

T. M. Ramaswami Iyer— for Appellant.

V. Rajagopala Iyer and *S. Jagadisa Iyer*—for Respondents.

Odgers, J.—This appeal and appeal No. 47 of 1928 were originally heard by myself and Curgenven, J., but owing to the latter's illness before he left the Court last year we were unable to deliver our judgments. In the meantime an informal application was made to me which is now put in the form of petition that we should ask Mr. Brook Elliot, a member of the Ceylon Bar to either appear as an amicus curiae or as a witness to help us in the elucidation of the Ceylon procedure in this case as contained in the Ceylon Procedure Code. We have given very careful consideration to this request and we are indebted to Mr. Brook Elliot for so readily placing his services and knowledge at our disposal. But we consider that the only way in which Mr. Brook Elliot could be of any real assistance would be if he were asked his opinion as to the very question that we have to decide. An expert in foreign law is called as I understand it to state what the law of a foreign country on a particular point is; an advocate of the Scottish Bar is often called as a witness in the English Courts to explain the law of Scotland on any particular point that arises. But in this case we have the law laid down for us in a particularly elaborate manner in the Ceylon Civil Procedure Code and it appears to us that it is our duty to interpret that Code as best we can and that we are not entitled to rely on any outside opinion, however eminent, as to the interpretation of that Code.

This was a suit to enforce payment of Rs. 8,000 the balance due on foot of a certain mortgage and a foreign judgment obtained by the plaintiff in the District Court of Colombo. Defendant 1 had effected this mortgage to the plaintiff on the security of certain properties in Ceylon on 3rd April 1917. The suit in the Colombo District Court on the mortgage document was started on 10th November 1918 and on 12th May 1919 there was a preliminary decree followed on 4th July 1919 by a final decree and on 16th October 1919 the plaintiff purchased the properties in Court auction for Rs. 9,000 odd and in 1920 sold them by private sale for Rs. 33,000. After giving credit for this, the suit was brought for the balance of Rs. 8,000. On 18th October 1922 the present suit in the Indian Court was started and the learned Subordinate Judge found that the claim was barred by limitation as to the original cause of action as the document could not be held to be a registered

document for the purpose of limitation. The learned Judge curiously enough did not give any finding as to the limitation with regard to the foreign judgment, and it is practically uncontested that the plaintiff has under Art. 117, Lim. Act, six years in which to bring his suit in British India on the foreign judgment. The authority of *Venkata Gurunadha Ramaseshayya* v. *Tripura Sundari Cotton Press, Bezwada* (1), precludes him from relying on the document registered outside British India. The only question in this appeal really is whether the foreign judgment was one based on the merits or not within S. 13-b, Civil P. C. The respondents' advocate faintly contended that there was no submission to the jurisdiction on the part of the defendant and no service on him, but the document which is the original plaint contains clear submission to the jurisdiction for it states:

"It shall be lawful for the said obligee or his aforewritten at once to sue for and recover payment of the said sum of Rs. 27,000."

It is obvious, I think, that the words "to sue for" must mean to sue in the Courts of the country where the obligation was entered into and the obligor is Nawanna Moona Roona Nagappa Chetti of Sea Street in Colombo and the obligee is also described as of the same address. In this case there was substituted service as provided for in the Ceylon Civil Procedure Code, Ss. 60 and 61. The latter makes substituted service as effective as if it had been made on the defendant personally. There is no reason to suppose that substituted service was not ordered and effected in this case with due regard to the procedure of the Ceylon Courts.

The record in the case is called the Journal and under S. 92, Ceylon Civil P. C., the Journal is to commence with the institution of the action and in it shall be minuted as they occur, all the events in the course of the action, i. e., the original application and every subsequent step, proceeding and order; each minute shall be signed and dated by the Judge, and the Journal so kept shall be the principal record of the action. This document is Ex. E, and it appears from that, that substituted service was effected on 5th May 1919 on the affidavit of the process server and the Fiscal's Report stating that notice was affixed to to the mortgage property. The difficulty is caused by the entry of 12th May and by some of the provisions of the Ceylon Civil Procedure Code to which reference will be made in a moment. On 12th May 1919 the Journal states:

"Mr. Kondaiya files affidavit and moves that decree nisi be ordered to issue for the 21st May 1919."

That motion was allowed by the District Judge and a decree nisi was issued on 17th May 1919. Finally substituted service of notice of the decree nisi was effected on 2nd July 1919, and the decree nisi was made absolute on 4th July. Execution by sale was ordered to issue on 11th August. The affidavit referred to under the entry of 12th May is stated to be the affidavit printed at p. 7 of the supplemental documents which is by the agent of the plaintiff sworn on 8th May 1919 and it sets out the facts and states that a sum of Rs. 30,000 and odd is due to the plaintiff. The question is whether such an affidavit was used in evidence so as to enable it to be said that ex parte decree was a decree on the merits and secondly whether such an affidavit is admissible under the Ceylon Civil Procedure Code or whether the Court is bound to pass judgment for the plaintiff in case the defendant does not appear though served. The chapter on default is Chap. 12. S. 85 provides that:

"if the defendant fails to appear on the day fixed for his appearance and answer, * * * * * and if the Court is satisfied by affidavit of the process server * * * * * and if on the occasion of such default of the defendant the plaintiff appears, then the Court shall proceed to hear the case ex parte and to pass a decree nisi in favour of plaintiff in the form No. 22 in Sch. 2 hereto."

This form is headed "Form of decree nisi in default of appearance of defendant," and it will be observed that the Court has apparently no option except to pass a decree nisi in the plaintiff's favour though it may proceed to hear the case ex parte. It is attempted to be said that the words "shall proceed to pass a decree nisi" really mean to hear the case and if it decides to pass a decree, to do so. But that is certainly not what the section says. The Civil Procedure Code further provides in S. 87 that no appeal shall lie against any decree nisi or absolute for default. But the Court may set aside the decree for good cause shown. Further S. 90 says that where there are

(1) A. I. R. 1926 Mad. 615=49 Mad. 463 (F.B.).

more defendants than one the Court shall not be obliged to pass a decree for default against a defendant for failing to appear at a stage of the action provided that one defendant at least appears at that stage. This appears to make it quite clear that under S. 85 the Court is bound to pass a decree. When we come to Ch. 19 on the trial of cases S. 167 provides: "The evidence of the witnesses shall be given orally" and S. 179 :

"The Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit,"

and S. 180 :

"In the event of such an order being made the Court may order the attendance of the declarant or deponent for viva voce cross-examination."

It does not seem clear how this affidavit at p. 17, if that is the one referred to in the Journal of the 12th May, was allowed to be used there being no order apparently under S. 179 for the substitution of affidavit evidence for viva voce. There is another difficulty in this case. Under Ceylon Ordinance 7 of 1840, S. 2, no mortgage can be a mortgage except when signed by the party making it in the presence of a notary public and two witnesses; and by S. 68, Ceylon Evidence Act, one attesting witness must be called. The admission of a party with regard to the execution of a mortgage will not do: see *Hira Bibi* v. *Ram Hari Lal* (2). This would seem to be another indication that the case did not proceed on the merits. It will be observed that the Ceylon procedure differs from our own in that an opportunity is afforded to the defendant who has not appeared after decree nisi to come forward and show cause why the decree should not be made absolute, instead of our procedure of moving to set aside the ex parte decree obtained by the plaintiff. One of the latest cases on the subject is *Arunachalam Chettiar* v. *Muhammad Salihu* (3). The authority as far as this Court is concerned is contained in the Full Bench case *Mohamed Kassim & Co.* v. *Seeni Pakir* (4) which was a case from Penang. There, there was no trial and no taking of evidence. The case was held to fall within the decision in *Keymer* v. *Visvanatham Reddi* (5), where the defendant refused to answer interrogatories and his defence was thereupon struck out and the defendant was placed in the same position as if he had not defended. In the King's Bench Division in England on a suit brought on this foreign judgment it was held not to have been on the merits of the case within S. 13 (b) Civil P. C. In the Full Bench case Krishnan J. one of the referring Judges with reference to *Janoo Hassan* v. *Mahomed Ohuthu* (6) which is overruled by the Full Bench observes as follows :

"That was a Ceylon case where also a similar rule prevails as in Penang entitling the Court to give a decree without any trial when the defendants being served do not appear; though the Ceylon rule gives power to the Judge to take evidence if he thinks fit, there is nothing to show that in the particular case any evidence was taken."

It is further to be observed that S. 13, Civil P. C., speaks of a foreign judgment. In the Journal there does not seem to be any trace of a judgment whatever but only a decree. In the absence of any indication that this affidavit was used and considered by the District Judge and as to how and under what authority it was allowed to be filed and having regard to the provisions of law with regard to the proof of a mortgage document it seems to me impossible to say that this decree in Ceylon was obtained on the merits. Mr. Justice Krishnan says that the Ceylon Code is 'identical with the rules of the Penang Court and he adds that the procedure in the District Court of Colombo is that where no defence is entered and affidavit of service filed judgment follows as a matter of course. In that case there was nothing to show that any evidence was recorded or the Court went into the merits though the defendants were ex parte. I am therefore inclined to think that in this case the judgment of which there is none was not on the merits and that the appeal should be dismissed with costs two sets for defendant 1 and for defendants 2 and 3 jointly.

Wallace, J.—The main point raised in this case is almost precisely the same as that in appeal No. 47 of 1928, namely, whether a decision of the District

(2) A. I. R. 1925 P. C. 203=5 Pat. 58=52 I. A. 362 (P.C.).
(3) A. I. R. 1928 Mad. 133.
(4) A. I. R. 1927 Mad. 265=50 Mad. 261 (F.B.).
(5) A. I. R. 1916 P. C. 121=40 Mad. 112=44 I. A. 6 (P.C.).
(6) A. I. R. 1925 Mad. 155=47 Mad. 877.

Court, Colombo, in a regular suit in which all that appears from the record is that on the defendant's non-appearance, the plaintiff's proctor filed an affidavit and the Court passed a decree nisi and then a decree absolute under Ss. 85 and 86, Ceylon Civil Procedure Code was a decision on the merits which would entitle the plaintiff to judgment on the forgein judgment under S. 13 (b), Civil P. C. In my judgment in appeal No. 47 of 1928, I have given reasons for holding that such a decision is not on the merits, and I need not repeat them here.

In the present case, the decree obtained by the plaintiff in the District Court of Colombo was an ex parte decree on the mortgage. He brought the property to sale in execution in Colombo and realised part of the decree amount and he is now suing on the foreign judgment to recover the balance in the Subordinate Judge's Court of Ramnad. The discussion of the point under S. 13 (b) by the trial Court is hardly adequate, but the matter has been fully argued before us here, and, as I held in appeal No. 47 of 1928, my conclusion is that the decision was not on the merits. On this point, the appeal must fail.

It is unnecessary therefore to go into the other points such as whether the District Court, Colombo, had jurisdiction to pass the decree, it being alleged that the defendant was not a resident at the time within its jurisdiction and was not served at all and had no knowledge whatever of the suit or the decree and that the manner in which process was taken ont was a fraud upon the District Court and whether the decree therefore offends against the principles of natural justice. The appeal must therefore be dismissed with costs (2 sets) as decided by my learned brother.

P.R.S./V.S. *Appeal dismissed.*

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* A. I. R. 1930 Madras 149

ODGERS AND WALLACE, JJ.

P. L. S. Firm, Colombo— Plaintiff — Appellant.

v.

M. R. M. S. Sulaiman—Defendant—Respondent.

Appeal No. 47 of 1928, Decided on 26th March 1929, from decree of Sub-Judge, Sivaganga, in Original Suit No. 116 of 1924.

Civil P. C., S. 13 (b)—Decree ex parte under Ceylon Civil P. C., Ss. 85 and 86 is not on merits — Plaintiff getting decree under Ceylon Civil P. C., Ss. 85 and 86 is not entitled to get judgment under Civil P. C., S. 13 (b).

The passing of decrees under Ceylon Civil P. C., Ss. 85 and 86 are not decisions on the merits of a case but are a penalty for default of appearance.

A basing his claim on certain promissory notes and hundis, byought a suit in the District Court of Colombo against *B*. *A* in that suit asked for the case to be proceeded ex parte against *B* who did not appear, and on *A*'s filing an affidavit, decrees were passed under Ceylon Civil P. C., Ss. 85 and 86. *A* brought the present suit in British Indian Court to recover the sum of Rs. 15,000 said to be due under the decree of the foreign Court.

Held: that as there was in the District Court of Colombo no decision on the merits, *A* was not entitled to have judgment under Civil P. C., S. 13 (b): *A. I. R.* 1927 *Mad.* 265 (*F.B.*), *Foll.*; *A. I. R.* 1916 *P. C.* 121, *Rel. on.*; *A. I. R.* 1928 *Mad.* 133, *Ref.* [P 152 C 2]

B. Sitaram Rao, K. Rajah Iyer and *K. S. Rajagopala Chari*—for Appellant.

M. Patanjali Sastri and *K. Umamaheswaran*—for Respondent.

Odgers, J.—These appeals, appeal No. 339 of 24 and appeal No. 47 of 28 were originally heard by myself and Curgenven, J., but owing to the latter's illness before he left the Court last year we were unable to deliver our judgments. In the meantime an informal application was made to me which is now put in the form of petition that we should ask Mr. Brook Elliot, a member of the Ceylon Bar to either appear as an amicus curiae or as a witness to help us in the elucidation of the Ceylon Procedure in this case as contained in the Ceylon Procedure Code. We have given very careful consideration to this request and we are indebted to Mr. Brook Elliot for so readily placing his services and knowledge at our disposal. But we consider that the only way in which Mr. Brook Elliot could be of any real assistance would be if he were asked his opinion as to the very question that we have to decide. An expert in foreign law is called as I understand it, to state what the law of a foreign country on a particular point is; an advocate of the Scottish Bar is often called as a witness in the English Courts to explain the law of Scotland on any particular point that arises. But in this case we have the law laid down for us in a particularly elaborate manner in the Ceylon

Civil Procedure Code and it appears to me that it is our duty to interpret that Code as best as we can and that we are not entitled to rely on any outside opinion however eminent as to the interpretation of that Code.

The plaintiff brought O. S. No. 116 of 1924 in the Court of the Subordinate Judge of Sivaganga. On 16th December 1924 , an ex parte decree was passed in the suit on a foreign judgment of the District Court of Colombo against defendants 1 and 13 in the suit. On 13th March 1926, defendant 13 applied to set aside the ex parte decree and succeeded. Defendant 2 is now the contesting defendant before us. The learned Judge on this application held that defendant 2 only became aware of the decree on 16th February 1926 and that his application was therefore within time. We were at first inclined to go into the facts to see if the learned Judge's order could be sustained on this point but in this case the most important question that arises is as to whether this is a decision on the merits. On 30th May 1917 the suit was filed. We have the Journal under S. 105, Ceylon Civil Procedure Code, printed. It is contended that because an affidavit is apparently put in, the decision is one on the merits although the defendant was ex parte. The suit was against 14 defendants of whom only defendants 1 and 13 were ex parte. On 7th July 1921 Mr. Kondayya moved for an ex parte trial as against defendants 1 and 13. This was allowed and the trial fixed to 15th July. On 19th September 1921 Mr. Kondayya filed an affidavit and moved that decree nisi be entered. Decree nisi was issued on 11th November 1921. The affidavit was filed on 15th Sepember 1921, and sets out the fact that certain promissory notes and a cheque were dishonoured and that the defendants are jointly and severally liable in the sum of Rs. 9,500 and odd. The Journal states that on 19th September the day fixed for the hearing the plaintiff appeared and that defendants 1 and 13 did not appear though they were duly served as by the affidavit of the process server appears. Reference must be shortly made to the provisions of the Ceylon Procedure Code. The Chapter relating to default of appearance is Chap. 12. S. 85 says :

"If the defendant fails to appear on the day fixed for his appearance and answer, or if he fails to appear on the day fixed, for the subsequent filing of his answer, or for filing of the replication, or on the day fixed for the hearing of the action, and if the Court is satisfied by affidavit of the proces server stating the facts and circumstances of the service or otherwise, that the defendant has been dnly served with summons, or has received due notice of the day fixed for subsequent filing of answer, or of replication, or of the day fixed for the hearing of the action, as the case may be, or if the defendant shall fail to file his answer on the day fixed therefor, and if on the occasion of such default of the defendant the plaintiff appears, then the Court shall proceed to hear the case ex parte and to pass a decree nisi in favour of plaintiff in the form No. 22 in the Sch. 2 hereto or to the like effect, and shall thereupon issue to the defendant a notice of such decree. Such notice shall be served personally unless the Court, for sufficient reasons to be assigned by it, direct some other mode of service."

Reference may also be made to the words of S. 87 :

"No appeal shall lie against any decree nisi or absolute for default."

Section 90 says :

"In the case of an action where there are more defendants than one, the Court shall not be obliged to pass a decree for default against a defendant for failing to appear at a stage of the action provided that one defendant at least appears at that stage against whom the action must proceed."

It is alleged that the affidavit printed at p. 3 of the appellant's documents was used at the hearing ex parte and that constitutes a decree on the merits. We have no judgment in the case and the only affidavit referred to in the order quoted above is that of the process server. Under S. 85 it would seem that the Court has no option but to give a decree for the plaintiff, the defaulting defendant being left to his remedy of moving to set aside the decree nisi if he can. Chap. 12 makes no reference to affidavit evidence which is only by S. 179 to be allowed by the Court for sufficient reason. The affidavit relied on does not appear in the Journal and it is not explained under what provision of law it has been used. It may be that it is the practice of the Colombo Courts to use affidavits of this kind before ordering the issue of the decree nisi but in the absence of any evidence on the point it seems to me that the affidavit in question cannot be relied upon to make this a decree on the merits. There is no judgment whatever.

Another possible explanation is that this suit though begun as a regular suit and we know that all the defendants

but two originally appeared and filed answers was after the dismissal of the suit against them converted into a summary suit and it will be remembered that in summary suits an affidavit is required.

Another question raised in this appeal has been already referred to, viz., whether these defendants had notice of this particular decree. Defendant 2 states that he was not served with any summons and was only aware of the decree passed against him on 16th February 1926. This becomes important in considering whether he was within time in making his application to set aside the ex parte decree. He further says he was employed in Colombo for the last two years and came to Tondi, the village in question, on 28th January 1926. The agent of the plaintiff on the other hand says that this defendant came to the village of Tondi a few days prior to 28th January 1926. The Court amins came to Tondi on the eve of his marriage, the defendant remaining in concealment. A resident of Tondi, Madar Shaik Ali, says that the marriage of this defendant was celebrated secretly because even at the end of January he was aware of the warrants out for his arrest. There is a conflict of evidence about this matter and it is evident that the amins found themselves in a hostile atmosphere in this village and wired to the Subordinate Judge to know what they were to do as the defendant was absconding inside the house. They asked for police bandobust from Tiruvadani as the outpost of Tondi did not seem to be available or willing to help them. It is of course the law that the defendant must know exactly what decree and for what amount is being executed against him and while it is quite likely that he knew that the amins were in the village to execute this particular decree it is possible that as he was a man in involved circumstances he was not sure what particular decree it was that was sought to be executed. This question really becomes of no importance in the view that I have taken that this decree is not one on the merits.

This is admittedly a decree for default and not a decree on the merits, c. f., Ss. 703 and 708, Ceylon Civil P. C. Therefore it may be argued with reason that an affidavit is not a distinguishing mark of a regular hearing on the merits and that exactly the same materials are placed before the Court in a case of this kind as in the summary procedure. There is also the fact that there is no judgment but merely a decree in this matter which supports the view that it is not a decree on the merits. In this view I am of opinion that this appeal fails and must be dismissed with costs.

While this judgment was under consideration we have been referred to two reported Ceylon decisions. The first is Vol. 6 of the Notes of Cases by Mr. K. Balasingham and is at p. 17 of that Volume. The learned Judges there held that at an ex parte hearing it was necessary for plaintiff to give such evidence of the material averments as would enable the Court to pass a decree. The Judges held there had been no hearing at all as all the plaintiff said was:

> "I have actually sustained the damages claimed and nearly half the claim was for pain of mind and body. It was also doubtful if such damages could be recovered."

The other case is reported in 3 *N. L. R. (Ceylon) p.* 34 and was a case of 1897. It holds that the plaintiff must make out a prima facie case and that the Judge is not bound to pass a decree till he is satisfied. He may grant an adjournment to enable plaintiff to repair the defects in his evidence and which may seem a strange proceeding to us here. The Judges refer to the old practice of allowing the defaulter defendant to appear and examine plaintiff in order to make the Court dissatisfied with the plaintiff's case. This is no longer allowed but the Court must still be satisfied that plaintiff has a case. This is reasonable. Suppose *A* sued *B* for the price of a coat and claimed Rs. 10,000. The case is ex parte. It may well be that the Court would not be satisfied without proof of the truth of the plaintiff's claim. i. e. that the coat is worth so much. I am not satisfied that this would make it a decree on the merits. The Ceylon case cited seems peculiar as there seems to have been a judgment. We have none here and in my opinion this case has nothing on the present.

Wallace, J.—This appeal is against the decision of the lower Court dismissing as against defendant 2 the plaintiff's suit, and the plaintiff appeals. The suit is based on a foreign judgment,

namely, the decree in O. S. No. 47816 of 1917 on the file of the District Court, Colombo. It was a decree based on certain promissory notes and hundis. The plaintiff has sued upon this decree in the Court of the Subordinate Judge of Sivaganga to recover the sum of Rs. 15,000 now said to be due under it.

The first and, to my mind, the most important contention is whether that foreign judgment satisfies the requirements of S. 13 (b), Civil P. C.; that is, is it a judgment given on the merits of the case? The Subordinate Judge has held that it was not and on full consideration I agree with him.

The Journal, which is the diary in the suit O. S. 47816 of 1917 maintained in the District Court, Colombo, is exhibited and discloses the following facts. The present respondent was one of the several defendants there, he being No. 13. All the defendants to the suit were served and several appeared on 12th August 1918, the date fixed for the trial, but this defendant did not. The District Court proceeded to try the case against those served, reserving the right to proceed against those absent, a procedure permitted by the Ceylon Civil Procedure Code. The trial against those present was held up till a connected case was disposed of in November 1919 and was finally dismissed on 27th May 1921 owing to the plaintiff having taken no steps. On 7th July 1921 the plaintiff appeared to ask for the case to be proceeded ex parte against those defendants who did not appear including the present respondent. After two adjournments, the case was taken up on 19th September 1921, and the entry in the Journal (the meaning and the implication of which we have to consider), is:

"Mr. C. T. Kondayya (that is, the plaintiff's proctor or vakil) filed affidavit and moves that decree nisi be entered in terms of the prayer of the plaint against defendants 1 and 13"

and the Court entered decree nisi, and on 11th November 1921, notice of the decree nisi having been affixed to the defendant's residence and no appearance made, a decree absolute was passed. It is on that decree absolute that the present suit is based.

The question is whether the entry of 19th September 1921 imports that the case was heard and judgment given on the merits. The procedure followed is, it is conceded, that laid down for the trial of regular suits, by Chap. 12, Ceylon Civil P. C.; S. 85 is the section particularly applicable. On the non-appearance of the defendant, the Court shall, if the plaintiff appears, "proceed to hear the case ex parte and pass a decree nisi." Does the phrase "shall proceed to hear the case ex parte" necessarily mean that the case was decided on the merits? I am unable to hold so. Hearing a case is merely attending to a case, taking it up for further proceedings. Dates are fixed for the "hearing of an action" after the pleadings have been put in: see Ss. 84 and 85:

"Hearing appears to me nothing more than taking the case up for trial. Even a decree nisi cannot be passed until the case is taken up for hearing and heard. That it does not necessarily imply the taking of evidence is indicated by the mandatory character of the section" "the Court shall pass a decree nisi."

That the passing of a decree for default is mandatory is clear from S. 90, which enacts that if all the defendants in a case do not fail to appear but some do appear, then the decree for default is not immediately obligatory on the Court. The present case is obviously governed by S. 90. The decree for default against those defendants who had not appeared was postponed until the trial of the case against those defendants who had appeared was closed. The reasonable interpretation of S. 85 is that the passing of the decree nisi is not a decision on the merits of the case but is a penalty for default of appearance.

It is argued that the fact that the plaintiff's proctor is said to have filed an affidavit, which is said to be the affidavit printed on p. 3 of the documents before us and appears to be a reduplication of the plaint, implies that the Court called for evidence and accepted the affidavit as evidence on which to base its decree. We are asked to infer from the fact that the affidavit was presented, that the Court called for it and used it as evidence, but the provisions of the Ceylon Code lend no support to this proposition. the general section relating to proof by affidavit is S. 179, which says that the Court may, for sufficient reasons, order that any particular fact be proved by affidavit. S. 437 clearly implies that except in an action of summary pro-

cedure, affidavits which are to be evidence in a case must be called for by the Court on specific order. We are not shown anything here to indicate that the Court did so order evidence to be given by affidavit. There is nothing to show that the Court called for this affidavit or used it as evidence. There is in fact—and it is a strong point against the plaintiff—no judgment or statement of reasons for the decree, nothing to show that the Court directed any attention to the merits of the case. When the Court has taken evidence and decides on evidence, it must write a judgment: see S. 184 and 187.

There are other indications that a decree nisi passed under S. 85 and a decree absolute which follows under S. 86 are not decrees passed on the merits. For example Ss. 86 and 87, speak of each of these decrees as decrees for default. Presumably this is of a deliberate purpose. No appeal against either is allowed (see S. 87) and if the decision was on the merits, one would naturally expect an appeal to be allowed. Again S. 87 provides for these decrees being set aside by motion, but what the Court has then to consider is not the merits of the controversy in the suit but the merits and demerits of the defendant's failure to appear. So in the present case, the decree nisi was evidently passed not on the affidavit but on the defendant's failure to appear. It is clear that the procedure in Chap. 12 does not anywhere contemplate a decision upon the merits of the matter in issue in the suit. The form of the decree nisi No. 22 affords no hint that the merits of the matters in issue in the suit have been considered. It is a decree purely because of the default of appearance.

The plaintiff has based an argument on the wording of the summons issued to the defendant in a regular suit procedure as contrasted with that issued in an action of summary procedure on a liquid claim. These are forms 16 and 19 respectively, found at the end of the Ceylon Civil Procedure Code. Form 16 says that in default of appearance:

"the action will be proceeded with and heard and determined in your absence."

Form 19 says that in default of appearance, plaintiff will be entitled to obtain a decree. But these forms must be read with conformity with the Code itself and there is no reason why we should read more into the words "hear and determine" than give the case a hearing and bring it to an end.

I am satisfied for the above reasons that there was in the District Court, Colombo, no decision on the merits. The point is not without authority in this Court. A very similar case is reported in *Arunachalam Chettiar* v. *Muhammad Salihu* (1), when Kumaraswami Sastri and Curgenven, JJ., held that the decision was not on the merits, following the Full Bench judgment of this Court in *Muhammad Kassim & Co.* v. *Seeni Pakir* (2) and the Privy Council ruling in *Keymer* v. *Visvanatham Reddi* (3).

As the suit fails on this point, it is unnecessary to go into the other points raised by the plaintiffs, namely, whether he is entitled to plead here that the lower Court was in error in setting aside the ex parte decree which he had obtained against the respondent and whether the respondent's application to set aside that ex parte decree was out of time.

I may just briefly note here that an application was made to us by the appellant to examine, for the purpose of elucidating the procedure in the District Court of Colombo, a learned barrister of this Court who has practised there, but I really do not see how an examination of this gentleman would assist us to decide the present case. Even if he were able to say that in certain cases the District Court did adopt a procedure which involves a decision on the merits, it is incredible that he will be able to say that it was the inveterate habit of that Court to decide all such cases on the merits and and that there could not be any exception to that practice, that in fact the District Court of Colombo and every District Judge in it invariably, as a matter of uniform rule, recorded decisions on the merits in all cases under S. 85. If the appellant had wished to to produce before us information which would enable us to decide in a clearer fashion what the exact procedure in the

(1) A. I. R. 1928 Mad. 133.
(2) A. I. R. 1927 Mad. 265=50 Mad. 251 (F. B.).
(3) A. I. R. 1916 P. C. 121=40 Mad. 112=44 I. A. 6 (P. C.)

District Court of Colombo was and what the meaning of the particular sections of the Civil Procedure Code cited before us is as laid down by the Supreme Court of Ceylon, it would not have been difficult for him to produce before us reported rulings of the Supreme Court on the points at issue in the case but no attempt has been mede to do this, when the case was argued at the Bar.

Since that argument appellant has by letter called our attention to two reported cases of the Supreme Court of Colombo. It is not neceseary for us to post the case for further argument on these, as they do not seem to me to arise from his point. From the case reported in Balaginsham's Notes of Cases, Vol. 6. p. 17, it appears that there must be an ex parte hearing of the plaintiff's case before a decree nisi can be passed. It was held that there has been no such hearing and the decree nisi was therefore vacated. From the case reported in 3 *New Law Reports* 34, it appears that though a defendant appears at the ex-parte hearing, he cannot plead because he is in default. In both cases, it is clear that the hearing is not a trial on the merits of the matters in controversy. As is stated clearly in the latter case the defendant's objections to plaintff's case

"could not be tried until pleaded by the by the defendant who was wilfully in default."

The decision therefore remains a decision for default of appearance and not on the merits, and it is clear, as I have pointed out, from S. 87, that defendant may, at any later stage, for good reasons shown, have the decree for default set aside and the case tried on the merits. In other words, the decree nisi and the decree absolute under Ss. 85 and 86 are not decisions on the merits. I would therefore decline to interfere and dismiss the appeal with costs.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 154

PHILLIPS AND REILLY, JJ.

B. Iswarayya—Appellant.

v.

(*Swarnam*) *Iswarayya*—Respondent.

Appeal No. 169 of 1927, Misc. Appeal No. 312 of 1927 and Appeal No. 201 of 1927, Decided on 15th February 1929, from decree of Dist. Judge, East Tanjore, D/- 8th March 1927, in Original Petn. No. 44 of 1926.

(a) Divorce Act, S. 7—Meaning of words "principles and rules."

The words "principles and rules" in S. 7 mean principles and rules of law of evidence, of interpretation, of practice, and of procedure but not statutory provisions nor statutory rules. The principles and rules to be applied are by the words of the section made subject to the provisions of the Act; they can never run counter to the Act. [P 155 C 1]

(b) Divorce Act, S. 37—Court has power to enhance alimony ordered to be paid to wife judicially separated.

Section 37 as it stands, gives power to the Court to enhance the alimony which a husband has been ordered under the section to pay to a wife judicially separated from him. [P 157 C 1]

(c) Divorce Act, Ss. 3 (5) and 42 — Children not minors cannot be provided.

There is no power under the Act to make any provision for children who are no longer minors under the Act. [P 157 C 1]

(d) Civil P. C., S. 35 — Successful appellant's conduct not creditable and straight forward ordered to bear his costs.

Costs ordered to be borne by the suceessful appellant because his conduct in the case did not appear to have been at all creditable or straightforward. [P 158 C 1]

T. V. Muthukrishna Ayyar and *N. Muthuswami Ayyar*—for Appellant.

K. V. Ramchandra Ayyar and *M. A. T. Coelho*—for Respondent.

Reilly, J.—In 1921 the respondent in A. S. No. 169 of 1927 obtained a decree under the Indian Divorce Act of judicial separation from her husband, the appellant. The husband was then ordered to pay Rs. 120 a month to the wife for her own maintenance and Rs. 30 a month to her for the maintenance of each of their four children. In O. P. No. 44 of 1926 on the District Judge's file the wife prayed that the amount to be paid for her maintenance by the husband should be increased to Rs. 260 a month, and in O. P. No. 43 of 1926 the children applied for an increase of the maintenance allowances to be paid by their father for them to Rs. 300 a month in all. The District Judge disposed of both petitions in one judgment. He found that the children were no longer minors under the Indian Divorce Act and that therefore their father could not be ordered to pay maintenance allowances for them under S. 42 of the Act. But he made an order raising the alimony to be paid to the wife to Rs. 310 a month, including in his calculation amounts required for the maintenance and education of the children and Rs. 160 a month for the wife herself. The husband appeals in

A. S. No. 169 of 1927 against the District Judge's order so far as it relates to the wife herself and in A. S. No. 201 of 1927 so far as it relates to the children.

Mr. Muthukrishna Ayyar for the husband contends first, that the alimony for the wife having been originally fixed under S. 37 of the Act at Rs. 120 a month the District Judge had no power to raise its amount. S. 37 does not in express words provide any power to increase the alimony of a wife once fixed. Mr. Mocket for the wife replies that since 1907 that power has been provided in England by the statutes which govern the Probate and Divorce Division of the High Court in such matters and from 1866 to 1907 it was provided by the statutory rules and regulations of the Court for divorce and matrimonial causes: and that power can be exercised by the Court in India because, S. 7, Divorce Act, provides that High Courts and District Courts shall act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief. Mr. Mocket's extreme contention that "rules" in S. 7, Divorce Act, means the Statutory Rules in force for the time being in England is in my opinion clearly untenable. If statutory rules in force in England were meant, there would be no question of the Court in this country acting on rules which in their opinion were as nearly as may be conformable to those rules. The provision would have been either that the statutory rules in force in England were to be observed in this country or that the rules to be made under S. 62, Divorce Act, were to be as nearly as may be conformable to the statutory rules in force in England. In my opinion the words "principles and rules in S. 7, Divorce Act, mean principles and rules of law, of evidence, of interpretation of practice, and of procedure but not statutory provisions, nor statutory rules. The principles and rules to be applied are by the words of the section made subject to the provisions of the Act; they can never run counter to the Act. Mr. Mocket suggests that they may fill up gaps left in the Act. But I am inclined to agree with Mr. Muthukrishna Ayyar that they can neither cut down the provisions of the Act nor supply any form of relief not provided by the Act. However, I do not think it necessary to discuss that question in any detail on this occasion as the present case appears to me to turn on other considerations. Mr. Muthukrishna Ayyar in the course of his argument has also compared the provisions of the Indian Divorce Act with the statutes and the statutory rules in force in England from time to time since 1857. Such a comparison is interesting. But in my opinion it is neither useful nor permissible for the purpose of interpreting the Indian Act unless the provisions of that Act which are in question are of doubtful meaning. If the provisions of the Indian Act are plain, we have no need, and in my opinion we have no right to look outside the Act for its interpretation.

The question here is whether the amount of alimony which the husband has been ordered to pay monthly can be raised by the Court after it has once been fixed. The words of S. 37, Divorce Act are "in every case" that is on any decree of judicial separation obtained by the wife:

> "the Court may make an order on the husband for payment to the wife of such monthly or weekly sum for her maintenance and support as the Court may think reasonable."

There is a proviso to that part of the section which I will discuss later. But in itself, as that provision stands, and leaving out of consideration any interpretation, judicial or otherwise, which has been put on similar provisions elsewhere, does it mean that an order for payment by the husband once made can never be varied, that the amount to be paid can never be raised by the Court? Does it mean that one order only can be made in the wife's favour? The Court is to fix the sum which it thinks reasonable. What is reasonable today may be unreasonable a few years hence. Where the husband has property on which a gross sum or an annual income can be secured to the wife, the earlier part of the section provides for that being done. The part of the section with which we are dealing appears to apply to other cases, where the husband has no such property, or no sufficient property, but is earning or receiving an income out of which he can properly be ordered to make payments to the wife. Such an

income in very many cases will be variable. A husband who depends on his own earnings may be earning nothing at the time when his wife obtains a decree of judicial separation against him. A year later he may have obtained a good appointment and be earning a large income. If the Court's power is restricted to the time when the decree is made, in such a case it would not be reasonable to make any order for payment to the wife at all. Does this part of the section mean that in such a case the wife can never get an order for payment of alimony? If it is suggested that the Court can make an order for payment after the decree but not necessarily at the time of the decree and then its power is exhausted, the result is hardly more reasonable. A husband may at the time when the first order is made be earning a very small income, out of which he cannot make any payment sufficient for the maintenance of his wife, but later on he may be earning thousands a month. Does the section tie the hands of the Court so as to prevent an order for the payment of proper alimony to the wife when it is obvious that the husband can well afford it? When a Court is given power to make a continuing order reasonable in the circumstances, by what principles of interpretation can we say that that implies power to make only one order applicable to one set of circumstances, which can never be varied, however gravely the circumstances may vary? And, when we remember the particular kind of circumstanees to which this part of the section applies, that is, cases in which a proper provision cannot be made for the wife out of the property of the husband but can be made out of his income, I see nothing in the words used to drive us to the conclusion, unreasonable in itself and not necessarily implied in the words, that the Court can do no more than make once and for all a single order in favour of the wife and then its power is spent.

Mr. Muthukrishna Ayyar has sought to support his interpretation of the section to that effect by comparing it with S. 42, which deals with orders regarding the minor children of parents judicially separated and provides explicitly that such orders may be made "from time to time." He would have us regard it as of importance by contrast that there are no such words in the part of S. 37 which I have been discussing. But S. 42 deals with orders with respect to the custody, maintenance and education of the children or for placing them under the protection of the Court. It is obvious that in such matters frequent orders differing from time to time, may be required in the interests of the children as they grow up, and the conduct or occupation of the parent to whom the custody of the children has been given may often make a variation of the original or subsequent oider necessary in that matter. The fact that the legislature has been careful to state explicitly that varying orders in respect of the children may be made from time to time, as is obviously desirable in their interests, is in my opinion no sufficient ground for supposing that having provided in S. 37 that the Court may order the husband to make such monthly payments to the wife as it thinks reasonable, the legislature intended to make that order invariable. Without provision for variation from time to time it might perhaps be thought that an order for the custody of the children was final. When alimony is to be fixed according to what is reasonable in the circumstances, no such finality is implied.

What at first sight may be thought a stronger argument in support of Mr. Muthukrishna Ayyar's contention is that S. 37 contains an explicit proviso for the reduction of the alimony which the husband has been ordered to pay but no proviso for its enhancement. Mr. Muthukrishna Ayyar argues that the very fact that a proviso has been introduced only for the reduction of alimony once fixed implies that enhahcement was never contemplated by the legislature; if alimony once fixed could be varied according to circumstances under the section without the proviso, the proviso regarding reduction would be superfluous. On examination that argument does not appear to me to be sound. When an order for the periodical payment of alimony has been made against a husband, it is of the nature of a decree, and, if he is to be allowed in certain circumstances to get it reversed or modified, it might be thought that explicit provision must be made for that in some way, and it is not made in the section apart from the proviso. But when the wife applies

for additional alimony she does not want the original order touched in effect ; she wants a further decree for additional alimony. The proviso might be thought necessary if the Court was to have power to unmake the order made ; no proviso is necessary to give power to make an additional order. My conclusion therefore is that S. 37, Divorce Act as it stands gives power to the Court to enhance the alimony which a husband has been ordered under the section to pay to a wife judicially separated from him. Returning for a moment to Mr. Muthukrishna Ayyar's comparative examination of the English statutes and statutory rules on the one side and the Divorce Act on the other, I may point out that under the English Act of 1857 the Court had power when pronouncing a decree for dissolution of marriage to fix an amount of alimony for the wife—either a gross sum or an annual sum—but nothing was said in the Act about power to increase the sum ; nevertheless R. 92 of the Rules and Regulations made under that Act prescribes procedure for a wife applying for the increase of alimony so fixed, which could not properly have been done unless power to increase the alimony fixed had been held to be implied in the power given by the Act to fix it.

The husband is on much firmer ground in his appeal against the District Judge's order so far as it makes provision for the children. The Act makes provision only in respect of minor children ; and under the Act the sons of native fathers are no longer minors when they reach 16 years of age and the daughters when they reach 13. It is admitted that none of the children concerned in this case was a minor within the meaning of the Act when O. P. No. 43 of 1926 was presented to the District Court. But the District Judge has tried to provide for them by adding the cost of their maintenance and education temporarily to the alimony of the wife, which he has raised for that explicit purpose. That is not to apply but to circumvent the provisions of the Act. In my opinion there is no power under the Act to make any provision for these children who are no longer minors under the Act. The learned District Judge says in his judgment that it was conceded that

" the wife who is entrusted with their custody and education is entitled to claim from the husband, the cost of their maintenance and education."

I do not understand exactly what that means. The " entrustment " of the children to the wife appears to have been made under an order for their custody which is no longer in force. The legality of providing for the children in that way is contested by the husband in A. S. No. 201 of 1927, and Mr. Mocket has not suggested before us that any such ' concession ' was really made by the husband before the District Judge. In my opinion A. S. No. 201 of 1927 must be allowed and no provision can be made for the children directly or indirectly.

The wife claimed in O. P. No. 44 of 1926, Rs. 260 a month for her own maintenance. The learned District Judge, though taking into consideration the expenses of the children made an order for the payment to the wife of Rs. 310 a month, calculated that what was needed by her at Rs. 160 a month. In my opinion he might well have fixed her alimony at Rs. 260 a month. The husband at the date of the petition was receiving a salary of Rs. 800 a month. As District Medical Officer there is no doubt that he has opportunities of adding considerably to that income by private practice. He did not go into the witness-box ; nor did he explain to the Court clearly what his income was. It is indeed not at all creditable that an officer in his position should not have been open with the Court and should have left the amount of his income to speculation. It will, I think, be quite safe to estimate his income at something over Rs. 1,000 a month. Out of that it is in my opinion reasonable that he should pay Rs. 260 a month to his wife in alimony. Though she has not put in any appeal or memorandum of objections against the District Judge's order, the reason of that appears to have been that in one sense the alimony fixed by the Judge was more than she had claimed. In the circumstances, I think we may properly make an order under R. 33, O. 41, Civil P. C., that the husband do pay alimony to the wife at the rate of Rs. 260 a month. The learned District Judge has made his order take effect from the date of the wife's petition, viz., 18th March 1926.

The husband objects to that ; but I see no sufficient reason why it should not be done, and I would make our order have effect from that date.

As to costs I would order the husband to pay the wife's costs in A. S. No. 169 of 1927. And, although A. S. No. 201 of 1927 must be allowed in his favour, I would order to pay the respondent's costs throughout, both because his conduct in the case does not appear to me to have been at all creditable or straightforward and because, though he has objected successfully to the District Judge's order, he did not bring to the notice of the learned Judge, either when his judgment was pronounced or afterwards, the fact that he had not made the supposed concession upon which the judgment partly proceeds.

C. M. A. 312 *of* 1927.—This appeal relates to an application (E. A. 253 of 1926) to record satisfaction in the matter of payments for two of the children concerned in A. S. 201 of 1927. The order of the District Judge must be set aside and the application remanded to him for fresh disposal. In this appeal each party will bear his own costs.

Phillips, J.—I agree with the orders proposed and will only add one word about S. 3 (5) and 42, of the Act. It seems to me most improper that a Court of matrimonial jurisdiction should not have power to pass orders as to the custody and maintenance of unmarried girls above the age of 13, or of boys over 16. Since 1869 great strides have been made in education and it cannot now be said that education always ceases in the case of girls at 13 and in the case of boys at 16 nor are they usually in a position to fend for themselves at that age. In my opinion the definition of minor children in S. 3 (5) requires amendment and would invite the attention of the legislature to the same.

P.R.S./V.S. *Order accordingly.*

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* A. I. R. 1930 Madras 158

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Yagammal—Plaintiff—Petitioner.

v.

Arulayee Ammal and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 663 of 1926, Decided on 30th October 1929.

*** Civil P. C., O. 9. R. 9—Decree passed—Suit cannot be dismissed — Preliminary decree modified in appeal—Date for further enquiries per appellate Court's directions—On default of party, Court dismissing suit under O. 9, R. 9—Dismissal is wrong and revision lies—Civil P. C., S. 115.**

After decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed in appeal. And if a trial Court, having fixed a date for further proceedings under directions of appellate Court modifying the preliminary decree, dismisses the suit on that date, under O. 9, R. 9, such a dismissal is wrong and a revision lies over it : *A.I.R.* 1924 *P.C.*, 198 and 32 *All.* 319, *Rel. on.*

[P 158 C 2 ; P 159 C 1]

A. V. Narayanaswami Iyer—for Petitioner.

R. Narasimha Chariar and *K. Muthuswami Chetti*—for Respondents.

Venkatasubba Rao, J.—The main question in the Civil Revision Petition is: is a suit liable to be dismissed for default after the passing of the preliminary decree? The plaintiff filed this suit for partition and in 1923 obtained a decree directing certain items to be partitioned. From this judgment, she filed an appeal and the appellate Court varied the decree in her favour, by directing partition of some additional items. When the case went back to the trial Court, it fixed a date for the appearance of parties. Neither the plaintiff nor the defendant having appeared on the day fixed, the Court made an order on 9th May 1925 dismissing the suit for default. It is this order that is impeached in the revision petition before us. On the merits, there can be no question that this order cannot be supported. As pointed out by the Privy Council:

"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal, The parties have on the making of the decree, acquired rights or incurred liabilities which are fixed unless or until the decree is varied or set aside: (*Lakshminarain* v. *Balamukund*) (1), at p. 446 *of* 47 *M. L. J.*

A similar view was taken by the Allahabad High Court in an earlier case. *Masumunnissa* v. *Latifan* (2).

But then a preliminary objection is raised that this revision petition does not lie. The argument may be thus stated. The plaintiff applied to the lower Court for the restoration of the suit under O. 9, R. 9, Civil P. C.

(1) A.I.R. 1924 P.C. 198=4 Pat. 61=51 I.A. 321 (P.C.).

(2) [1910] 32 All. 319=5 I.C. 872=7 A.L.J. 196.

That application was dismissed by an order dated 16th March 1926. The respondent contends that an appeal lies from the last mentioned order under O. 43, R. 1 (c) and that the High Court ought not to exercise its revisional powers when the party aggrieved has a remedy by way of appeal The answer is simple. The order dismissing the suit cannot be treated as one made under the provisions of O. 9, Civil P. C. That is the effect of the decision of the Privy Council to which we have referred. It follows necessarily that although the plaintiff's application to restore the suit purports to have been made under O. 9, it is not in fact governed by the provisions of that chapter at all. It must be deemed to be an application under S. 151 for the exercise of the Court's inherent powers. The preliminary objection thus fails.

In the result, we allow the Civil Revision Petition and set aside the order of the lower Court dated 9th May 1925. The District Munsif will restore the case to his file and allow the plaintiff to take further proceedings in the suit.

In the circumstances, we direct each party to bear his costs.

P.R.S./V.S. *Revision allowed.*

A. I. R. 1930 Madras 159

JACKSON AND REILLY, JJ.

B. Iswarayya—Petitioner.

v.

Swarnam Iswarayya—Respondent.

Civil Misc. Petns. Nos. 1935 and 1966 of 1929, Decided on 30th April 1929, from decree of High Court in Appeal Suit No. 169 of 1927.

Divorce Act Ss. 56 and 37—Leave granted by High Court on condition that petitioner should deposit fixed amount in Court—Divorce Act S. 7.

Where the points involved were whether the High Court is justified in reading S. 37 as entitling the Court to order enhancement in alimony granted for maintenance to a wife judicially separated, and whether the High Court has power under O. 41, R. 33 of the Civil P. C., to order such enhancement where none was asked the petitioner-husband was granted leave to appeal to the Privy Council but the High Court acting under Divorce Act, S. 7, ordered the petitioner to deposit a sum of Rs. 3,000 for the expenses of wife.

[P 159 C 2]

T. V. Muthukrishna Aiyar and *Muthuswami Ayyar*—for Petitioner.

M. A. T. Coelho and *C. M. J. Ernest*—for Respondent.

Jackson, J.—This is an application under S. 56, Divorce Act, 4 of 1869 for leave to appeal to His Majesty in Council from the order and decree of this Court in *B. Iswarayya* v. *Iswarayya* (1) fixing the alimony to be paid by the petitioner to respondent his divorced wife at Rs. 260 a month.

The amount originally fixed by the District Judge was Rs. 120 and this was confirmed on appeal. Then the respondent petitioned the District Judge for an increase and he fixed the amount at Rs. 160 plus Rs. 150 for the children. This Court found that nothing need be paid to the children who were no longer minors under the Act but increased the alimony of the mother to Rs. 260.

The petitioner contends that there is no provision in the Act for increasing the amount of alimony once it is fixed and this Court is not justified in reading S. 37 as entitling the Court to make such orders as regards maintenance as may from time to time be reasonable. He also contends that inasmuch as the respondent did not appeal against the order of the District Judge fixing her alimony at Rs. 160 this Court in raising the amount to Rs. 260 exceeded the power given to an appellate Court under O. 41, R. 33, Civil P. C. I consider that neither of these points is so clear as to justify us in finding that this is not a fit case for appeal nor can they be said to be unsubstantial for they materially affect the law of divorce and the law of procedure.

But in giving leave to appeal I think it necessary to order that the petitioner pay the costs of the respondent in the proceedings before the Privy Council. Under S. 7, Act 4 of 1869, this Court is bound to act and give relief on principles and rules which conform to those obtaining in England and I have no doubt that in a similar case arising in England O. 91, Part 8 of the Annual Practice would be applied and the wife would be given her costs. In the circumstances we give leave to appeal on condition of petitioner depositing Rs. 3,000 within 3 weeks of the re

(1) A. I. R. 1930 Mad. 154.

opening of the Court next July which sum may be drawn by respondent.

Reilly, J.—In C. M. P. 1935 of 1929 the husband prays for a certificate that this is a fit case for appeal to His Majesty in Council under S. 56, Divorce Act. The two questions which the husband wishes to raise in appeal, viz.: (1) whether the amount of alimony which a husband has been ordered to pay monthly under S. 37 of the Act can be raised by the Court when it has once been fixed and (2) whether R. 33, O. 41, Civil P C., gives power in special circumstances to make such an order as was made in this case are questions of general importance. But does that make it a fit case for appeal under S. 56, Divorce Act? Even if it were enough to make the case a fit one under S. 109 (c), Civil P. C., it would not necessarily be enough under S. 56, Divorce Act. Considering the nature of the cases which can be taken before His Majesty in Council under S. 56 of the Act it would often be a very great hardship if a wife could be subjected to such an appeal, when it was clear that she had no means sufficient to contest it merely because it raised a question of general importance. In this case it is alleged by the wife, and is not disputed before us, that she cannot afford to appear before the Privy Council and contest the proposed appeal. But, as suggested by Mr. Coelho for the wife, the Act provides machinery by the aid of which an appeal can be prosecuted without injustice against a wife who has no means of her own to contest it. Under S. 7 we are to act on principles and rules as nearly as may be conformable to the principles and rules on which the Court for divorce and matrimonial causes in England acts. "Principles and rules" in that section include in my opinion "principles and rules of procedure." As a matter of procedure in England the husband can be required to advance to his wife the expenses of contesting an appeal which he wishes to prosecute against her. That procedure I think we are entitled to adopt here before declaring that the case is a fit one for appeal and so enabling the husband to prosecute his proposed appeal before the Privy Council. In my opinion this would not be a fit case for appeal within the meaning of S. 56 of the Act, if the husband did not advance to the wife the expenses of contesting the appeal: if he did so, it would be a fit case. I would therefore require the husband to deposit in this Court within 3 weeks after the Court reopens after the long vacation Rs. 3.000 for the wife's expenses in contesting the appeal. If he makes the deposit in time, I would declare the case a fit one for appeal to His Majesty in Council and allow the wife to draw Rs. 3,000; if he fails to make the deposit, I would dismiss his application.

P.R.S./V.B *Conditional leave granted.*

A. I. R. 1930 Madras 160

VENKATASUBBA RAO AND REILLY, JJ.

(*Immani*) *Seshayya* and *others*—Appellants.

v.

(*Dronamraju*) *Lakshminarasimha Rao Pantulu* and *others*—Respondents.

Letters Patent Appeal 12 of 1925, Decided on 21st January 1929 from judgment of Devadoss, J., D/- 26th September 1924 reported in *A. I. R.* 1925 *Mad.* 855.

(a) Transfer of Property Act, S. 58—Debt with security of land for its payment, is mortgage—Money borrowed and lender put in possession of land—Covenant that certain sum out of income should be appropriated towards mortgage and balance to be paid to debtor—Failure to fulfil latter part of covenant—Transaction held to be mortgage and that mortgagee must debit balance against mortgage debt under S. 76 (h), T. P. Act.

The intention of the parties must be looked into, and that when once there is a debt with the security of land for its repayment, then the arrangement is a mortgage by whatever name it is called.

A sum of Rs. 2,200 was advanced to the borrower, who agreed to pay an equal sum as interest thereon. The lender was put in possession of certain lands belonging to the borrower and as between the parties, the annual profits were estimated to be Rs. 240. The lender was required annually to pay Rs. 100 for the revenue and village expenses, appropriate Rs. 80 towards the mortgage debt and pay the balance of Rs. 60 to the debtor. It was further provided that after the debt was discharged in 55 years in the manner set forth, the creditor was to surrender possession of the land to the borrower, and that if the lender failed to pay Rs. 60, he should be bound to relinquish a part of the land in proportion to that sum. Since 1882 the annual payment of Rs. 60 was never made to the mortgagor.

Held: that the parties intended that the money was to be repaid and that the land was to be treated as security for repayment.

[P 162 C 2]

Held also : that the sum of Rs. 60 should be debited under S. 76 (h) against the mortgage debt and in that event the debt became wiped out long before 1920. 6 *All.* 203 and 34 *I. C.* 999, *Rel. on* ; 2 *Mad.* 314 and 35 *M. L. J.* 287 *Expl.* [P 163, C 2]

*** (b) Transfer of Property Act, S. 62 (a)—Usufructuary mortgagee, if he gets money from usufruct, must apply it in reduction of mortgage debt.**

Notwithstanding the mention of certain period in mortgage deed, if a mortgagee with possession gets into his hands, from the usufruct of the property, a sum of money belonging to the mortgagor, it is the bounden duty of the former to apply that sum in reduction of the mortgage debt. [P 162, C 2]

(c) Transfer of Property Act, S. 62 (a)—Meaning of words "when such money is paid."

The words used in S. 62 (a), "when such money is paid," mean in the context "when such money is paid from the rents and profits." [P 162, C 2]

G. Lakshmanna and *M. Appalacharya* — for Appellants.

S. Varadachariar, *P. Somasundaram* and *N. Rama Rao*— for Respondents.

Venkatasubba Rao, J.—This is a Letters Patent appeal from the judgment of Devadoss, J., and raises an important question, in regard to the effect of a certain transaction evidenced by two documents dated 2nd May 1865. The two deeds may be treated as practically one and the purport of the arrangement is shortly this. A sum of Rs. 2,200 is advanced to the borrower, who agrees to pay an equal sum as interest thereon. The lender is put in possession of certain lands belonging to the borrower and as between the parties, the annual profits are estimated to be Rs. 240. The lender is required annually to pay Rs. 100 for the revenue and village expenses, appropriate Rs. 80 towards the mortgage debt and pay the balance of Rs. 60 to the debtor. It is further provided that after the debt is discharged in 55 years in the manner set forth, the creditor is to surrender possession of the land to the borrower. The only remaining material clause is, that if the lender fails to pay Rs. 60 he shall be bound to relinquish a part of the land in proportion to that sum. It is evident that the term was fixed as 55 years, because at the rate of Rs. 80 it would take that period to discharge the total sum of Rs. 4,400. The right, title and interest of the borrower in the lands in question were sold in Court auction and the plaintiff having become the purchaser, the sale in his favour was confirmed on 1st March 1882. It is not denied that since then, the annual payment of Rs. 60 was never made to him. I may observe, that it is alleged on behalf of the defence that notwithstanding the Court sale, the lender continued to pay Rs. 60 to the original debtor. But this is not material, as it is admitted that the lender had notice of the Court sale and the alleged payments may be therefore ignored. The plaintiff has treated the transaction as a mortgage and has filed the suit, from which this appeal arises as one for redemption. The suit was filed in 1914. It was contended that it was premature as the term of 55 years would expire only in 1920. The District Munsif in whose Court it was filed disposed of the suit in 1919. The appeal to the Subordinate Judge was decided in 1921. On the expiry of the term, that is, in 1920, the defendant gave up possession of the land to the plaintiff. The question, therefore, whether the suit was premature or not, is not of much importance, in so far as the action relates to the possession of the property.

The same point, however, arises in another form, when did the debt become discharged ? for, not only does the plaintiff contend, that his right to redeem accrued when the debt was paid off, irrespective of the period fixed, but he further urges that the defendant became liable from that moment to account for the profits from the lands. He contends, in short, that the debt became discharged long before the expiry of 55 years, the period fixed. He maintains that the defendant, who, contrary to the terms of the arrangement, retained in his hands the sum of Rs. 60 was bound to apply that sum in reduction of the mortgage debt. If that was done, the debt would, of course, have been discharged long before 1920. The question to decide is : was the defendant so bound ?

The point to be first decided is, is the transaction a lease or a mortgage ? for, on this will depend, whether the plaintiff's contention can prevail or not.

"The only guiding rule that can be extracted from the cases on the subject is, that the intention of the parties must be looked into, and that when once you get a debt with the security of land for its repayment, then the arrangement is a mortgage by whatever name it

is called. Ghose on Mortgages, 5th Edn. Vol. 1, Page.102."

Let us now examine the terms of this arrangement. The deed calls the advance a loan and provides for interest upon it. It refers to the discharge of the debt and prescribes a method by which it may be gradually paid off. The obvious intention of the deed is, to treat the property as security for the amount advanced together with interest upon it. In the face of these provisions, can the sum advanced be regarded as a premium or bonus paid for the use of the land? Generally, where a lessee pays a premium to his lessor, the intention is not that it shall be repayable. Every recital in the deed in question shows, that the parties intended that the money was to be repaid and that the land was to be treated as security for repayment. The fixing of a term is clearly not inconsistent with the transaction being a mortgage. Mr. Lakshmanna, for the defence, relies on the fact that the deed is described as a 'cowle' and that the word means a lease. Assuming that he is right, we must still look at the substance of the transaction and not be guided merely by the word, which the parties chose to use, in describing the instrument. But, as a matter of fact, the treatises to which we have been referred show, that the word 'cowle' has a much wider signification and may mean "a contract" or "an agreement." There is then the further fact, that the deed stipulates that in the event of the creditor failing to pay Rs. 60 the debtor may insist upon possession being given, of a share of the land in proportion to that sum. Is it conceivable that if the parties intended the arrangement to be a lease, they would have provided that the lessee was in a certain event to deliver up a part of the property?

This leads me to the main question in the appeal. In the case of a mortgage with a period fixed, where the mode of repayment is prescribed, can the debt never and in no circumstances become discharged, before the expiry of that period? Mr. Lakshmanna has strongly contended that, in such a case, the clause fixing the term is an essential part of the contract and that the mortgagor must wait till the period comes to an end. Mr. Varadachari, for the plaintiff, concedes that in a case of this kind, it is not open to the mortgagor, to redeem the mortgage before the close of the period by tendering the amount. But, what he strongly urges is this, notwithstanding the period if the mortgagee gets into his hands, from the usufruct of the property, a sum of money belonging to the mortgagor, it is the bounden duty of the former to apply that sum in reduction of the mortgage debt. According to Mr. Lakshmanna, the true principle is, that the mortgagee while remaining liable for the sums received by him, is not bound to apply them in discharge of the mortgage debt; in other words, taking the present case, the debt could be discharged only in the manner provided in the deed and it could not be treated as paid off before the expiry of the full 55 years. The defendant's liability, Mr. Lakshmanna says, is merely to separately account for the sums retained in his hands contrary to the terms. In my opinion, the sounder and the more equitable rule is that for which Mr. Varadachari contends.

Section 62, T. P. Act, runs thus :

> In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property ;
>
> (a) Where the mortgagee is authorized to pay himself the mortgage money from rents and profits of the property, when such money is paid;
>
> (b) where the mortgagee is authorized to pay himself from such rents and profits, the interest of the principal money, when the term (if any), prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided.

The present case is covered by Cl. (a). The words used are: "when such money is paid." They mean in the context "when such money is paid from the rents and profits." The question to decide then is, when did the mortgage money become paid off? The clause in question does not say that a different rule is to be applied, when by the contract a term of years is fixed. On the contrary, it seems to embody the principle, that in no case can the mortgagee retain possession, after the debt itself is discharged from the usufruct. It is true that where a period is fixed as a material part of the contract, the mortgagor cannot be at liberty by any act of his own, to get rid of the stipulation,

that is to say, he cannot, at his will, curtail the period, by tendering the money before the prescribed date. The case cited by Mr. Lakshmanna such as *Setrucharla Ramachandra* v. *V. Suria-narayanaraju Bhahadur* (1) and *Aga Muhammad Ali* v. *C. Venkatappiah* (2) decide no more than this. What the law will prevent is if the mortgagor, before the prescribed period, seeks to discharge the debt in a manner not contemplated by the contract, that course he will not be permitted to adopt. But the question here arises in an entirely different form. A portion (Rs. 60) was by agreement of parties excluded from the usufruct for a specific purpose. If the purpose failed or the term was not carried out, what was the result? The part excluded reverted without any further act or agreement and became again profits. The mortgagee would then be liable to apply it in reduction of the debt. S. 76 (h) enacts that the mortgagee shall apply the usufruct, first in reduction of the interest, then of the principal. This, he is bound to do under the law; so that, if a part of the profits initially excluded was not applied as directed, it became usufruct as a matter of course and without a special contract to that effect.

The proper way then of viewing the question is: has the part excluded, in the events that have happened, regained its character of rents and profits? If so the mortgagee has no option but to appropriate it to the mortgage debt. *Jaijitraj* v. *Gobind Tewari* (3) is a very instructive case on the point and gives effect to the principle as I have stated it. *Brijkumar Lal* v. *Magli Sahai* (4) also supports the view I have taken. I cannot follow Mr. Lakshmanna's contention that S. 77, T. P. Act, supports him. In the first place, that section refers to a case, where there is a contract, that the receipts from the property shall be taken in lieu of the interest and "defined portions of the principal." I doubt if the section applies to the present case at all. Mr. Lakshmanna says that out of the sum of Rs. 80 mentioned in the deed, we must allocate Rs. 40 to the principal and Rs. 40 to the interest. Granting we do so, how does that satisfy the term regarding "defined portions of the principal?" The relation is not constant; the ratios Rs. 40:2,000 and 40:1960 and 40:80 are not the same. In other words, the principal gets gradually reduced, whereas Rs. 40 is a constant figure. But assuming that this is not a sound objection, how does S. 77 avail the defendant? All that it enacts is, that the rule of appropriation mentioned in S. 76 (h) shall not in certain cases hold good. I am, therefore, of the opinion that the plaintiff's contention must prevail, namely, that the sum of Rs. 60 should be debited against the mortgage debt and the account taken accordingly. It is obvious that in that event, the debt became wiped out long before 1920, that is, before the expiry of the period fixed.

That it is the correct principle will become apparent if an analogous case be considered. Let us suppose that the revenue on this land had been remitted by the zamindar and the sum representing that revenue had annually been left in the hands of the defendant. Can it be successfully maintained that it is not a part of the usufruct, which the mortgagee was bound to adjust, against the mortgage debt? Clearly not. The same principle applies to the facts of the case.

Next, does the existence of the special clause namely, that if the mortgagee fails to pay Rs. 60 he shall be bound to relinquish a proportionate part of the land, make any difference? In my opinion, it does not. The mortgagor was given an option and it was open to him not to avail himself of that term. Had the plaintiff elected to take advantage of this clause, he would have obtained possession of a part of the land and no further question would arise. Similarly, it was open to the mortgagor to have sued for the sum of Rs. 60 and the defendant could not in that event have pleaded that he applied the sum to reduce the mortgage debt. This, however, did not happen in this case and the mortgagor not having exercised his option in that way, it is open to him now, to ask that the same shall be adjusted against the mortgage debt.

Lastly, in regard to this part of the case, Mr. Lakshmanna contended that what the plaintiff purchased at the

(1) [1878] 2 Mad. 314.
(2) [1918] 35 M. L. J. 237=48 I. C. 379.
(3) [1884] 6 All. 303=(1884) A. W. N. 92.
(4) [1916] 34 I. C. 899.

Court auction did not include the mortgagor's right to the annual payment of Rs. 60. This is an unfounded contention and does not require serious notice.

I now turn to a contention relating to the revenue. It was urged for the plaintiff, that the mortgagee failed to pay the beriz or revenue for nine years from Faslis 1295 to 1303 and that the amount allocated in the deed for that purpose, should also be calculated against the mortgage debt. This is a question of fact, but neither the District Munsif nor the Subordinate Judge has given a finding on the point. Under S. 103, Civil P. C., we have ourselves examined the evidence and find it difficult to uphold the contention of the plaintiff. He alleges that the zamindar sued him as the defendant made default, that three suits were filed, that one was dismissed, two were decreed and that he thereupon paid the sums mentioned in the two decrees. Not only has he failed to produce the decrees, but it is admitted that they were passed for much larger amounts than the revenue payable for the lands in question. He asks us to assume without evidence first, that the defendaut made default and secondly, that the suits filed were in respect of the cist which the latter was bound to pay. We cannot on the material before us record a finding in his favour. There was not a single demand made on the defendant for the return of the money. If the plaintiff paid what the defendant was bound to pay, why did he not send a demand for the amount from fasli 1303 (1893) to 1915, the date of the suit? We must hold that the plaintiff has not made out this part of the case. Then remains the question, on what footing is the account to be rendered by the defendant? I have held that he was bound to adjust the sum of Rs. 60 retained in his hands from 1883 against the mortgage debt. In finding out when the mortgage debt became discharged, interest shall be calculated on each sum of Rs. 60 as it became payable, at 2 per cent per annum (that is slightly in excess of the contract rate, namely, 1-9/11 per cent.) After the mortgage debt is on this calculation found to be fully paid off, the defendant shall be liable annually for Rs. 140 (Rs. 240 less Rs. 100 payable for revenue etc.) with 6 per cent per annum to the year 1913. In the last mentioned year, the plaintiff called on the defendant to render an account; and from then, to the date of the delivery of possession (1920 or 1921), the defendant is liable to account on the basis of the actual profits received and not estimated rent, with 6 per cent per annum. These are my directions in regard to the taking of accounts. In this connexion, I may observe that Mr. Varadachariar has contended, that from the very date the debt has become paid off, he is entitled to hold the defendant accountable for actual profits received. I do not agree with this contention. Although the mortgage debt has become extinguished, the possession of the defendant cannot be said to be wrongful, till he refused to surrender the land after demand was made. What has actually happened was not what at the outset was in the contemplation of the parties; but so long as the defendant's possession is not wrongful, I fail to see why the parties should not be held to be bound by the terms of the contract. The arrangement, as I have held, is a mortgage and not a lease, but it does not follow from that, that the defendant is liable to pay during the prescribed period of 55 years, more than the estimated profits of the land. It was hinted in the course of the argument, that if an account was taken on the basis of actual profits, the figure might amount to some tens of thousands of rupees. I do not think, that either in law or in equity, that can be the measure of the defendant's liability, when it is borne in mind that his act was not wrongful. It must be further remembered that the original arrangement involves that the mortgagee shall get no higher interest than 1 9/11 per cent per annum an absurdly low rate. Having regard to all the circumstances, the most just and proper order seems to be what I have made.

The decree we pass is a preliminary decree. I direct the lower Court to pass the final decree in the light of the observations and directions contained in this judgment.

Each party shall bear his costs of this Letters Patent Appeal.

Reilly, J.—We have heard very long arguments in this case; but it appears to me that the main question for deci-

sion is a comparatively simple one. The terms of the documents, Ex. A and B, have been explained in the judgment just delivered by my learned brother. It is not disputed that the Rs. 60 a year which the defendants had to pay to the mortgagor, has not been paid to the plaintiff since he purchased the mortgagor's interest in Court auction. Since this litigation started, possession has been given by the defendants to the plaintiff, and we are told that that was done in 1920 or 1921. The main question before us therefore is whether the Rs. 60 a year, which the defendants and their predecessors had to pay to the original mortgagor, should be adjusted as it fell due against the mortgage debt or must be recovered from the defendant by the plaintiff otherwise than in connexion with the mortgage transactions.

Those transactions have been discussed during the main part of the argument before us as if they were mortgages, and I will deal with them first on that footing. The two mortgages represented by Exs. A and B may be conveniently treated as one and the plaintiff be referred to as the mortgagor. I think it will be useful to look at the matter in the first instance as if there were no term of years mentioned in the mortgage documents, as if there was nothing said about 55 years or about possession being surrendered at the end of the year Ananda or the year Siddarti. The transaction would then be a usufructuary mortgage for Rs. 4,400 which was to be paid off by Rs. 80 a year out of the usufruct being applied to the reduction of that amount of Rs. 4,400, which represented both the principal and the interest, and Rs. 60 out of the ususfruct was to be paid by the mortgagee to the mortgagor for his own purposes. If that were the agreement into which the parties entered and from the year 1882 the Rs. 60 was not paid to the mortgagor, what would be the position? Mr. Lakshmanna for the contesting defendants maintains that, although the mortgagee in those circumstances might have kept the Rs. 60 in his own hands instead of paying it over to the mortgagor, if the mortgagor wanted to recover the Rs. 60 for any year, he must do so quite apart from the mortgage transaction. But on what principle could a mortgagee in possession be heard to say that he had in his hands money belonging to the mortgagor, which he had received in his capacity as mortgagee out of the income of the mortgaged property in his possession but that he refused to adjust that against the mortgage debt and that he would hold it until the mortgagor sue him for it in some proceedings unconnected with the mortgages. I do not think it is necessary in this connexion to drag in the idea that in those circumstances the mortgagee would be trustee for the mortgagor in respect of the mortgagor's money which he kept in his hands, though no doubt he would be so. It is enough, I think, to remember that the essence of a mortgage transaction is that the mortgage is security for the mortgage debt. When the mortgagee has obtained payment of his debt, the security is done with; there is no purpose left in it. Let us suppose that we reach a stage where the mortgage debt except Rs. 480 has been paid off by the application of Rs. 80 a year out of the income and at the same time by his failure to pay the Rs. 60 a year to the mortgagor the mortgagee has Rs. 480 out of the income from the mortgaged property in his hands. It appears to me almost absurd to suggest that in such circumstances the mortgagee could say:

> "The mortgage debt still remains to the extent of Rs. 480. I have got the mortgagor's money to that amount in my hands; but I intend to keep that entirely separate."

It has been suggested that the mortgagee could do that, because he could have got the Rs. 60 a year in his hands not in accordance with the terms of the contract between the parties but in violation of the terms. Surely, we cannot allow a party to plead his own wrong in that way. In my opinion it is clear on principle that, when the mortgagee has paid himself the mortgage debt out of the mortgaged property in his possession, he cannot maintain that the mortgage is still in force. That principle is recognized in S. 62-A, T. P. Act, and it was enforced in *Jaijit* v. *Gobind Tewari* (3). That case is interesting because it enforced the principle in circumstances somewhat more marked than those of the present case. In that case, the income of the property was to be applied by the mortgagee to the payment of the interest on the mortgage

debt except a certain amount which he was to pay every year for the mortgagor's purposes. The principle of the mortgage debt was to be paid by the mortgagor only in one lump sum. The mortgagees failed to apply the part to the income which he was bound under the contract to have applied to the mortgagor's purposes, and the Court held, that that part of the income which was the mortgagor's money and which the mortgagee had kept in his hands instead of applying to the mortgagor's purposes, must be adjusted against the principal of the mortgage debt, even though according to the contract the principal could only be paid off in one lump sum. If the proper principle is that the mortgagor's money which the mortgagee retained in his hands in that way must be applied to reduce the mortgage debt even in such a case as that, much more must it be so applied in a case where there is no stipulation that the principal can be paid only in one lump sum but it is to be paid out of the income of the mortgaged property. The decision in *Jaijitraj* v. *Gobind Tewari* (3) has never been overruled, nor has dissent ever been expressed from it.

Now does the fact that in this case a term of 55 years is mentioned make any difference in the application of this principle? We are not concerned in this case with any question of redemption, because in this transaction the mortgagor could never redeem by paying the balance of the mortgage debt to the mortgagee; his right was only to recover possession when the mortgage debt was satisfied. For myself I doubt whether in these documents, Exs. A and B, any term of years in the strict sense was really intended. I doubt whether the meaning is more than that the Rs. 4,400 was to be paid off out of the income of the property at the rate of Rs. 80 a year and so would be cleared of in 55 years ending with Siddarti. But, even, if the mention of the term of 55 years ending with Siddarti means more than that, how does it really affect the mortgagee's position in the circumstances that have arisen? If the amount of the mortgagor's money which the mortgagee retained in his hands has to be adjusted against the mortgage debt then at a time long before the expiry of the 55 years the mortgage debt must have been satisfied. From that time, until the end of the 55 years in what capacity would the mortgagee claim to remain in possession? Obviously not as a mortgagee to whom any part of the mortgage debt was still due. I think the result of that is, that, if this transaction is a mortgage and nothing else, the Rs. 60 must clearly be adjusted as it fell due against the mortgage debt until it was discharged and that the plaintiff must be held to have been entitled to recover possession from the date on which the debt was so discharged.

There appear to me to be only two ways in which the defendants could modify or get out of that result. If it were permissible, as it is not permissible for them to represent that, although the parties entered in the documents Rs. 4,400 as the amount of the principal and interest and agreed that that should be paid off by taking Rs. 80 out of the income of the property which they took for purposes of the transaction at a conventional and fixed sum of Rs. 240 a year, they really knew that the income of the property would be much more than that as indeed it is admitted before us it has turned out to be, and that they intended that the total of the mortgage debt, principal and interest, should be more than Rs. 4,400 then they might be able to say that, even when the Rs. 60 had been adjusted as I have suggested, there would still be more due to them and that the debt had not really been discharged. But it is obviously not permissible for them to say in the face of the documents that the real transaction was for some larger amount than Rs. 4,400 that the real principal and interest together were something more than Rs. 4,400 though that would only include interest at the comparatively low rate of 2 per cent. If they cannot say that, then the only other way in which they can avoid the result indicated is by showing that this transaction was or included a lease. It cannot be contended and Mr. Lakshmanna has not seriously contended that the transaction did not include a mortgage. The very language of the documents precludes any such contention. But Mr. Lakshmanna has contended that here we have a mortgage which partakes of the nature of a lease. For

myself I think that in this country that form of language is only likely to lead to confusion. We can have a transaction which is a mortgage and have a transaction which is a lease; we can, have a transaction which is a mortgage and also a lease, as in the case of a Malabar kanam. But I do not think that in this country there is any real profit or use in speaking of a mortgage as partaking of the nature of a lease, as if we could have a mortgage with a tinge or flavour of a lease in it. What we have to find out is, whether the transaction included a lease. Mr. Lakshmanna has drawn attention to the fact that in Ex. A the document is described as a cowle. "Cowle" is a word which may be used for a lease but may be used for other transactions. Mr. Lakshmanna has also pointed out that in the early part of Ex. A there is mention of the rent of the property as being Rs. 240 a year. But nothing can be got from that, because that is only a statement showing the income which the mortgagor was getting when he was in possession. If we are to find that this transaction includes a lease, we must ask "where is the rent?" Ordinarily there will be rent either paid in advance as a premium or reserved to be paid periodically. Now the Rs. 4,400 cannot possibly be represented to be a premium, because it is decsribed as a debt to be repaid. Then, apart from that the only amount which could be represented to be rent is the Rs. 60 a year to be paid to the mortgagor. That is not described as rent, and, when we remember the provision that, if the Rs. 60 a year is not paid to the mortgagor, he may recover one-fourth of the property and keep it in his possession, it is obvious that Rs. 60 also was not rent. If it were, we should get the curious result that the lessor might recover one-fourth of the property from the lessee, if the rent was not paid, and then the lessee would be able to keep the whole of the remaining three-fourths in his possession without any rent being due from him.

I think it is quite clear that this transaction does not include a lease. I may remark that, even if it were definitely called a lease, that would not be conclusive in the matter as is shown by *Brij-Kumar Lal* v. *Magli Sahai* (4), and other cases which deal with what are called zuripeshgi leases in Bengal.

Mr. Lakshmanna has also laid stress upon the special provision by which the mortgagor could recover a quarter of the property if the sum of Rs. 60 is not paid to him in any year, and he contended in one part of his argument that that was the only remedy which the mortgagor had if the Rs. 60 was not paid. I think it is quite clear that that provision only gave the mortgagor an option to recover a quarter of the property if he wished. That did not affect the position and liability of the mortgagee in respect of Rs. 60 if he did not pay it to the mortgagor and the mortgagor did not choose to exercise that option.

So far I have referred only to the Rs. 60 a year, which had to be paid to the mortgagor. Under Ex. A, the mortgagor has also to pay Rs. 95 a year as kattubadi to the zamindar. It is represented for the plaintiff that for several years more than 20 years ago the mortgagee did not pay that to the zamindar and that he himself was forced by decrees of Court to pay it. That amount of kattubadi, which he had to pay, he wishes also to set off by adjustment against the mortgage debt. It is clear that the mortgagor is not concerned with any kattubadi not paid by the mortgagee to the zemindar unless he himself was forced to pay it or is still liable to pay it. He is certainly not still liable to pay anything to the zamindar on that account for the years mentioned, and, if he wishes to recover by adjustment against the mortgage debt any kattubadi by himself, he must prove that he had to pay it. He has not troubled to produce the decree under which he says he was forced to pay kattubadi for six years; and the only evidence which he has produced, Ex. E series, though it shows that he had to pay certain amounts under decrees, larger than the amount of the kattubadi in the years concerned, does not show that it was the kattubadi on this land, with which we are concerned, that he had then to pay. I agree that he has not made out his case that he had to pay kattubadi to the zamindar on this land.

I agree that Rs. 60 a year from the date of the plaintiff's purchase should be adjusted against the mortgage debt with interest at two per cent per annum as

proposed by my learned brother. On the question how the account between the parties should be taken after the mortgage debt is found to have been discharged in that way, I am not prepared to dissent from that view that it is only Rs. 240 a year minus the kattubadi and the village payment (making Rs. 100 a year in all) which should be credited to the plaintiff at six per cent per annum until the date when he demanded possession. Mr. Varadachariar has contended that from the date when the mortgage debt was discharged, the mortgagor is entitled to the full profits of the property (minus of course the kattubadi and the village payments) on the ground that, when the mortgage debt was cleared off, the mortgage transaction had come to an end. As I have said in one sense it is quite clear that the mortgage transaction had come to an end at that point of time. But it cannot be said that the relation between the mortgagor and the mortgagee had entirely ended with that discharge or that the mortgage transaction left no result behind it. Certainly as there was no demand from the plaintiff for recovery of possession until 1913, it cannot be said that the mortgagee's possession from the date of discharge to 1913 was wrongful or that it was adverse to the mortgagor. And it is only in his position as mortgagor that the plaintiff has the longer period of 60 years under the law of limitation to recover possession.

I think we can properly say, that, as the mortgagee's possession originated in the mortgage and remained in a sense that of a mortgagee, until there was a demand for recovery from the mortgagor, the conventional income, which the parties had agreed between themselves should remain in force as the income of the property to save them the trouble of accounting, should be considered to remain in force until there was a demand for recovery. After that date of course, the plaintiff is entitled to recover the full profits of the property until the date on which possession was given. I agree therefore in all respects with the order proposed by my learned brother.

P.R.S./V.S. *Order accordingly.*

A. I. R. 1930 Madras 168

PHILLIPS AND REILLY, JJ.

Pynda Venkatachalapati Garu—Plaintiff—Appellant.

v.

Pynda Ramakrishnayya and *others*—Defendants—Respondents.

Appeal No. 248 of 1924, Decided on 4th April 1929, from decree of Sub-Judge, Cocanada, in Original Suit No. 13 of 1923.

(a) Contract Act, S. 251—Contract with firm—Promissory note evidencing contract signed by partner in his own name—All partners are liable—Promisee should be allowed to adduce evidence as to alleged contract—Evidence Act, S. 92 Proviso (2).

Where there is a contract with the partnership and a promissory note signed by a partner in his own name and not in the name of the partnership, as evidence of such contract, all the partners will be liable. The principle that only the maker of the promissory note can be held liable thereunder is not applicable in a case where an independent contract is alleged and, therefore, the promisee can be allowed to adduce evidence as to the independent contract: *A. I. R.* 1914 *P. C.* 132 and 40 *Mad.* 727, *Rel. on*; 7 *Cal.* 256 and *A.I.R.* 1913 *P C.* 146 *Ref.*; 25 *Mad.* 580, *Doubted.* [P 170 C 1]

(b) Civil P. C., O. 6, R. 17—Suit on promissory note signed by one partner in his name only—Creditor contending to hold all partners liable — No clear indication in plaint whether creditor based his suit on independent liability—Amendment of plaint was allowed by High Court.

A suit was brought by a creditor to recover two loans given to a firm of four brothers. For each of the loans a promissory note was executed by the 3rd partner alone which he signed in his own name and not in the name of the partnership. It was contended for the creditor that as the loans were given to the partnership, the other three partners were also liable for their amount. The plaint was not worded so as to indicate clearly that the creditor based his suit not only on the promissory notes but on the independent liability. No question of amending it was raised in the lower Court because the Subordinate Judge held that because the promissory note had been executed for the loans by the 3rd partner, it was not open to the creditor to base his claim on any other cause of action.

Held: that in the circumstances the creditor may properly be allowed an opportunity to amend his plaint. [P 172 C 1]

T. R. Ramachandra Iyer and *S. Srinivasa Iyer*—for Appellant.

S. Varadachariar—for Respondents.

Phillips, J.—This suit is brought by the plaintiff to recover two loans given to a firm of four brothers, defendants 1 to 4. For each of the loans a promissory note was executed by defendant 3 alone which he signed in his own name and

not in the name of the partnership. On the promissory notes therefore defendant 3 can alone be held liable; but it is contended for the plaintiff appellant that as the loans were given to the partnership, the other three partners will also be liable for their amount. The plaint is not worded so as to indicate clearly that the plaintiff bases his suit not only on the promissory notes but on the independent liability of the partnership, but it is I think capable of such interpretation; no question of amending it was raised in the lower Court because the Subordinate Judge held that because the promissory notes had been executed for the loans by defendant 3, it was not open to the plaintiff to base his claim on any other cause of action.

One of the earliest cases in which this question was considered is *Sheik Akbar* v. *Sheik Khan* (1). There it was held that, when the original cause of action is the bill or note itself, and does not exist independently of it, there is no cause of action for money lent, or otherwise than upon the note itself, for the note is the only contract between the parties. If realy there is no independent cause of action, this decision that the note alone can be sued upon must be accepted and has been accepted in many cases since it was propounded. The appellant, however, relies on the case in *Karmali Abdulla* v. *Karimji Jwanji* (2), in which the Privy Council held that that one partner could he held liable upon hundis drawn by another partner when the transaction for which the hundis were drawn was a partnership transaction. In that case the suit was not based upon the hundis but upon the account between the parties, of which the hundis formed one item. In *Shunmuganatha Chettiar* v. *Srinivasa Iyer* (3) a Bench of this Court held on the strength of the above case that in a suit on a promissory note executed by two out of the three partners of a firm for money advanced for purposes of the firm the third partner was also liable. If this latter decision is correct, the plaintiff's contention that he has a cause of action against the other partners, defendants 1 and 2 and 4 must succeed.

It is, however, argued for the respondent that the case in *Shunmuganatha Chettiar* v. *Srinivasa Iyer* (3), goes beyond the case in *Karmali Abdulla* v. *Karimji Jivanji* (2), and is not good law. Even in the case in *Sheik Akbar* v. *Sheik Khan* (1), it was recognized that, where there was a cause of action independent of the note, resort could be had to that cause of action; and in this Court it has been held that, where the note has been executed by the Manager of a Malabar tavazhi, the other members of the family or the tavazhi are liable: *Krishna Iyer* v. *Krishnaswami Iyer* (4) and *Thankammal* v. *Kunhanna* (5). The Subordinate Judge has distinguished these cases as being cases governed by Hindu Law and has held that they are the only exceptions to the rule that the maker of a promissory note alone is liable thereon. This is quite true if there is no alternative cause of action, but in *Sadasuk Janki Das* v. *Kishan Pershad* (6), the Privy Council while holding that the principal could not be made liable on a promissory note which was not signed in his name, remarked that the plaintiffs in that case could:

"had they thought it fit to have framed their case in an alternative form and have sued both on the hundis and alternatively upon the consideration."

In that case the money was lent to the Maharaja Sir Kishan Pershad Bahadur, defendant 1, through his agent, Mohan Lal, defendant 2, and the suit was brought upon the hundi alone, and it was held that, as the alternative relief had not been put forward in Courts below, the plaintiff's suit as against defendant 1 must fail because he was not liable under the hundi itself. In the present case, if the plaintiff really entered into a contract with the partnership that is clearly a contract which is independent of the contract evidenced by the promissory notes, because in those notes the contract was one between the plaintiff and defendant 3 alone whereas the other was a contract between the plaintiff and the partnership of which defendant 3 was a member.

(1) [1881] 7 Cal. 256=8 C. L. R. 528.
(2) A. I. R. 1914 P. C. 132=39 Bom. 261=42 I. A. 48 (P. C.)
(3) [1916] 40 Mad. 727=31 M. L. J. 138=4 M. L. W. 27=35 I. C. 219=(1916) 2 M. W. N. 14.
(4) [1900] 23 Mad. 597.
(5) [1919] 37 M. L. J. 369=53 I. C. 878.
(6) A. I. R. 1918 P. C. 146=46 Cal. 663=46 I. A. 33 (P.C.).

In *Darguvarapu Sarrapu* v. *Rampratapu* (7), where a promissory note was given by one partner for the price of goods sold to the partnership, it was held that the other partners were liable. In principle there would appear to be no distinction between money to be paid for the price of goods and money to be paid for repayment of a loan; if that is so, in this case the partnership would be liable to the plaintiff. There appears to me to be no reason why the liability incurred by members of a joint family under the Hindu Law in respect of a promissory note should be put upon any different footing to the liability incurred by the partners of a firm under S. 251, Contract Act; but the language of their Lordships in *Sadasuk Janki Das* v. *Kishan Pershad* (6) at p. 668 (*of* 46 *Cal.*) very clearly indicates the view that no liability attaches under a promissory note unless such liability is expressly recited. Possibly, therefore, *Darguvarapu Sarrapu* v. *Rampratapu* (7), requires reconsideration. However, it is, unnecessary to discuss the question now, for the cause of action may be based on the contract independent of the promissory note.

In that event the real question at issue is not whether the firm benefited by the transaction, but whether the firm did enter into the contract. If the plaintiff can show that there was a contract with the partnership and the promissory note was merely evidence of such contract, all the partners would appear to be liable. The principle that only the maker of the promissory note can be held liable thereunder is not applicable in a case like this where an independent contract is alleged. I think, therefore, that the Subordinate Judge ought not to have refused to allow the plaintiff to adduce evidence as to this independent contract. I would, therefore, allow plaintiff to amend his plaint and after the amendment is approved the suit will be remanded for fresh disposal in ths light of the above remarks.

Costs in this Court will abide the result of the suit.

Reilly, J.—The promissory notes on which the plaintiff sues in this case have not been translated; but it is admitted that there is no word in them to indicate or suggest that the plaintiff in lending the amounts mentioned in them, was dealing with any one but defendant 3, who executed the notes. Whatever may have been the relations of defendant 3 to the other defendants at the dates when he made these notes, on no fair, nor even possible, interpretation of the notes themselves could it be held that any person but defendant 3 was liable on them. Mr. Ramachandra Iyer does not suggest that an undisclosed principal can be held liable on a promissory note executed by his agent; but he contends that a person to whom no reference whatever is made in a promissory note executed by his partner may be held liable on the note. His argument is that, though under S. 27, Negotiable Instruments Act, an agent must act in his principal's name when making a promissory note, if he is to bind his principal by the note, that section has no application to partners, whose liabilities for each other's acts are regulated by S. 251, Contract Act. I see no basis for the contention. Under S. 251, Contract Act, a partner can bind his copartners to the same extent as if he was their agent and no further. If such a contention as Mr. Ramachandra Iyer's was ever possible, it is not possible after the language used by the Privy Council in *Sadasuk Janki Das* v. *Kishan Pershad* (6):

> "It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand."

There is no distinction in this respect between what is necessary to make it clear that a firm is bound by a promissory note made by one of its partners and what is necessary to make it clear that a principal is bound by a promissory note made by his agent. I agree that on the promissory notes in this suit the plaintiff can get a decree against no one but defendant 3, and that he has got.

But it is further contended that the plaintiff could get a decree against all the defendants as partners on the consideration for the promissory notes, that is on the loans made to the firm represented by defendant 3 in the transactions. That is so, if it is proved that that the loans were made to the firm

(7) [1902] 25 Mad. 580.

and if the pleadings are sufficient to support such a case. I do not think it is of any profit now to discuss the old question whether, when a promissory note has been executed for a certain amount. a suit can be based on the consideration only if the consideration has been antecedent to the execution of the note or that can be done also when the consideration and the note are contemporaneous. That question appears to me to have been concluded by the case which I have already mentioned: *Sadasuk Janki Das* v. *Kishan Pershad* (6). In that case it is stated in the judgment of the Privy Council that

"it would, of course, have been open to the plaintiffs, had they thought fit, to have framed their case in an alternative form and to have sued both on the hundis and alternatively upon the consideration."

There the execution of the hundis and the making of the loan were contemporaneous. In this part of the case Mr. Varadachariar for defendants 1, 2 and 4 suggested in his turn that there was a distinction in this matter between suing a principal on a loan made to his agent acting within authority for him and suing a firm on a loan made to them represented by one of the partners. There again in my opinion no distinction can properly be drawn. If when an agent takes a loan for his principal but executes a promissory note for the amount which does not disclose that the borrower is his principal, the lender can sue the agent on the note and alternatively the principal, on the loan, I see no reason, why, when the loan is made to a firm but a promissory note is taken from one of the partners, which does not disclose that any one but he is liable on it, the lender should not sue the partner on the note which he has made and alternatively the firm on the loan itself. It appears to me to make no difference in this matter that the agent is a different person from his principal, while the partner is included in the persons forming his firm. But, if the firm is to be made liable in such a suit the lender must not only allege and prove that the loan was really taken for his firm by the partner who made the promissory note but must base the suit on the loan to the firm. Although we have not got the full plaint in *Sadasuk Janki Das* v. *Kishan Pershad* (6) before us, it is instructive to notice that the report shows that in that plaint it was alleged that the money was borrowed by

"defendant 2 who executed the hundis for and on behalf of and as agent of defendant 1 (his principal); but nevertheless the plaint was confined in the opinion of their Lordships to an action brought on the hundis themselves. That shows that if the suit is to be based on the note and alternatively on the consideration, it is not enough to allege that the loan was taken for the principal or the firm. In the present case the suit is obviously upon the promissory notes. Is it also or alternatively on the consideration? In connexion with each note the plaint states that defendant 3 borrowed the amount

"for the trade carried on by the defendants as Paida & Co.

In para. 7 it is stated that

"demand for the repayment of the principal and interest due on the two promissory notes was made by the plaintiff."

and in para. 8 it is stated that

"the cause of action for this suit arose on 11th April 1920 and 17th August 1920 the dates of the two promissory notes."

With great respect it is quite impossible in my opinion to get out of those statements any averment that the loans were made to the firm of which defendant 3 was a partner or any allegation that the plaintiff has or bases his suit upon an alternative cause of action against the firm. The plaint also contains a statement that the defendants, that is the firm, repaid Rs. 100 towards the second promissory note; but repayment of part of the debt by parties not liable on the notes cannot make them liable on the notes or on the consideration. I have no wish to insist on technicalities of pleadings to the detriment of any party. But it is the duty of a plaintiff to make clear to the Court and to his opponent what his alleged cause of action is. In my opinion only by torturing the language of the plaint in this case or by an effort of the imagination can we say that the plaintiff intended to sue the defendants alternatively on the loan to the firm. Nor could we do so without implicitly criticizing the opinion expressed by the Privy Council of the plaint before them in *Sadasuk Janki Das* v, *Kishan Pershad* (6). I have no doubt that, when presenting his plaint, the plaintiff was under the impression that he could sue all the defendants on the promissory notes themselves, as was

contended for him before us. But that was undoubtedly a mistake. On the plaint as it stands, although I do not agree with all his opinions or reasoning in my opinion the decision of the learned Subordinate Judge was right.

But in the circumstances I think the plaintiff may properly be allowed an opportunity to amend his plaint. I agree that we should give him a short adjournment in which he may, if he wishes, amend his plaint so as to make it clear that he is alternatively suing all the defendants as members of a firm or loans made to that firm. If he makes the amendment, I would set aside the decree of the Subordinate Judge and remand the suit to him for fresh disposal on the amended plaint, the costs of this appeal in that event to abide and allow the result of the suit at the new trial. (After allowing the amendment, their Lordships remanded the suit for fresh disposal).

P.R.S./V.S. *Suit remanded.*

A. I. R. 1930 Madras 172

VENKATASUBBA RAO, J.

(*Guda*) *Balambhotlu* — Petitioner — Appellant.

v.

Mandela Bapanamma and *others* — Respondents.

Appeal No. 76 of 1925, Decided on 19th April 1929, from order of Sub-Judge, Naraspur, in Appeal Suit No. 32 of 1923.

Civil P. C., O. 21, R. 11—Wrong mention of defendants' names does not render application invalid.

Plaintiff obtained decrees in two mortgage suits. They were against two different sets of defendants called *A* and *B* in first suit and *C* and *D* in second suit. When the plaintiff applied for execution of the decree in suit against *A* and *B*, in stead of giving the names of defendants as *A* and *B*, he gave them, as *C* and *D*.

Held: that this bona fide defect does not render the application invalid: *A. I. R.* 1926 *Mad.* 321; 17 *Mad.* 76 and 29 *M. L. J.* 669, *Rel. on.* [P 173 C 1]

P. V. Vallabhacharyulu — for Appellant.

P. V. Ranga Rau—for Respondents.

Judgment.—The point I have to decide is whether the execution petition No. 1066 of 1921 is in time or not. There were certain previous execution applications filed. The question is, whether they were in accordance with law within the meaning of Art. 182, Lim. Act. The present petition was filed within three years of the last of the previous petitions, but it is contended for the respondent that those petitions are defective and cannot, therefore, be taken into account for the purpose of the statute.

The facts are these: The plaintiff obtained decrees in two mortgage suits. They were against two different sets of defendants. Let us call them *A* and *B* in the first suit, *C* and *D* in the second. The suits related to different sets of properties. We are now concerned with what I may call the suit against *A* and *B*. The defect alleged in the previous petitions arose thus. When the plaintiff applied for execution of the decree in that suit, he gave the names of the defendants wrongly, that is to say, instead of giving their names as *A* and *B*, he gave them as *C* and *D*. That the mistake was bona fide cannot possibly be doubted. The learned Subordinate Judge thinks that the question of good faith has no bearing at all on the point to be decided. In this, he is entirely mistaken. With each of the execution petitions, the plaintiff filed a copy of the decree and it is not disputed that the copy so filed was of the right decree. The description of the properties was also correctly given. The Court clerk, by comparing the execution petition with the copy of the decree filed, could have at once discovered the mistake. As it turned out, the mistake was not discovered. As the petitions were dismissed in initial stages, even notices were not taken out against the defendants. Does this mistake prevent the previous applications from being in accordance with law? The decided cases show clearly that the appellant's contention must prevail. Where execution was applied for, the name of the deceased defendant being wrongly mentioned, that was held to be in accordance with law: *Samia Pillai* v. *Chokkalinga Chettiar* (1). When the plaintiff applied for a relief not granted by the decree, it was held that the defect did not render the application invalid: *Rajam Aiyar* v. *Anantharatnam* (2). When execution was applied for against original defen-

(1) [1894] 17 Mad. 76=4 M. L. J. 8.
(2) [1916] 29 M. L. J. 669 = 31 I. C. 318= (1916) 1 M.W.N. 127.

dants, although in the meantime the mortgaged property passed to third parties, the Court held that the application was in accordance with law: *Parakkat Devaswom* v. *Venkatachellam Vadhyar* (3). I shall cite a passage from the judgment of Muthuswami Aiyar and Best, JJ., in *Samia Pillai* v. *Chokkalinga Chettiar* (1), the first of the three cases mentioned above:

"Where there has been in fact an application for execution made by the party entitled to make it, the mere fact of a mistake having been made in giving the particulars required by S. 235, Civil P. C., cannot, we think, have the effect of rendering the application a nullity."

With this proposition I entirely agree. The order of the lower Court is set aside and the appeal is allowed with costs.

P.R.S./P.R. *Appeal allowed.*

(3) A. I. R. 1926 Mad. 321.

A. I. R. 1930 Madras 173

WALLACE AND SUNDARAM CHETTY, JJ.

M. Basavayya — Defendant—Appellant.

v.

Majoti Bapana Rao Soucar and *others* —Plff. and Defendants—Respondents.

Second Appeal No. 538 of 1925, Decided on 11th September 1929, from decree of Sub-Judge, Masulipatam, in Appal Suit No. 8 of 1924.

(a) Limitation Act, Art. 120—In cases where fraud is proved time begins to run when fraud is known to plaintiff—Even to suits falling under Art. 120 same principle applies.

In cases in which the relief is sought on the ground of fraud, misconduct, mistake, etc., it would appear that limitation is made to commence from the time when the fraud, misconduct or mistake becomes known to the plaintiff. Art. 120 being an omnibus one, the general expression employed in Col. 3, is necessitated by a variety of suits not specifically provided for coming within its purview, in some of which there would be fraud, misconduct, or mistake as part of the cause of action, but in the rest that element would be absent. It would thus be in consonance with the scheme of the Act, dealing with suits on a cause of action consisting of fraud, misconduct, etc., if the right to sue should be deemed to accrue under Art. 120, from the time of the plaintiff's knowledge of the same even in respect of suits based on similar grounds coming under that article: 7 *L. W.* 280; 38 *Mad.* 67, aud *A. I. R.* 1928 *Mad.* 837, *Rel. on.*; 33 *Mad.* 31; 38 *Mad.* 1064, *Dist.* [P 174 C 1]

(b) Limitation Act, Art. 120—Decree passed against minor through negligence and misconduct of guardian ad litem—Time runs against minor when he comes to know of misconduct.

Where in a suit falling under Art. 120, the cause of action is not merely the passing of an adverse decree against the minor, but in addition to it the fact that such a decree was passed by reason of the misconduct or gross negligence of his guardian ad litem, limitation should not begin to run the moment the decree was passed, but only when gross negligence of the guardian which alone would entitle the minor to have the decree set aside, became known to him. [P 174 C 2]

V. Rama Doss and *V. Krishna Mohan* —for Appellant.

Y. Suryanarayana, *V. N. Shama Rao* and *K. Kameswara Rao*—for Respondents.

Judgment.—The suit out of which this second appeal has arisen, was filed by the plaintiff for declaration that the decree obtained by defendant 1 in O. S. No. 86 of 1913 on the file of the District Munsiff's Court, Masulipatam. is invalid as against him, and for an injunction restraining defendant 1 from executing that decree as against him (plaintiff) or his property. In that suit, the present plaintiff who was then a minor was impleaded as a defendant, represented by the present defendant 3 as his guardian ad litem.

Both the Courts below have found that the guardian ad litem was guilty of gross negligence in the conduct of that suit by omitting to set up an important plea, which was available as a ground of attack against the then plaintiff's claim. No attempt has been made to challenge this finding.

The question argued before us is one of limitation. It is admitted on both sides that this suit is governed by Art. 120, Limitation Act, but the dispute is as to the starting point for limitation. This is a residuary article, for all suits which cannot be brought under one or other of the specific articles. It provides a period of six years from the time when the right to sue accrues. The starting point is prescribed in general terms, and this expression may be taken to mean, when the cause of action arises. The cause of action would comprise the facts which have necessarily to be proved in order to entitle the plaintiff to the relief asked for by him in a particular usit. In the present case the mere fact, that a decree was passed in O. S. No. 86 of 1913 as against the present plaintiff is not enough to entitle him to the relief asked for, but he must make out, that his guardian ad litem suffered such a decree to be passed against him, on account

of gross negligence. The decree in that suit was passed on 27th October 1913. This plaintiff attained majority on 5th February 1916 and the present suit was instituted on 19th December 1921. The lower appellate Court has found, that that the plaintiff came to know of the decree in question in or about March 1921. If it should be held that the date of the decree is the starting point of limitation, the suit is barred under Art. 120 and even S. 8 of the Act is of no avail to plaintiff, the suit having been filed more than three years after his attaining majority. If the right to sue should be deemed to have accrued when all the facts constituting the cause of action became known to plaintiff, the suit would be within time.

In cases in which the relief is sought on the ground of fraud, misconduct, mistake, etc., it would appear that limitation is made to commence from the time when the fraud, misconduct, or mistake becomes known to the plaintiff, c. g.: vide Arts. 90, 91, 92, 95, 96 and 114. Under Arts. 91 and 114, limitation would begin to run from the time when the facts entitling the plaintiff to the relief asked for become known to him. Art. 120, being an omnibus one, the general expression employed in Col. 3, is necessitated by a variety of suits (not specifically provided for) coming within its purview, in some of which there would be fraud, misconduct, or mistake as part of the cause of action but in the rest, that element would be absent. It would thus be in consonance with the scheme of the Act, as indicated by such specific articles referred to above, dealing with suits based on a cause of action consisting of fraud, misconduct, etc., if the right to sue should be deemed to accrue under Art. 120, from the time of the plaintiff's knowledge of the same even in respect of suits based on similar grounds coming under that article. This is the view expressed by Phillips, J. in *Venkateswara Ayyar* v. *Somasundaram Chattiar* (1), at p. 283. The decisions of this High Court in *Mambi* v. *Kunhi Pakki Haji* (2), and *Viswanathan* v. *Narayan Das* (3), seem to be in favour of the plaintiff's contention. In the former case the declaration sought for was in respect of a sale for the purpose of enforcing the plaintiff's right of pre-emption. It was held that the starting point of limitation under Art. 120 was not the date of the sale but the time when the plaintiff became aware of the terms of the sale which would enable him to exercise his right. In the latter case also the date of the alienation by a trustee was not taken as the starting point but the time when the plaintiff came to know of the fraud, which was the ground on which the alienation was attacked. A different view was taken in the case reported in *Ottapurakal Tazhathe Soopi* v. *Cherchial Pollikkal Upathumma* (4), where the plaintiff sued for a declaration that the alienation by a karnavan was not binding on the tarwad. The learned Judges in that case held that the right to sue accrued on the date of sale deed itself and not when the plaintiff obtained knowledge of the sale. But there seems to have been no element of fraud urged in that case as part of the cause of action. If the sale was attacked as having been brought about by fraud, which would constitute at least a part of the cause of action, the right to sue would accrue, when the fraud became known to the plaintiff. The case in *Ottapurakkal* v. *Upathumma* (4) has been distinguished in this way in the decision in *Viswanadhan* v. *Narayan Das* (3). The decision in *Venkatachella Reddiar* v. *Collector of Trichinopoly* (5) is distinguishable for the aforesaid reason.

Where in a suit falling under Art. 120, the cause of action as in the persent case, is not merely the passing of an adverse decree against the plaintiff but in addition to it, the fact that such a decree was passed by reason of the misconduct or gross negligence of his guardian ad litem, it stands to reason, that limitation should not begin to run. the moment the decree was passed, but only when the gross neligence of the guardian which alone would entitle the plaintiff to have the decree set aside, became known to him. In this view, the plaintiff's suit should be held to be not barred under Art. 120. In the re-

(1) [1918] 7 M. L. W. 280=44 I. C. 551=(1918) M. W. N. 244.,
(2) [1912] 38 Mad. 67=23 M. L. J. 607=17 I. C. 337=(1912) M. W. N. 1217.
(3) A. I. R. 1923 Mad. 837.
(4) [1910] 33 Mad. 31=5 I. C. 698.
(5) [1915] 38 Mad. 1064=33 I. C. 45.

sult this second appeal fails and is dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 175

ANANTAKRISHNA AYYAR, J.

Minakshi Ayi — Defendant — Appellant.

v.

Subramanian Chettiar and *others*— Plaintiffs—Respondents.

Second Appeal No. 1489 of 1925, Decided on 18th April 1929, against decree of Second Additional Sub-Judge, Madura, in Appeal Suit No. 36 of 1924.

(a) Hindu Law — Widow—Survivorship—Partition among co-widows of husband's property—Co-widows dealing with respective shares as absolute owners—Rights of survivorship held to be given up by each of co-widows under partition.

After the death of the husband, his property was divided by an oral partition between two co-widows. Ever since that partition each of the co-widows had been dealing with the properties that fell to her share as if she took the same with absolute rights under the partition. At a time when no dispute arose whether right of survivorship was given up by the widows each widow executed sale deeds with reference to property that fell to her share, specifically purporting to confer absolute title to the alienees using the vernacular expression ordinarily in use to connote the idea of conferring absolute rights on the alienees.

Held: that the partition was absolute and that rights of survivorship had been given up by each of the co-widows under such a partition arrangement: 3 *M. H. C. R.* 268, *Foll.*; *A. I. R.* 1919 *P. C.* 27; 22 *Mad.* 522; 26 *M. L. J.* 479; 28 *M. L. J.* 685 and *A. I. R.* 1924 *Mad.* 75, *Rel. on.* [P 177 C 1]

(b) Evidence Act, S. 101—Onus of proof lies on him who asserts that partition among co-widows precludes right of survivorship.

The onus of proving that a partition that was effected by the co-widows precludes the rights of survivorship in each other is on the person who asserts the same. [P 177 C 1]

M. Patanjali Sastri—for Appellant.

T. L. Venkatarama Iyer and *P. Venkatarama Iyer*—for Respondents.

Judgment. — Chokkalingam Pillai died about 35 years ago leaving no issue, and on his death two widows, Valliammai and Minakshiayi, inherited his properties. The two widows sold certain properties belonging to the estate to pay off the debts incurred by their husband Chokkalingam Pillai, and afterwards they entered into an oral partition by which each got about nine kulies of land; old survey No. 46-C was among the properties thus divided by them. And in that partition Valliammai got the western half of this survey number, while Meenakshiayi, defendant 5 in the suit, got the eastern half of this survey number. Valliammai alienated the western half of survey No. 46-C to the plaintiff's predecessor-in-title from whom the plaintiff purchased the same. Valliammai died in 1916. The plaintiff as purchaser of Valliammai's right in the western moiety of survey No. 46-C, instituted the original suit for possession of the same from defendants 1 to 4 who were let into possession by the plaintiff's vendor. Defendant 5, Meenakshiayi, put forward her right to possession of the western half on the death of her co-widow Valliammai, and she executed a lease deed in favour of defendant 1 in respect of the said western portion.

The dispute between the parties centered on the question whether on the death of Valliammai, defendant 5 was entitled to possession of the suit properties. This again depended on the question as to the exact effect of the oral partition entered into between the two widows, Valliammai and defendant 5 in or about 1894.

The District Munsif dismissed the suit, holding that it was not proved to his satisfaction that Valliammai and defendant 5 divided their husbands' properties with absolute right of ownership and precluding the rights of survivorship inter se.

On appeal the learned Subordinate Judge disagreed with the finding of the District Munsif, and came to the conclusion that

"the two widows orally divided their husband's properties with absolute rights as against each and that therefore defendant 5 had relinquished her right of survivorship by the said partition."

He accordingly reversed the District Munsif's decree and granted a decree in the plaintiff's favour and directed the defendant to surrender 46-C.

Defendant 5, the co-widow, has preferred the second appeal.

On her behalf it was contended by the learned advocate Mr. Patanjali Sastri, that having regard to the admitted fact that the partition between the two co-widows was an oral one, and having regard to the statement in the 8th Edn. of 1914 of Mayne's Hindu Law, para. 554 at p. 777 to the effect :

"Where several widows hold an estate jointly, or whether one holds as manager for the others, each has a right to her proportionate share of the produce of the properties, and of the benefits derivable from its enjoyment and the widows may be placed in possession of separate portions of the properties, either by agreement among themselves or by decree of Court . . . . . But no partition can be effected between them, whether by consent or by adverse decree, which would convert the joint estate into an estate in severalty, and put an end to the right of survivorship."

it must be taken to be clear that the oral partition of 1894 between the co-widows must be taken to be one merely for convenient management and that no idea of giving up right of survivorship ever entered into the minds of the parties at that time. Before considering this argument of the appellant, it would be convenient to examine the reasons given by the lower Courts for arriving at the findings. Issue 3 framed in the suit was:

"whether Valliammai and defendant 5 divided their husband's properties with absolute rights of ownership and if so whether such a division is valid in law."

In considering this issue the District Munsif observed as follows :

"the first point for determination is whether at the partition between Valliammai and defendant 5, the latter consented to give up her rights of survivorship in her co-widow's properties. In other words, whether Valliammai had absolute rights of alienation over the suit properties."

After noting that there was no direct evidence on this point as to what happened at the partition he proceeded to consider the recitals in Ex. 8 of 1899, C of 1890 (both executed by Valliammai), and in Exs. K of 1901, and 1 of 1908 (executed by defendant 5), by which the co-widows alienated portions of properties that fell to them in the partition. These sale deeds recite that :

"the vendees are to enjoy the properties absolutely from generation to generation."

In answer to the plaintiff's contention that these recitals in document executed by the two co-widows after the partition, and at a time when there was no dispute between them as to whether they had parted with their rights of survivorship as against each other, would prove that the partition between the two widows was absolute and without the existence of rights of survivorship in each other, the learned District Munsif observed as follows :

"It seems to me that no importance can be attached to the casual recitals contained in these exhibits. These recitals are ordinary ones which we meet with in all sale deeds. They might have been written, in my opinion, without intending that any speccial significance should attach to them. At any rate I am of opinion that in the absence of direct evidence as to what took place at the partition between these widows or of any deed containing the consent of the widows to release their rights of survivorship, it is not safe to draw any conclusion in favour of such release from the recitals in these sale deeds. I therefore find that the plaintiff has not made out that Valliammai and defendant 5 took their share in their husband's properties with full rights of ownership."

He, however, went further, and in para. 11 of his judgment held :

"granting for the sake of argument that these widows took their shares with absolute rights according to the decision in *Ramakkal* v. *Ramaswami Naicken* (1), an alienation by either of the widows which is to enure beyond the life time of the surviving co-widow is not valid in law. I therefore find issue 3 against the plaintiff."

On plaintiff's appeal, the learned Subordinate Judge as already observed, held that :

"the two widows orally divided their husband's properties with absolute rights as against each other"

and therefore :

"defendant 5 has relinquished her right of survivorship by the said partition."

Referring to the sale deeds Exs. S, K, and C and I executed by the two co-widows with the recitals referred to already, the learned Subordinate Judge observed as follows :

"we see from the aforesaid four sale deeds that both the widows executed the sale deeds purporting to confer absolute right to their alienees."

He then proceeded to consider Ex. 2 dated 1st March 1926 by which defendant 5 leased to defendant 1 the western half of survey No. 46-C, (i.e., the suit property) wherein it is mentioned that the same fell to the share of Valliammai and on Valliammai's death without heirs, the executant, defendant 5, got the same. The Subordinate Judge remarked with reference to Ex. 2 :

"the aforesaid description involves the admission that if Valliammai had left any heir, the latter would have got the lands in preference to defendant 5. That seems to imply that in the oral partition entered into between them, there was a stipulation releasing the rights of survivorship of each to the other,"

and finally he stated as follows :

"apart from what we can gather from the various documents filed in the case, there is no evidence as to whether the partition between the two widows was intended to be absolute as against each other, in other words, whether it contained the provision releasing the right of

(1) [1899] 22 Mad. 522=9 M. L. J. 101.

survivorship in respect of each other (para. 20). . . . Having regard to the language used in defendant 5's lease, Ex. 2, and the four sale deeds referred to above, by which the two widows executed sale deeds purporting to confer absolute title on their alienees, I am inclined to hold that the two widows orally divided their husband's properties with absolute rights as against each, and therefore following the rulings referred to above I hold that defendant 5 has relinquished her right of survivorship by the said partition."

The question therefore is whether the learned Subordinate Judge was justified in finding as he did on the basis of the documents referred to above.

I agree with the contention of the learned advocate for the appellant that the onus of proving that the partition that was effected by the co-widows precluded the rights of survivorship in each other is on the person who asserts the same, in this case on the plaintiff, I also agree that the statement in para. 554 of (Mayne's Hindu Law edition of 1914) would prima facie help the appellant's contention. It thus being clear that the onus of proving that the oral partition between the two widows involved the parting with of the rights of survivorship on the part of each of the widows is on the plaintiff, the only question before me is whether the plaintiff has discharged that onus.

In *Ramakkal* v. *Ramaswami Naicken* (1), it was held by Subramania Aiyar and Boddam, JJ. :

"where the two co-widows entered into a deed which they called a deed of partition whereby they divided the property between them and each gave the other full power of alienation," that each widow had released her right of survivorship so as to preclude her from recovering from the alienee after the other co-widow's death the property given by way of partition to the latter and alienated by her. In the case reported in *Subbammal* v. *Krishna Iyer* (2), Sadasiva Iyer and Spencer, JJ. held that the use of the expressions "santati paramparyamayi" "sarva swathanthra badhayamayi" occurring in such partition deeds between the co-widows is a circumstance from which the intention to give up the right of survivorship may be legitimately inferred. In the case reported in *Alamelu Ammal* v. *Balu Ammal* (3), there was an oral partition between three daughters each purporting to take one-third share absolutely, the Court (Sadasiva Iyer and Napier, JJ.), held that the same involved the relinquishment of rights of survivorship on the part of the daughters : see also *Immani Ammal* v. *Periaswami Udayan* (4), by Oldfield and Venkatasubba Rao, JJ.

In the present case, no doubt we have no evidence as to what exactly happened at the time of the oral partition of 1894 between two co-widows; but we have the undoubted facts that ever since that partition, each of the co-widows had been dealing with the properties that fell to her share "as if she took the same with absolute rights" under the partition. At a time when no dispute arose whether right of survivorship was given up by the widows, each widow executed sale deeds with reference to property that fell to her share, specifically purporting to confer absolute title to the alienees using the vernacular expression ordinarily in use to connote the idea of conferring absolute rights on the alienees. These sale deeds containing such recitals and also the particular recital in Ex. 2 referred to by the learned Subordinate Judge constitute, in my view, relevant items of evidence available to the Court to come to a conclusion whether the partition between the co-widows was absolute or not. If the partition was absolute then the reported decisions leave no doubt and that rights of survivorship have been given up by each of the co-widows under such a partition arrangement. The decision of the Privy Council reported in *Mt. Hardai* v. *Bugwan Singh* (5), seems to support the above view. At p. 109 Viscount Cave observed as follows :

"Further from the time of the arrangement of 1875 until the commencement of this suit, that is to say, for a period of 38 years all the parties to the arrangement, including the plaintiff, dealt as absolute owners of the property allotted to them and to this, with trifling exceptions, no objection was taken by the other parties to the division. In these circumstances, the true inference appears to their Lordships to be that . . . . . the members of the family agreed and arranged among themselves that the whole property should be at once divided among the daughters and their sons then living, the mother surrenderiug her claims and each daughter accepting the property allotted to her in severalty in lieu of the undivided share in the whole estate which would have devolved upon her on her mother's death and abandoning her right of survivorship on the

(2) [1914] 26 M.L.J. 479=22 I.C. 399.
(3) [1915] 28 M.L.J. 685=26 I.C. 455=(1915) M.W.N. 26.
(4) A.I R. 1924 Mad. 75.
(5) A.I.R. 1919 P.C. 27.

death of either of her sisters. Whether this arrangement is binding on the grandsons cannot be determined in this suit and on that question their Lordships expressed no opinion. But the plaintiff at all events is bound by her own arrangement."

In that case no oral arrangement was come to in 1875 to which the daughters were parties and from 1876 each of the daughters dealt with the property allotted to her on the division as her own absolute property. The Privy Council held, as mentioned already, that the proper inference to be drawn was that each daughter accepted the property allotted to her in severalty in lieu of the undivided share and abandoned her right of survivorship on the death of either of the daughters.

For the above reasons it seems to me that the learned Subordinate Judge was justified in his finding that the original oral partition arrangement between co-widows was such as precluded the fifth defendant the surviving co-widow, from putting forward her right of survivorship with reference to the properties that fell to the senior widow in the partition. That it is open to co-widow to give up the rights of survivorship in such partition of their husband's estate has been laid down as early as 1866: see the decision reported *Rindemma* v. *Venkataramappa* (6) at p. 269. The same view has been adopted in the several reported decisions referred to by me already *Ramakkal* v. *Ramaswami Naicken* (1), *Sudalai Ammal* v. *Gomati Ammal* (7), *Subbammal* v. *Krishna Iyer* (2), *Alamelu Ammal* v. *Balu Ammal* (3). The decision of the Privy Council in 24 *C. W. N.* 105 at p. 109 (5) also, it seems to me, supports this view.

The decision of the learned Subordinate Judge is therefore right and I accordingly dismiss the second appeal with costs.

P.R.S./V.S. *Appeal dismissed.*

(6) 3 M.H.C R. 268.
(7) [1912] 23 M.L.J. 355=16 I.C. 423=(1912) M.W.N. 908.

A. I. R. 1930 Madras 178

PANDALAI, J.

(*Manchiraju*) *Venkayya*—Appellant.

v.

(*Vadalamudy*) *Venkataramayya* and *others*—Respondents.

Second Appeal No. 1860 of 1927, Decided on 1st May 1929.

(a) Transfer of Property Act, S. 81—*A* and *B* together mortgaging in favour of *C*—*B* mortgaging his mortgaged interest to *D* who had no notice of previous mortgage—*D* purchasing *B's* interest—*D* can marshall *B's* securities even if he has become purchaser.

Even where the mortgages have culminated in sales, the Court can, on a consideration of equity, extend to the purchaser the right to have the securities, which are properly marshallable, first sold in execution. [P 180 C 1]

A and *B* holding separate interests, mortgaged together their properties to *C*. *B* subsequently mortgaged his mortgaged interest to *D* who had no notice of the previous mortgage. In a suit brought by *C* on his mortgage:

Held: that *D* could marshall the securities of *B* if, in the mortgage to *C*, there were other properties than those which were mortgaged to *D* himself, even when he was not a mortgagee but had become a purchaser of the mortgaged interest: (1916) 1 *M. W. N.* 265 and *A. I. R.* 1924 *Pat.* 450, *Rel. on.* [P 179 C 2; P 180 C 1]

(b) Transfer of Property Act, S. 81—Subsequent mortgagee cannot be allowed to require properties of any debtor but his own to be first sold—Civil P. C., O. 34, R. 4.

A and *B* holding separate interests together mortgaged their properties to *C*. *B* subsequently mortgaged his interest to *D* who had no notice of the previous mortgage. *A* sold his interest to *P*. In a suit brought by *C* upon his mortgage:

Held: that *D* could not require the properties sold to *P* to be first sold because a subsequent mortgagee could not be allowed to require properties of any but his own debtor to be first sold either by way of marshalling under S. 81, or by way of exercise of discretionary power to control execution sales under O. 34, R. 4, Civil P. C. [P 180 C 1]

V. Suryanarayana—for Appellant.

V. Lakshmanna—for Respondents.

Judgment.—The dispute in this case is only about a direction given in the decree of the lower Court that the properties sold to defendant 5 must be brought to sale first and those sold to defendant 4 should be sold, if necessary, afterwards. The appellant is defendant 5 and defendant 4 is the real contesting respondent. The suit was brought upon a mortgage Ex. A dated 15th December 1913 executed by defendants 1 and 2 and one Narayanaswami since deceased mortgaging the properties mentioned in the plaint schedule to the plaintiff. On 5th January 1914 defendant 2 alone, one of the mortgagors mortgaged his interest in item 2 of the properties in the former mortgage to defendant 4 who, it has been held, took the mortgage without notice of the former one. Defendant 4 brought a suit upon his mortgage and after decree bought the mortgaged properties himself by pri-

vate sale on 26th June 1917. Defendant 5 purchased defendant 1's rights in the mortgaged properties by a sale deed Ex. 3, dated 22nd June 1921. In this suit which was brought by the plaintiff to enforce his mortgage of 15th December 1913, defendants 4 and 5 were the chief contesting defendants. Defendant 4's contention was that he had no notice of the suit mortgage at the time of his own mortgage of January 1914, that the plaintiff had been guilty of fraudulent conduct in not disclosing his mortgage and therefore was not entitled to the priority and that as defendant 2 executed the mortgage to the plaintiff only as surety on behalf of defendant 1, the plaintiff should be directed to recover his amount in the first instance from the share of defendant 1 and his brother, the deceased Narayanasami.

Defendant 5 contended that he was ready and willing to pay off the suit mortgage but did not do so because the mortgagee, plaintiff's father, had died and as regards the liability of the properties inter se, contended that they should be held proportionately liable. Three issues were framed :

(1) Whether the plaintiff's mortgage was genuine and supported by consideration ?

(2) What marshalling rights, if any, defendants 4 and 6 to 9 were entitled to ?

(3) To what relief the plaintiff was entitled ?

On issue 1 the Munsif found that the plaintiff's mortgage was genuine and supported by consideration and on issues 2 and 3 that defendant 2 joined in the suit mortgage as surety for defendant 1 and that though it was clear that on a mortgage like that, the plaintiff could proceed against all or any of the mortgaged properties at his choice it was right as between the defendants themselves to append a direction that the plaintiff should in the first instance proceed against the properties sold by defendant 1 to defendant 5. Defendant 5 appealed and the only question before the Subordinate Judge was whether the direction appended by the District Munsif as to the order in which the property should be sold could be upheld. The learned Subordinate Judge held that the case was not governed by Ss. 81 and 82, T. P. Act, because defendants 4 and 5 relied upon sales in their favour and did not claim as mortgagees. But the learned Judge held that the Court could even in circumstances not justified by those sections make an order under O. 34, R. 4 regulating the order for the sale of the mortgaged property, and founding himself upon the fact that defendant 4 when he took his mortgage in January 1914 had no notice of the plaintiff's mortgage of December 1913 whereas defendant 5 when he took his sale deed in June 1921 had notice of the plaintiff's mortgage, made the same direction which the District Munsif had made. The present appeal is by defendant 5 against that direction.

A great many decisions have been cited during the argument to show that the direction appended by the lower Court to the decree cannot be sustained by Ss. 81, 82 or 56, T. P. Act. It is unnecessary to refer to those decisions because the sections themselves are clear. S. 56 applies only as between a purchaser of one of several properties previously mortgaged and the vendor. This is not that case. Section 81 applies as between mortgagees of the same debtor, the first of whom has got several securities and the second of whom has but some of those securities and advanced loan without notice of the earlier encumbrance. In such a case the later mortgagee is entitled to marshal the securities and to require that the earlier mortgagee shall first proceed against those securities which have not been encumbered in favour of the latter. This is not that case either, except to the extent which I will presently mention. It is this. From the facts stated defendants 1 and 2, who are shown to have been divided from each other prior to the mortgage sued upon, together mortgaged their properties, in which, of course, they must have had their several interests. One of them viz., defendant 2 subsequently mortgaged his interest in one of those items to defendant 4. Stopping there for a moment, it is clear that defendant 4 has no right to marshal the securities against the plaintiff in so far as the plaintiff is a mortgagee from defendant but he is entitled to marshal the securities of his own debtor viz., defendant 2 if in the mortgage to the plaintiff there are other properties than those which were mortgaged to defendant 4. At an early stage of the argument, I suggested that the direction contained in the decree might be right

to that extent. The appellant's advocate acceded to it and I think rightly. The respondent's advocate was not content with it; but so far at any rate as concerns defendant 2's property contained in the suit mortgage, if there be any other than those which were mortgaged to defendant 4, it is clear that defendant 4 to the extent to which he was a mortgagee was entitled to marshal them as against the plaintiff. To the extent of defendant 2's own property, the only complication on this topic is that defendant 4 is not the mortgagee himself but has become the purchaser. But there are decisions of which it is only necessary to cite *Ramaswami Chetty* v. *Madura Mill Co. Ltd.*, (1), and *Rajkeshwar Prasad Narain Singh* v. *Mahommad Khalilul Rahman* (2), to show that even where the mortgages have culminated in sales, the Court may on a consideration of equity extend to the purchaser the right to have the securities which are properly marshallable, first sold in execution. To the extent to which the direction in the decree only covers the properties of defendant 2, I do not think that the appeal deserves to succeed.

But defendant 5 is the purchaser from defendant 1 of his interest in the mortgaged property and the main question in this appeal has been whether the direction in the decree can be upheld as against defendant 5 and the properties of which he is the owner. On this point the learned advocate for the respondents has not been able to show me any instance in which a subsequent mortgagee has been allowed to require properties of any but his own debtor to be first sold either by way of marshalling under S. 81 or by way of the exercise of discretionary power to control execution sales under O. 34, R. 4. The other cases cited before me have been cases of either a second mortgagee or a purchaser, subsequent to a second mortgage, of some property from a man who had first mortgaged those and other properties to a third party and either by way of marshalling under S. 81 or by way of regulating sales under O. 34, R. 4, the Court has intervened to order that such other properties of the same debtor should be first proceeded against, whether such direction is contained in the decree itself or whether it should be made during execution. The respondent's learned advocate has asked me to say that there are special equities in this case which justify such an order as has been made against defendant 5 though he does not claim from the same debtor as defendant 4. It was urged that defendant 2 joined in the mortgage deed to the plaintiff only as surety for his co-mortgagor, defendant 1 and that a surety would be entitled to ask the principal debtor to pay off the debt in the first instance. The learned Judge has not even referred to the fact that defendant 2 was only a surety. Assuming that to be so, I am unable to see how such an obligation could be transferred to the owner of the property sold by the principal debtor so as to involve that property in the liability to be first sold for the debt. Even though the purchaser knew that the debt was one for which his vendor was primarily liable, we cannot have such a liability running with the land. It is purely personal; at any rate I have not heard of such a ground adopted as justifying a direction of the kind now given against defendant 5. Then it was said that the defendant 5's purchase itself was fraudulent and it was suggested that if I found any difficulty on that point on the record, the case may be sent down for a finding on it.

I am afraid I can find reason for neither. No one pleaded in the case that defendant 5's purchase was fraudulent. There was no issue upon it. No doubt the Munsif in trying to support his direction tries to distinguish between the recitals in Ex. 3, the sale deed to defendant 5 of 1921 and the mortgage deed to the plaintiff Ex. A of 1913 and says that the recitals in Ex. 3 appear to be fraudulent. All that need be said is that there was no issue and no contention on that point and the fact that certain discrepancies exist between recitals in two documents executed between different parties at a distance of eight years cannot ordinarily be said to be evidence of any fraud. The learned Judge has made no reference whatever to these observations in his judgment or in any way based it upon the character of the sale deed Ex. 3. It appears to me that the District Munsif not knowing on what grounds to support his conclu-

(1) [1916] 1 M. W. N. 265=34 I. C. 338.
(2) A. I. R. 1924 Pat. 459=3 Pat. 522.

sion was casting about for one and pitched upon a vague, and futile allegation of fraud which is supposed to cover all manner of legal insufficiency. There is no ground whatever to send the case back upon a point which never arose and on which the appellate Judge has made no observations whatever.

The result is that the direction in Cl. 4 of the lower appellate Court's decree will be deleted and the following substituted

"and that defendant 2's interests if any in the property comprised in the mortgage Ex. A other than the property sold to defendant 4 under Ex. 2, will be proceeded against in the first instance and then if necessary the properties sold to defendant 4 under Ex. 2. This direction to have effect only as between the plaintiff-decree-holder on the one hand and defendants 2 and 4 on the other."

The appellant who has substantially succeeded must have his costs here and in the lower appellate Court from defendant 4 who must bear his own in both the Courts.

This case having been ordered to be posted for being spoken to this day the Court made the following order :

* * *

The order as to costs will stand.

P.R.S./V.S. *Appeal allowed.*

A. I. R. 1930 Madras 181

KUMARASWAMI SASTRI AND WALSH, JJ.

Sri Rajah Bommavadevara Naganna Naidu Bahadur Zamindar Garu and *another*—Defendants—Appellants.

v.

Sri Rajah Bommadevara Satyanarayana Varaprasadarao Bahadur Zamindar Garu and *others*—Plaintiffs—Respondents.

Appeal No. 327 of 1924, Decided on 4th September 1929.

(a) Alluvion and dilluvion—Accretions—Rights to accretions by alluvion arise ex jure naturae wherever land abuts on river—Riparian owners.

Rights to accretions by alluvion arise, ex jure naturae, wherever land abuts on a river, whether the bed of the river be the property of the riparian owners as in the case of private rivers, or the property of the Crown as in the case of public rivers. *Case law discussed.* [P 183 C 1]

(b) Riparian owners—Demarcation of bank of river by survey shows the then limits of riparian owner's property but not its fixed limit for ever.

If land on the bank of a river which is gradually silting up is surveyed at any particular time, though this will of course show the then limits of the riparian owner's property, it does not mean that it is the demarcated and fixed limit of the river bank : *Attorney General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.*, (1915) A. C. 599, *Rel. on.* [P 181 C 1]

(c) Bengal Alluvion and Dilluvion Regulation (11 of 1825)—Applicability.

Regulation 11 of 1825 is not applicable in Madras : 36 *Mad.* 57, *Foll.* ; 41 *Mad.* 840, *Expl.* [P 183 C 1]

V. Ramadoss, *K. V. Reddi* and *P. V. Rangaram*—for Appellants.

K. Kutti Krishna Menon, *V. Suryanarayana* and *V. Govindaraja Chari*—for Respondents.

Walsh, J.—This appeal arises in the following circumstances : The plaintiff's father and the father of defendants 1 and 2 were brothers and owned the zemindari of Vallur. The plaintiff's father who was the junior brother brought a suit for partition in 1896 and obtained a decree against the father of defendants 1 and 2, Ex. QQ in O. S. No. 15 of 1896 dated 31st March 1902. In the division made at this partition South Vallur fell to the share of the plaintiff's father and North Vallur to that of the father of defendants 1 and 2. The river Kistna had been corroding its banks and the Government started conservancy operations in 1893. The conservancy operations resulted in a gradual accretion to the mainland on the Vallur side of about 704 acres. The father of defendants 1 and 2 claimed the accretions as his own as being the owner of the foreshore. He brought a suit in 1912. The Government opposed his claim on the ground that the river was navigable. The plaintiff's claim in that suit was allowed. The case is reported in *Secretary of State* v. *Venkatanarasimha Naidu* (1). The present plaintiff whose father had died was a minor at the date of this litigation and his estate was under the Court of Wards. There was no representation made by the Court of Wards during this litigation that he had any claim to any part of the accretions. The Government was ordered in that suit to pay about three lakhs mesne profits to the plaintiffs. On attaining his majority the present plaintiff has filed the present suit saying that 90 acres out of the 704 acres of accretion belonging to him were wrongly taken possession of by the father of the defendants. He bases his claim on an assertion that at the time of the division the eastern

(1) [1920] M. W. N. 209=11 M. L. W. 256=58 I. C. 689=27 M. L. T. 147.

portion of the river bed which adjoins North Vallur was assigned to his father and that as these 90 acres formed part of the river bed he is entitled to them. Two questions therefore arose in the suit, one of fact and one of law. The question of fact was whether the river bed was divided at the partition so as to award its eastern half to the plaintiff's father. The question of law is whether, assuming that the river bed belonged to his father, the accretion to the mainland would belong to the plaintiff or defendants. It is not denied that it is a gradual accretion and has been caused by the planting of nanuul grass during the river conservancy operations The lower Court has found that the river bed was divided in the manner alleged by the plaintiff and, on the question of law, that he is entitled to the accretion which then formed part of the river bed. It has therefore given a decree for recovery of possession of the suit land against defendants 1 and 2 subject to the provisions of the Rivers Conservancy Act. It has allowed the plaintiff mesne profits to be recovered from defendants 1 and 2 for faslis 1330, 1331 and 1332 ; but it has disallowed his claim for mesne profits as against defendant 3, the Secretary of State for India. Against this decree defendants 1 and 2 have preferred this appeal.

The initial difficulty which the plaintiff has to meet is that the decree on which his whole claim rests, for it is admittedly not based on his possession, is entirely silent as to the alleged division of the river bed contended for by him. (Here His Lordship dealt with the plaintiff's case of the division of the river bed and after considering the evidence on this question proceeded as follows) : Differing therefore from the view of the lower Court we hold that the plaintiff has failed to prove that the eastern portion of the river bed adjoining the North Vallur estate was granted to his father at the time of the partition ; and, if he fails to prove this, it must be held that the partition was made as contended for by the defendants, that each riparian or lanka owner enjoyed up to the middle portion of the stream adjoining his share or lanka. In view of this finding it is unnecessary to discuss at length the second question, whether, assuming that the plaintiff has proved that the river bed is his, he is entitled to the accretions claimed. But we would hold against him on this point also differing from the view of the law taken by the lower Court.

The principle that the riparian owner owns a half of the river bed ad medium filum aquae is of course not disputed. In *Venkata Lakshmi Narasimha* v. *Secretary of State* (2), which followed : *Micklathwait* v. *Newlay Bridge Co.* (3), it was laid down that as regards a grant of land in India described as bounded by a non-navigable river the onus of showing that the grant did not cover the bed ad medium filum acquae was on the grantor. That even where the owner of the river bed is different from the riparian owner, a gradual accretion to the shore will belong to the riparian owner and not to the owner of the river bed is laid down by the Privy Council in *Secretary of State* v. *Rajah of Vizianagaram* (4). There the accretion was in the Godavari river at a point where it was tidal and navigable and the bed was the property of the Government ; it was nevertheless held that the accretion belonged to the riparian owner. That case is really sufficient to settle the whole matter before us. But as the learned Subordinate Judge has taken a different view of the law and there had been some discussion on it before us the matter may be pursued a little further. In *Foster* v. *Wright* (5), it was held that the person who possessed fishery rights in a river was entitled to fish in that part of the river which had covered the riparian owner's lands by gradual encroachment. So also in *Re, Hull and Selby Railway* (6) it was held that, where there was a gradual encroachment by the sea upon the land, the land covered by the water belonged to the Crown. In *Hindson* v. *Ashby* (7) the view of Romer, J., that a strip of land formed by gradual accretion in a river belonged to the land owner and not to the person possessing fishery rights in the river was upheld. But on the

(2) [1918] 41 Mad. 840 = 35 M. L. J. 159=47 I. C. 606=(1918) M. W. N. 662.
(3) [1887] 33 Ch. D. 133=51 J. P. 132=55 L. T. 336.
(4) A. I. R. 1922 P. C. 105=45 Mad. 207=49 I. A. 67 (P.C.).
(5) [1885] 4 C. P. D. 438=49 L. J. C. P. 97=44 J. P. 7.
(6) 151 E. R. 139.
(7) [1896] 2 Ch. 1=65 L. J. Ch. 515=60 J. P. 484=45 W. R. 252=74 L. T. 327.

facts it was found not to be a case where the accretion was gradual : *Attorney General of Southern Vigeria* v. *John Holt and* Co. (*Liverpool*) *Ltd.* (8) is a case where the principles of gradual accertion do not apply ; but there are some remarks which bear on the present case and they will be quoted later. The learned Sub-Judge has referred in para. 38 to the Bengal Regulation 11 of 1825 ; but that has been held to be not applicable in Madras : vide *Surya Row Bahadur* v. *Secy. of State* (9), at p. 61. The present also is not a case of a small shallow river silting up gradually. Doss's Tagore Law Lectures on the law of Riparian Rights p.209 relied on by the learned Sub-Judge in the same paragraph is not applicable to the present case. The principles applicable to the present case will be found at p. 261 of the same book where the learned author states :

"Rights to accretions by alluvion.

"This right arises ex jure naturae, wherever land abuts on a river, whether the bed of the river be the property of the riparian owners as in the case of private rivers, or the property of the Crown as in the case of public rivers vide also his remarks at pp. 151 to 156.

The learned Sub-Judge admits that it was argued before him that the Bengal Regulation was not applicable to the Madras Presidency. But he draws an inference from the decision in *Venkata Lakshmi Narasimha* v. *Secy. of State* (2) referred to above that it logically follows upon that decision that in the special cases where the ownership of the bank and the ownership of the river bed adjoining it are in different persons, all accretions formed in the river bed must go to the owner of the river bed. That this does not follow has been decided by the Privy Council, in *Secy. of State* v. *Rajah of Vizianagaram* (4). There is really only one difficulty about the law on the point and that no doubt is a somewhat serious one, namely whether, when there has been a demarcation of the river bed, the results of the accretions formed go to the riparian owner of the river bed. The learned advocate for the respondents relies on 28 *Hals.* 362 and *Attorney General* v. *Chambers* (10). This latter case was mentioned in *Hindson* v. *Ashby* (7) by Lindley, L. J. who had also decided *Foster* v. *Wright* (5) as being apparently opposed to the decision in *Rex* v. *Lord Yarborough* (11), *Gifford* v. *Lord Yarborough* (12) and *In Re Hull and Selby Ry. Company* (13). What he say is :

"Whether, apart from the Statute of Limitations, the accretions, or the land left by the water can become the property of the plaintiffs or cease to be the property of the defendant is a question of considerable difficulty, and one which, in my view of the facts, it is not now necessary to decide. Passages were cited from Bracton, Britton, Fleta, and Hela de Jure Maris, c. i. and vi., and the year book, 22 Ass. fo. 106 pl. 94, to show that the doctrine of accretion does not apply where boundaries are well defined and known. This may be if the boundary on the waterside is a wall, or something so clear and visible that it is easy to see whether the accretions, as they become perceptible are on side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water except the water itself."

Then he quotes the cases which were opposed to the view and says :

"But it is unnecessary to dwell more on this question, and I leave it for reconsideration and decision when it shall arise."

A full discussion of the law on the point is found in Coulson and Forbes' Law of Waters, Edn. 4, pp. 82 and 91 and Hunt's Boundaries amd Fences, Edn. 6. pp. 35 to 48. There is no evidence at all in the present case that the boundary of the river was demarcated at any time. The learned advocate for the respondents sought to establish such a state of things from the following statement of D. W. 2 :

"There are survey stones between the metta lands and the plaint lands. There are only the big stones planted at a distance of one furlong each by the River Conservancy Department."

The witness admits that he never inspected the plaint lands subsequent to the suit to see whether there were any survey stones. But in any case there is no evidence at all that the Conservancy Department planted any stones to demarcate the boundary of the river. Then it is attempted to be argued that because the defendant's riparian lands were surveyed the western boundary of these lands must be taken to be the

(8) [1915] A. C. 599=84 L. J. P. C. 98=112 L.T. 955.
(9) [1913] 36 Mad. 57=12 I. C. 398=(1911) 2 M. W. N. 261.
(10) 45 E. R. 28.
(11) 3 B. & C. 91=2 Bligh (N.S.) 147=4 D. & R. 790=5 Bing 163=1 Dow & Clark 178.
(12) 3 B & C. 91=2 Bligh (N.S.) 147=4 D. & R. 790=5 Bing 163=1 Dow. & Clark 178.
(13) 5 M & W. 327=8 L. J. Ex. 260.

limits of the estate and also to be the eastern boundary of the river. Apart from the fact that it is not shown that defendants had any notice of such survey, this argument is clearly illusory because as remarked before if land on the bank of a river which is gradually silting up is surveyed at any particular time, though this will of course show the then limits of the riparian owner's property, it does not mean that it is the demarcated and fixed limit of the river bed, and in the present case it is not even clear from the evidence that survey stones were planted along this western boundary of the defendant's land. In *Attorney General of Southern Nigeria* v. *John Holt and Co. (Liverpool) Limited* at p. 612 it is observed :

"It need no longer be matter of doubt that the operation of the rule of adding to the ownership of riparian lands the property of soil ad mediam filum is not interfered with on account of a specific or scheduled measurement of the land a delineation or colouring on a plan which measurement, delineation or colouring does not in fact include any part of the bed of the river or of the street."

Hint's Law of Boundaries., Walls and Fences, Edn. 6, p. 48, deals with this question of a marked boundary where the author says :

"Finally, it is submitted that the true solution of this troublesome question of accretion is to be found in the question. Yes or nay, was the boundary according to the intendment of the parties interested in its delimination fixed by reference to a physical feature, subject to the incident of alteration through natural causes which is necessarily inherent in such a feature ; or was it fixed by reference to the position of that physical feature as it then subsisted."

Now, taking the plaintiff's case as he puts it, there cannot, we think, be the smallest doubt that if the proposal of the Special Deputy Collector, which the plaintiff says was carried into effect, was to give the river bed to the plaintiff's father irrespective of any fixed boundary of such river bed, there is not the smallest mention in any of his proposals of any fixed boundaries he proposed to give as those of the river bed. Even in the plaint this is clearly the attitude taken up. In para 5 the plaintiff states that at the time of the partition the Special Deputy Collector drew a line bisecting the Kistna paya between certain lankas in such a manner that the river portion on the eastern side thereof and the lankas therein might fall to the share of South Vallur (i. e., the plaintiff's estate). In para. 6 he says that in accordance with the aforesaid partition .the plaintiff's estate alone was entitled to the river portion on the eastern side and the lankas ; and he further states in that paragraph that all the accretions newly formed such as lankas etc., springing up in this plot passed only to the plaintiff's estate. It is not asserted in the plaint that the western limit of the defendants' metta lands was to be considered as the eastern boundary of the river. On the point of law, therefore, even assuming that the plaintiff's father was assigned the river bed east of the line drawn by the Special Deputy Collector the accretions will still belong to the defendants who are riparian owners and the suit must fail and the appeal must be allowed.

The memorandum of cross objections put in by the respondent must therefore also be dismissed. They relate to mesne profits paid by the Government to the defendants 1 and 2 as a result of the decree in the previous litigation. It becomes unnecessary to consider the question whether such money can be pursued by the plaintiff and recovered from the hands of defendants 1 and 2. But we may say as regards the alternative claim for its recovery from the Government that it is clearly untenable for the reasons stated by the learned Subordinate Judge in para. 47 of his judgment : vide also *Secy. of State* v. *Varaprasada*, *A. I. R.* 1929 *Mad.* 520. The appeal will therefore be allowed throughout with costs in both the Courts and the plaintiff's suit dismissed. The memorandum of cross objections is also dismissed with costs.

Kumaraswami Sastri, J.—I agree and have nothing to add as my learned brother has dealt fully with all the points raised.

P.R.S./V S. *Appeal allowed.*

* A. I. R. 1930 Madras 185

CURGENVEN, J.

Public Prosecutor, Madras—Petitioner.

v.

Vedi—Respondent.

Criminal Revn. Case No. 641 of 1929 and Criminal Revn. Petn. No. 584 of 1929, Decided on 10th September 1929, against order of Sess. Judge, Salem Division, D/- 12th March 1929.

*** Criminal P. C., S. 162—Before charge is framed copies of witnesses' statements to police should not be granted until stage of cross-examination is reached—If that stage is allowed to go, accused must wait for time of actual cross-examination after charge—Evidence Act, S. 145.**

So far as proceedings before charge are concerned, copies of witnesses' statements made to the police should not be granted until the stage of cross examination is reached. If that stage is allowed to go by without application being made, an accused must wait until the witness is again about to be subjected to cross-examination before he can claim grant of a copy. Under S. 145, Evidence Act, until the occasion arises for putting the statement to the witness it cannot legally be used for any purpose whatsoever. It should not therefore be placed in the accused's hands until that stage in the trial has been reached when he may so use it: *A. I. R*, 1926 *Mad.* 183; *A. I. R.* 1929 *Cal.* 182 and *A.I.R.* 1923 *Bom.* 23; *Ref., A.I.R.* 1927 *Cal.* 514, *Doubted.* [P 185 C 2, P 186 C 1]

K. N. Ganpathi for *Public Prosecutor*—for the Crown.

Order.—The Revision Petition is presented by the Public Prosecutor against an order passed by the Sessions Judge of Salem in the following circumstances: In C. C. No. 103 of 1928 on the file of the Sub-Divisional Magistrate of Hosur, certain of the prosecution witnesses had been examined and cross-examined. Application was then made on behalf of the accused under S. 162, Criminal P. C., for copies of the statements which these witnesses had made to the police. The learned Sub-Divisional Magistrate refused the request on the ground that the proper occasion for making it had gone by. The learned Sessions Judge, however, pointed out that the accused would have a right of further cross-examination after the framing of a charge, and in view of this circumstance ruled that copies should be given.

The point not dealt with by the learned Sessions Judge, but raised here, is whether an accused person can apply for, and be granted, such copies (where not already applied for and granted) at any time before the cross-examination after charge takes place, or whether he must wait until at least the witness is in the box and the cross-examination due to begin. Mr. Ganapathi for the learned Public Prosecutor contends that this latter condition must be satisfied.

So far as appears—and I have not had the advantage of hearing the other side—this precise point has not been dealt with in any reported case. In *Peramaswami Rayudu, in re* (1) Krishnan and Wallace, JJ. held that, since the purpose of furnishing the copy is to contradict the witness, the witness must already have made a statement which lays him open to contradiction. Accordingly, application can only be made, and a copy granted when the witness is under cross-examination. This however, only lays down the procedure so far as the first cross-examination is concerned. The question was answered in very much the same way by a Calcutta Bench in *Madari Sikdar* v. *Emperor* (2). The learned Judges say not only that the witness must be under cross-examination but that

> "the cross-examination must lay the foundation for the suggestion that the evidence given by the witness in Court is contradicted by his statement recorded under S. 161, Criminal P. C. and it is only then that the accused is entitled to ask the Judge to refer to the writing and grant him copies."

I find it not a little difficult to understand how a cross-examining counsel can found a suggestion of contradiction between two statements one of which he has not seen; and this part of the decision has been criticized by Rankin, C. J. in a later case (*Babarali Sardar* v. *Emperor*, *A. I. R.* 1929. *Cal.* 182). That case left it open whether the proper time to apply was when the witness appears in the box or when the cross-examination commences. In *Emperor* v. *Usman* (3), the later stage was deemed to be the appropriate one, having regard to the terms of S. 145, Evidence Act.

Accepting then, that so far as proceedings before charge are concerned, copies should not be granted until the stage of

(1) A. I. R. 1923 Mad. 183.
(2) A. I. R. 1927 Cal. 514=54 Cal. 307.
(3) A. I. R. 1928 Bom. 23=52 Bom. 195.

cross-examination is reached, I am inclined to the view that if that stage is allowed to go by without application being made, an accused must wait until the witness is again about to be subjected to cross-examination before he can claim grant of a copy. For, in the first place, until the witness so appears there is no certainty that he will be available for cross-examination, and therefore no certainty that the statement can be used for the only purpose for which the accused may possess it. But further, if the law requires that grant of the copy for use in the original cross-examination should be contingent upon that cross-examination being due to begin, the same principle would seem to apply to cross-examination after charge. Under. S. 145, Evidence Act, if it is intended to contradict a witness by a writing :

" his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. "

Until the occasion arises for putting the statement to the witness it cannot legally be used for any purpose whatsoever; and I see no reason why it should be placed in the accused's hands until that stage in the trial has been reached when he may so use it.

Whether adherence to this rule would give rise to inconvenience in practice is scarcely a relevant consideration if it is the correct rule. Equal inconvenience, if any, would attach to the application of the rule to the earlier cross-examination as to the later. Upon a request for a copy being made, the Court must necessarily afford the accused a reasonable opportunity for obtaining it before he is deprived of the opportunity to cross-examine upon it. But with a little contrivance that ought not to result in serious delay.

I allow the Criminal Revision Petition, set aside the orders of the Sessions Judge and the Sub-Divisional Magistrate and direct the Sub-Divisional Magistrate to proceed in accordance with the above observations.

P.R.S./V.S. *Orders set aside.*

A. I. R. 1930 Madras 186

JACKSON, J.

(*Annai*) *Errappa* and *others*—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. Cases Nos. 643 to 646 of 1929, and Cases Referred Nos. 31 to 34 of 1929, Decided on 4th October 1922 by Sess. Judge, Chittoor Division, D/- 6th August 1929.

(a) Criminal P. C., S. 361—Sub Ss. (1) and (2) are not mutually exclusive—Translation of English evidence must also be made.

An accused person is often in a much better position than his pleader to follow the drift of the evidence and it is obvious that he ought to be kept informed of what is being said. Where therefore certain witnesses at the original trial give evidance in English, translation of such evidence should be made, for the first two paragraphs of S. 361 are not mutually exclusive : *A. I. R.* 1928, *Cal.* 27, *Diss. from.* [P 186 C 2]

(b) Criminal P. C., S. 537—S. 537 is wide enough to cover any irregularity and retrial should not be ordered unless there is failure of justice.

Section 537 may be taken to cover any irregularity in the widest sence of that term, provided there has been no failure of justice The appellate Court ought not to order a retrial in a case where provisions of S. 361 are overlooked without satisfying itself whether or no a failure of justice has been occasioned : *A. I. R.* 1927 *P. C.* 44, *Rel. on.* 25 *Mad.* 61, (*P. C.*) *Disc.* [P 187 C 1]

Public Prosecutor—for the Crown.

Order.—This is a reference from the learned Sessions Judge of Chittoor. In four appeals the Joint Magistrate of Chandragiri has ordered a retrial of the appellant because certain witneseses at the original trial gave evidence in English and their evidence was not translated to the appellant as required by S. 361, Civil P. C.

The Sub-Divisional Magistrate in my opinion was right in holding that the code lays down that such translation should be made and with all respect I do not agree with the ruling in *Hari Narayan Chandra* v. *Emperor* (1) that paras. 1 and 2, S. 361 are mutually exclusive. An accused person is often in a much better position than his pleader to follow the drift of the evidence and it is obvious that the ought to be kept informed of what is being said. But the Sub-Divisional Magistrate misdirects himself when he observes that the irregularity cannot be cured under S. 537,

(1) A. I. R. 1928 Cal. 27

Criminal P. C. No doubt after *Subramania Ayyar* v. *Emperor* (2) an idea prevaild that S. 537, Criminal P. C., did not apply to the mandatory provisions of the code, although there is nothing in the section itself to give it such a restricted shape. But the ruling in *Abdul Rahman* v *Emperor* (3) has dispelled that idea, and S. 537 may be taken to cover any irregularity in the widest sense of that term, provided there has been no failure of justice. The Sub-Divisional Magistrate ought not to have ordered retrial in those cases without satisfying himself whether or no a failure of justice had been occasioned.

With these observations his order in all four cases is set aside, and he is directed to rehear the appeals.

P.R.S./V.S. *Order set aside.*

(2) [1902] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P.C.)

(3) A. I. R. 1927 P. C. 44=5 Rang. 53=54 I. A. 96 (P.C.).

A. I. R. 1930 Madras 187

WALLER AND CORNISH, JJ.

T. M. A. Nathan — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 181 of 1929 and Criminal Revn. Petn. No. 184 of 1929, Decided on 6th September 1929, from judgment of Bench Magistrates, Otacamund. D/- 18th October 1928, in Summary Trial No. 610 of 1928.

(a) Criminal P. C., Ss. 265 and 367—Judgment and record must in all cases be signed by all members present—Words "presiding officer of Court" do not show that judgment may be signed only by chairman of Bench as they are compendious description of all classes of judicial officers—All members signing register containing sentence and thus agreeing in judgment—But judgment signed only by Chairman—Omission to sign by all is mere irregularity.

The intention of S. 265 is that by whomsoever the judgment and record may have been written, they shall be signed by all the members present. The words "presiding officer of the Court" do not afford any assistance in the construction of S. 265 and do not show that the judgment may be signed only by the Chairman of the Benches; they are no more than a compendious description of all classes of judicial officers, Magistrates and Judges who have to pronounce judgments. But the failure to comply with a mandatory provision of the Code is not necessarily an illegality and thus where all the members of the Bench sign the register, in which the sentences are embodied, and thus agree in the judgment, their omission to comply with the technical requirements of the law in the fact that the judgment is signed only by the chairman is a mere irregularity which occasions no failure of justice: *A. I. R.* 1928 *Mad.* 1172, *Doubted.* [P 187 C 2, P 188 C 1]

(b) Criminal P. C., S. 526 (8)—Rejection of application made under S. 526 (8) for adjournment on ground that it is made after trial was begun is contrary to S. 526 (8) and vitiates whole proceedings.

Where the accused in the course of a trial applies for an adjournment for the purpose of moving the High Court for transfer and the Court rejects the application on the ground that it had been made after the trial had begun, such rejection is contrary to the terms of S. 526 (8) and vitiates the whole proceedings. [P 188 C 1]

V. L. Ethiraj—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner has been convicted by a Bench of Magistrates. He comes up in revision on the ground that the judgment convicting him is illegal as it has been signed only by the Chairman of the Bench. We think that that is a perfectly good ground of objection. S. 265, Criminal P. C., is divided into three subsections. The first provides that records and judgments shall be written by the presiding officer in English or in the language of the Court or in his mother tongue. The second prescribes that, if authorised by the Local Government, a Bench may employ a clerk to prepare the record or judgment, which shall be signed by each member of the Bench present and taking part in the proceedings. The third directs that, if no such authority has been given, the record which presumably includes the judgment shall be prepared by a member of the Bench and signed "as aforesaid" and shall then be "the proper record." The first subsection says nothing about signing the record or judgment, but deals merely with the language in which they shall be written. The intention, we think, is that by whomsoever the judgment and record may have been written they shall be signed by all the members present. We have been referred to a decision contra by Devadoss, J., in *Rama Kottia* v. *Subba Rao* (1), which is based on the wording of S. 367, Criminal P. C. With great respect we do not consider that that section affords any assistance in the construction of S. 265. The words "presid-

(1) A. I. R. 1928 Mad. 1172.

ing officer of the Court" are no more than a compendious discription of all classes of judicial officers, Magistrates and Judges, who have to pronounce judgments.

The Public Prosecutor invites our attention to S. 537, Criminal P. C. and argues that the omission should be treated as an irregularity which has occasioned no miscarriage of justice. It has been held that the failure to comply with a mandatory provision of the Code is not necessarily an illegality. In this case all the members of the Bench signed the register in which the sentence was embodied. They obviously agreed in the judgment and we do not think that their omission to comply with the technical requirement of the law as to the signing of it was anything more than an irregularity, which occasioned no failure of justice.

There is, however, a further and fatal objection. It is founded on that disastrous provision of law, sub-S. (8), S. 526, Criminal P. C., which is absolutely imperative in its terms. The petitioner in the course of the trial, applied for an adjournment for the purpose of moving the High Court for a transfer but the Bench rejected the application on the ground that it had been made after the trial had begun. That was, of course, no ground at all. Such an aplication can be made in the course of a trial and must, unfortunately, be granted. To refuse it, contrary to the terms of the section, is to deny the applicant an absolute right conferred on him by the statute and vitiates the whole proceedings. We set aside the conviction, but, as the case arises out of a family dispute, do not order a retrial.

P.R.S./P.N. *Conviction set aside.*

A. I. R. 1930 Madras 188

CURGENVEN, J.

N. Venkadu and *others*— Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 123 of 1929 and Criminal Revn. Petn. No. 105 of 1929, Decided on 12th September 1929, from judgment of Sub-Divl. Magistrate, Ellore, in Criminal Appeal No. 47 of 1928.

Criminal P. C., S. 537—Failure to define accurately common object with which unlawful assembly acts, is curable under S. 537.

It is not a general proposition of law that a conviction under S. 147, I. P. C., cannot be supported wherever the common object, as stated in the charge, is not precisely made out. Failure to define expressly and accurately the common object with which an unlawful assembly acts is an error, omission or irrigularity as may be cured by S. 537 : 36 *Cal.* 865 and 37 *Cal.* 340, *Rel. on.*; 6 *M. L. J.* 17 ; 27 *Cal.* 990 and 33 *Cal.* 295, *Ref.* [P 189 C 1]

G. Lakshmanna and *G. Chandrasekhara Sastri*—for Petitioners.

A. Narasimha Ayyar for *Public Prosecutor*—for the Crown.

Order.—The six petitioners have presented this petition against their convictions under Ss. 147 and 328, I. P. C., and sentences of two months' rigorous imprisonment and a fine each of Rs. 25. The ground taken is with reference to the terms of the charges and a certain finding of fact of the learned Sub-Divisional Magistrate in appeal. The charge alleges that the petitioners :

" Were members of an unlawful assembly and in prosecution of the common object of such assembly, viz., in wreaking vengeance for the social dishonour done to you at the social functions of the day, proceeded to the house of P. W. 1 at Kovvali, arming yourselves with sticks, challenged P. W. 1 to come out, committed the offence of rioting and caused injuries on three of the prosecution witnesses."

The Stationary Sub-Magistrate found that the evidence established the various components of the charge, including the fact of social dishonour caused to the petitioners on the day previous to the occurrence. It appears that a woman had died and a dinner and other ceremonies were to take place. There was some unpleasantness over the invitation of the accused to this dinner and when, after the dinner a ceremony called " Suddulu " was performed they were not accorded due honours. The Sub-Divisional Magistrate, adverting to the circumstance that this affair of the " Suddulu " is not mentioned in the earlier reports, considers that it may have been a later development. He goes on to add that the evidence established ill feeling between the parties and that petty incidents due to it had taken place before the occurrence, among these incidents being the unpleasantness over the invitation to the dinner. It is at least doubtful, therefore, whether he does not find established

some part of what the charge described as social dishonour done at the functions of the day.

The error that was clearly committed in drafting the charge was to insert as the common object of the accused what was in fact nothing other than a motive. Accordingly, the phrase :

" In wreaking vengeance for the social dishonour done to you at the social functions of the day "

may be regarded as pure surplusage and in deciding what should have been the essential components of the charge may be omitted from consideration. We are left, therefore, with the allegation that the accused formed an unlawful assembly, went to the house with sticks, committed rioting and caused injuries to three witnesses. It is no doubt true that, as so revised, the charge does not explicitly recite a common object, which should properly have been to beat or injure these persons. The question is whether it was, therefore, so defective as to require that the accused should now be acquitted. Mr. Lakshmanna for the petitioners, has showed me several decisions principally originating from the Calcutta High Court and one : *In re., Loganathaiyar* (1) (at p. 40) from Madras, the substance of them being that, where the common object recited in the charge is different from the common object found a charge of rioting cannot be sustained and the accused person should be acquitted : see for instance *Rahimuddi* v. *Asgar Ali* (2) and *Paresh Nath Sircar* v. *Emperor* (3). In the latter case, which was decided by three Judges ; Rampini, J., who wrote a dissenting judgment, was of opinion that the provisions of S. 537 cured the defect inasmuch as the accused could not have been in any way prejudiced. In a later Calcutta case *Silajit Mahto* v. *Emperor* (4) it was recognized that :

" It is not a general proposition of law that a conviction under S. 147, I. P. C., cannot be supported wherever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge."

The same principle was given expression to in *Babbon Sheikh* v. *Emperor* (5). I have been referred to no authority for the view that failure to define expressly and accurately the common object with which an unlawful assembly acts is not such an error, omission or irregularity as may be cured by S. 537, Criminal P. C. I think, accordingly, that I should only be justified here in interfering in revision if it appears that the accused were prejudiced by the manner in which the charge was drafted. I am unable to discover any ground for this view. It must have been quite clear that the case they had to meet was, as set out in the charge, that, as an unlawful assembly, they went into the house and injured the inmates, and I think it was equally clear that the common object imputed to them was that which they put into effect. I see, therefore, no sufficient reason to revise the convictions and I dismiss the revision petition.

P.R.S./V.S. *Petiton dismissed.*

(1) [1909] 6 M. L. T. 17=4 I. C. 700=11 Cr. L. J. 30.
(2) [1900] 27 Cal. 990=5 C. W. N. 31.
(3) [1906] 33 Cal. 295=2 C. L. J. 516.
(4) [1909] 36 Cal. 865=4 I. C. 19=13 C.W.N. 801.
(5) [1910] 37 Cal. 340=11 C. L. J. 335=5 I. C. 365=14 C. W. N. 422.

A. I. R. 1930 Madras 189

JACKSON, J.

V. M. Rathnavelu Mudaliar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 429 of 1929 and Criminal Revn. Petn. No. 388 of 1929, Decided on 18th October 1929. from order of the Sess. Judge, North Arcot, in Criminal Appeal No. 19 of 1929.

Criminal P. C., S. 423—Prosecution broken in every respect—Appellate Court cannot send case for retrial—Appellate Court orders retrial for supplying formal defects.

The appellate Court can no doubt order a retrial under S. 423, Criminal P. C., but hardly where the prosecution has hopelessly broken down in every respect, so as to enable the prosecutor to substantiate some new charge against the accused, or to produce evidence which might easily have been produced at the first trial. It is rather for supplying formal defects that an appellate Court orders retrial: 42 *Mad.* 885, *Rel. on.* [P 190 C 1]

K.S.Jayarama Ayyar—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner was tried under S. 15, Act 8 of 1899. It is a summons case but a charge was framed that petitioner had either sold 31 cans of dangerous petroleum to an unlicensed person, or had transported the same cans

through that person without a pass, and therefore, he had committed an offence under S. 15 (c) of the Act.

The offence under S. 15 (c) is breaking any condition contained in a license under the Act. The lower Court found the accused guilty under S. 15 (c) of having sold 31 cans to an unlicensed person, which must mean that selling to an unlicensed person contravenes some condition of his license. The license was never proved, and, assuming that that could be a remediable omission, this Court has been unable to discover from the rules what condition in what license would have been contravened.

The prosecution, therefore, entirely failed to make out its case in the Court of trial.

The learned Sessions Judge came to the same conclusion, observing quite correctly that upon the essential points of the case there is neither evidence nor finding, and he could not uphold the conviction. He considered, however, that the proper course was to order a retrial. Here it must be found that the learned Judge exceeded his proper function. In certain circumstances he can no doubt order a retrial under S. 423, Criminal P. C., but hardly where the prosecution has hopelessly broken down in every respect, so as to enable the prosecutor to substantiate some new charge against the accused or to produce evidence which might easily have been produced at the first trial. It is rather for supplying formal defects that an appellate Court orders retrial: see *Varadarajulu Naidu* v. *Emperor* (1). The petition is allowed and the petitioner acquitted. The fine will be refunded if that has not been done. [Ed. The case adds nothing to 42 *Mad.* 885.]

P.R.S./V.S. *Petition allowed.*

(1) [1919] 42 Mad. 885=37 M. L. J. 81=51 I. C. 343=(1919) M. W. N. 669.

A. I. R. 1930 Madras 190

JACKSON, J.

Krishna Pannadi—Prisoner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 391 of 1929, and Criminal Revn. Petn. No. 354 of 1929, Decided on 16th October 1929 against judgment of Sess. Judge, Coimbatore Division, D/- 18th March 1929.

Criminal Trial — Counter cases should be tried by one Judge and judgment should be pronounced when both cases are finished.

Cases and counter cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished. [P 190 C 2]

K. S. Jayarama Ayyar for *M. Krishna Bharathi* - for Petitioner.

The Public Prosecutor—for the Crown.

Order.—The petitioner has been sentenced to one year's rigorous imprisonment for stabbing a man in the neck with a spear, and six months rigorous imprisonment concurrently for hurting a man in S. C. No. 158 of 1928, Coimbatore. In S. C. No. 157 of 1928, he was the complainant, with the plea that certain of the prosecution witnesses in S. C. No. 158 had set upon him.

There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy.

It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished.

This precludes the danger of an accused being convicted before his whole case is before the Court, and also prevents there being conflicting judgments upon similar facts. But at the same time the rule involves obvious difficulty. It seems to infringe the fundamental principle that the Court must not import any facts into a case which are not to be found upon the record. To take an illustration, suppose in the first of the cases the accused succeeds in showing that the prosecution has failed to prove its charge, and then in the second case the same accused as complainant goes into the witness box and breaks down in cross-examination so as to convince the Court that the truth lies with the other side. Can the Court be expected to dismiss this circumstance from its mind, and if it does not do so, what legal justifction is there for importing it into the case already heard ?

The only way in which such a procedure can be justified is by setting up a fiction that the case and the counter case are really one; and this fiction should be made a reality by statute. If a Court were empowered to link cases, as they link files in a secretariat there would also be the incidental advantage of a great saving of time. At present in

each case the evidence of every witness must be fully recorded, and what P.W. 1 says for the prosecution in one case must all be written out again when he repeats it as D.W. 1 in the other case.

But whether there be a statutory enactment or not the point remains that for practical purposes a case and its counter are one, and it is this that makes these general observations particularly germane to the present case.

Because the lower Courts have entirely ignored this principle, the learned Assistant Sessions Judge, when the two cases were referred to him, changed their order for some reason which the record does not divulge, and proceeded to try 158 before 157. Then when 158 was concluded he wrote his judgment upon it and the Public Prosecutor had no other course open to him than to withdraw 157 which that judgment had irrevocably discredited.

The learned Sessions Judge on appeal finds that this procedure did not prejudice the accused:

"There was no restriction regarding the manner in which he might defend himself. There was nothing to prevent him from examining in his defence all his own prosecution witnesses."

That no doubt is true; but on the other hand there was nothing to compel him to do so; and when he expected all these prosecution witnesses to be examined in his own case, he was probably well advised not to subject them to an earlier cross-examination. Was the accused ever warned that if the Judge was against him on the first case, the second would be dropped? Presumably not, and if he was not warned, it can never be said that he was not prejudiced.

There was, as the learned Judge observes, no actual illegality in taking up the case first and disposing of it before the other was heard, but it offends against the accepted practice.

He adds:

"the public prosecutor having requested that this case might be tried first, the Assistant Sessions Judge was well within his rights in acceding."

The Assistant Sessions Judge should certainly have left a note explaining on what the request was based, and why he acceeded. In its absence there arises a suspicion that the Public Prosecutor suggested that he would succeed in 158 and then it would not be necessary to try 157, and if so, the suggestion was scarcely proper.

As the accused was not given the opportunity which he expected would be given him of examining all his evidence, there must be a retrial.

There is one point upon which this Court offers no opinion, but which should be borne in mind. If it is found that the accused was going on duty (apparently the sentence was enhanced on some such consideration) what was he doing with a spear? The finding and sentence are cancelled and petitioner is ordered to be retried by the District Magistrate or any Magistrate subordinate to him having jurisdiction and no previous connexion with the case. He may remain on bail till the case is concluded.

P.R.S./V.B. *Retrial ordered.*

A. I. R. 1930 Madras 191

REILLY, J.

Balasundaram - Accused—Petitioner.

Criminal Revn. No. 292 of 1929 and Criminal Revn. Petn. No. 260 of 1929, Decided on 3rd April 1929, against order of Third Presy. Magistrate, Egmore.

Criminal P. C., S. 173—Form of charge sheet—Legality considered.

Section 173 does not require to be entered in charge sheet abstract of evidence given by each of the witnesses and the charge sheet prescribed by G. O. No. 3487 Law (General) dated 16th October 1928 and published in the Fort St. George Gazette dated 23rd October 1928 can be legally prescribed under S. 173 although it requires less details to be given than the form previously prescribed and is not illegal.

[P 191 C 2, P 192 C 1]

T. S. Venkataraman—for Petitioners.

Order.—The information given in the charge sheet in this case is not very full; but I cannot say that it does not comply with the provisions of S. 173, Criminal P. C. The contention that that section requires that an abstract of the evidence to be given by each of the witnesses mentioned should be entered in the report of charge sheet appears to me unsound. Nor is there in my opinion anything in the suggestion that this form of charge sheet, prescribed by G. O. No. 3,487 Law (General), dated 16th October 1928, and published in the Fort St. George Gazette dated 23rd October 1928, could not legally be prescribed under S. 173, Criminal P. C., because it

requires less details to be given than were required in the form previously prescribed. This petition is dismissed.

P.R.S./V.B. *Petition dismissed.*

A. I. R. 1930 Madras 192

JACKSON, J.

(*Pidugu*) *Mattayya*—Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 288 of 1929 and Criminal Revn. Petn. No. 256 of 1929, Decided on 18th November 1929, against judgment of Sess. Judge, Guntur Division

(a) Criminal P. C., S. 476—Any Court seised of transferred case can complain.

If a case is transferred it is not only the Court which originally received the forged document can complain under S. 476. It is a continuing offence and any Court seised of the case can complain. [P 192 C 1]

(b) Criminal P. C., S. 476—Forging document—Document filed—Presumption is that it was one given to pleader.

In a prosecution under S. 476 for filing a forged document, there is a fair presumption that the document filed was the one given to pleader. [P 192 C 2]

V. L. Ethiraj and *N. Somasundaram*—for Petitioner.

The Public Prosecutor—for the Crown.

Judgment.—Petitioner has been sentenced to three years' rigorous imprisonment by the Assistant Sessions Judge, Guntur, under Ss. 471 and 467, I. P. C. for filing a forged receipt in a suit on a promissory note in which he was defendant.

Two points are taken in revision. Firstly, that if a case is transferred only the Court which originally received the forged document can complain under S. 476 Criminal P. C. It is a continuing offence and any Court seised of the case can complain.

Secondly, that the learned Sessions Judge misdirected himself when he observed that the burden of proof did not lie upon the prosecution to prove that the receipt filed by the pleader was the receipt given to the pleader by the accused. The observation is not happily worded because the burden is on the prosecution to make out its case. It might have been said rather, that there is a fair presumption that the document given to a pleader is the document filed, and the accused should offer some rebuttal. I do not find that the learned Judge failed to regard the case from this aspect, or that the petitioner has been prejudiced. That ends the matter so far as revision is concerned, but there has been discussion of the merits, and I may add that on the merits I agree with the lower Courts.

The petitioner's defence is that a forged receipt was substituted for a genuine receipt by his enemies. He has done little to show that there was a genuine receipt. In the suit he cited no evidence to prove it, and gave up his plea of discharge when the plaintiff took an oath. He never summoned the attestator who might corroborate the writer.

His enemies are not likely to have elaborated a plot merely to defeat his plea of discharge to the amount of Rs. 150 and the chances of getting him prosecuted for perjury were remote. If the suit had come on for trial, and he had at once said that the receipt was not the receipt he gave his vakil, the Court would not have prosecuted him. And anyone who had taken the trouble to arrange this trap, would nave taken care to spring it in the suit itself. If the suit were settled without reference to the document there was great risk of the Court declining to move in the matter of a document which had not really affected the issue.

If the plaintiff himself was in the plot he certainly would not have taken an oath instead of putting the petitioner to the proof of his alleged discharge. And if the petitioner genuinely believed that he held the plaintiff's thumb-marked receipt he would never have consented to abide by an oath and lose his money. As for the futility of the fabrication, people for whom litigation is a tissue of falsehood lose all sense of truth and cannot distinguish between a good and a bad lie; just as some are colour blind they became truth blind. The petition is dismissed.

P.R.S./V.B. *Petition dismissed.*

A. I. R. 1930 Madras 193

WALLER AND CORNISH, JJ.

Subba Goundan—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 212 of 1929 and Criminal Revn. Petn. No. 184 of 1929, Decided on 9th August 1929, against order of Joint Magistrate, Tirupattur, in Criminal Appeal No. 13 of 1929.

Criminal P. C., S. 423 (b)—Sentence by appellate Court—Alteration of sentence of three months' rigorous imprisonment to one month and fine of Rs. 60 and in default two months does not amount to enhancement.

The accused was convicted and sentenced to undergo three months' rigorous imprisonment. He appealed and his conviction was affirmed but the sentence was altered into one of one months' rigorous imprisonment and a fine of Rs. 60 with a further two months' rigorous imprisonment in default of payment.

Held : that the appellate Court in effect reduced the sentence, the proper test being whether the accused really considers the fine as heavier sentence than imprisonment : 23 *Bom.* 439, *Rel. on* ; *A.I.R.* 1924 *Pat.* 563 ; 23 *All.* 497 and 36 *All.* 485, *Dist.* [P 193 C 2, P 194 C 1]

A. C. Sampath Ayyangar—for Petitioner.

K. N. Ganpathi—for the Crown.

Waller, J.—The petitioner was convicted and sentenced to undergo three months' rigorous imprisonment. He appealed and his conviction was affirmed, but the sentence was altered into one of one month's rigorous imprisonment and a fine of Rs. 60, with a further two months' rigorous imprisonment in default of payment. He asks us in revision to say that the sentence passed on him by the appellate court is illegal as amounting to an enhancement. He has the support of several decisions, for example, *Bhola Singh* v. *Emperor* (1) which followed *King Emperor* v. *Sagwa* (2). The ratio decidendi in these cases was this—that, in the event of the fine not being paid, the prisoner would serve a sentence equivalent to that passed by the trial Court, and still be liable to have the fine collected from him. The same view was taken in *Emperor* v. *Mehar Chand* (3). With great respect, it seems to us that the proviso to S. 386 (1) (b), Criminal P. C. takes much of the force out of this line of reasoning. The legislature recognized that no sane man, who had money or credit at his disposal, would go to jail, if he could avoid it by paying a fine. It, therefore, provided that, if the whole of a sentence of imprisonment imposed in default of payment of a fine had been served, no warrant should issue against the defaulter's property "unless for special reasons to be recorded in writing the Court considers it necessary to do so." In practice, no Court would, we imagine, try or levy execution, unless there was property to attach and, as we have pointed out above, it is almost inconceivable that a man would go to jail, if he had means to pay the fine. It is, consequently, in the highest degree improbable that the contingency which influenced the High Courts of Allahabad and Patna would ever arise. A contrary view was taken in *Queen Empress* v. *Chagan Jagannath* (4), which followed an unreported decision of this Court.

It cannot be denied, indeed, Mr. Sampath Ayyangar, admits that, in this case, the appellate Court, in effect, reduced the sentence. The petitioner had only to pay his fine in order to escape from two months' in jail. We find it very difficult to say that a sentence which, if submitted to, had not been enhanced, but reduced, must be held to have been enhanced merely because the prisoner has refused to submit to it. He has an option in the matter. If he does not choose to exercise that option in his own favour, is he to be heard to say :

" you must still further reduce my already reduced sentence, because, if I am contumacious, I shall not only have to serve a sentence equal to my unreduced sentence, but will also be liable to have my property attached to pay the fine I have refused to pay."

It is, of course, impossible to decide the question academically or to lay down a principle applicable to all cases. In this particular instance, the petitioner does not appear to say that he is unable to pay the fine or would prefer to suffer the sentence passed on him by the trial Court. Judging by the energy with and the expense at which he has conducted the proceedings, we feel no doubt but that he could pay the fine without any difficulty. We are satisfied that, if he were before us and we offered him the option of paying Rs. 60

(1 A. I. R. 1924 Pat. 563=3 Pat. 638.
(2) [1901] 23 All. 497=(1901) A. W. N. 176.
(3) [1914] 36 All. 485=24 I. C. 607=12 A. L. J. 827.
(4) [1899] 23 Bom. 439.

or going to jail for two months, he would choose the former alternative without hesitation. There is therefore no reality in his argument that, academically speaking, his sentence has been enhanced. The same test was applied by Piggot, J., in *Emperor* v. *Mehr Chand* (3) above cited. We think that the proper test is whether the petitioner really considers a fine of Rs. 60 a heavier sentence than two months' rigorous imprisonment. That he does consider it to be so, he has not attempted to allege. His contention is that his sentence would be perfectly legal, if we reduced the default term of imprisonment by one day that is, if his already reduced sentence were still further reduced. We consider it absurd and dismiss his petition.

P.R.S./V.S. *Petition dismissed.*

A. I. R. 1930 Madras 194

CURGENVEN, J.

M. Kanniappan—Petitioner.

v.

Kullammal—Respondent.

Criminal Revn. No. 48 of 1929, and Criminal Revn. Petn. No. 38 of 1929, Decided on 30th July 1929, against order of Third Presidency Magistrate, Egmore, Madras, D/- 27th November 1928.

(a) Evidence Act, S. 112 — Divorce not legally taking place—Child is born during continuance of valid marriage.

Where divorce in the sense of a legal dissolution of the marriage, has not taken place, a child born must be taken to be born during the continuance of a valid marriage between a woman and her husband. [P 194 C 2]

(b) Evidence Act, S. 157—Entry in vaccination register regarding father's name of illegitimate child made three years after child's birth is inadmissible in evidence—Evidence Act S. 35.

Where an entry in the vaccination register, which includes a statement by a woman that a person, bearing the name of the alleged father of her illegitimate child, was the father of the illegitimate child, is made three years after its birth, the entry does not satisfy the terms of S. 157, and is not admissible in evidence.

[P 194 C 2]

Quaery.—It is doubtful whether such a statement is rendered admissible by S. 35. [P 195 C 1]

(c) Evidence—Appreciation of.

The lower Court is the proper and, in general, the final Judge of the credibility of evidence.

[P 195 C 1]

M. A. T. Coelho—for Petitioner.

V. Rajagopalachari—for the Crown.

B. R. Krishnaswami Iyengar — for Respondent.

Order.—This is a Revision Petition against an order of the Third Presidency Magistrate granting the petitioner maintenance allowance at the rate of Rs. 5 per mensem in respect of her younger child. The question in issue is whether the counter petitioner has been shown to be the father of that child.

The first point taken is that the learned Presidency Magistrate has overlooked the provisions of S. 112, Evidence Act. He appears to find that petitioner's husband divorced her, but he does not explain what meaning he attaches to that term, and using it in the sense of a legal dissolution of the marriage it is clear that no divorce has taken place. I must take it therefore that, in the language of S. 112, the child was born "during the continuance of a valid marriage" between the petitioner and her husband. It has then to be shown, for the petitioner to succeed, that the parties to that marriage "had no access to each other at any time when he (the child) could have been begotten." On the date when petitioner gave evidence (5th October 1928) she gave the age of the child as four years, and stated that the counter petitioner had been keeping her for fourteen years. Her husband was employed in Bangalore, but some years before the child was born she came to Madras and lived with her father. Evidence which the lower Court has accepted shows that when the elder son three years senior to the younger was born petitioner's husband severed relations with her, on the ground that he was not the father even of that child; and certainly for some long while before the younger was born he had been living in Bangalore and his wife had been living in Madras. I think it may fairly be inferred, from this circumstance and from the relations shown to have been existing between petitioner and her husband, that he had no access to her at the time the younger child was begotten.

On the specific issue of the counter petitioner's paternity, the learned Presidency Magistrate has admitted certain evidence which is in my view inadmissible. The entry Ex. A in the vaccination register, which includes a statement by petitioner that a person bearing counter petitioner's name was the father of the child, was made three years after its birth and does not therefore satisfy

the terms of S. 157, Evidence Act. I doubt whether such a statement is rendered admissible by S. 35. So too, the activities of P. W. 6, the caste headman, in trying to prevent counter petitioner's marriage do not constitute admissible evidence, though the objection does not apply to the evidence of P. W. 3, that the counter petitioner sought his help to pay money to the petitioner to dissuade her from creating trouble over the marriage.

Excluding what is inadmissible, it appears to me that there is quite enough evidence on the record to show beyond reasonable doubt that counter petitioner is father of the child. What that evidence is will be found detailed in the lower Court's order. That Court is the proper and, in general, the final Judge of its credibility, but I may add that I see no reason to differ from the view which it takes. The Criminal Revision Petition is dismissed.

P.R.S./V.S. *Petition dismissed.*

A. I. R. 1930 Madras 195

CURGENVEN, J.

M. Lakshumanayya and *others*—Petitioners.

v.

S. Rajam Ayyar and *others*—Respondents.

Civil Revn. Petns. Nos. 1612, 1613 and 1704 of 1928 and 4 of 1929, Decided on 1st October 1929.

(a) Madras District Municipalities Act—Election—Miscount alleged by petitioner—Court satisfied of existence of reasonable ground for petitioner's belief—Court has jurisdiction to grant recount—Election.

Where a miscount is alleged by the petitioner and his application is supported by a verified petition, and the Court is satisfied that there is a reasonable ground for the petitioner's belief that there has been a miscount, the Court has jurisdiction to grant a recount: *The Stepney Case*, 4 *O'M. & H.* 34 and (1927) *M. W. N.* 842 (*F. B.*), *Ref.* [P 196 C 2]

(b) Civil P. C., S. 35 — No relief asked against party — Costs cannot be granted against such party.

Where no right to relief is alleged to exist against a person, he is not a proper party, and an order making him liable for costs cannot be supported: 61 *I. C.* 315 and *A. I. R.* 1928 *Mad.* 1129, *Rel. on.* [P 197 C 2]

K. S. Krishnaswamy Iyengar and *N. Srinavasa Iyengar*—for Petitioners.

M. S. Venkatarama Iyer, *S. Ranganathan* and *P. C. Parthasarathi*—for Respondents.

Judgment.—These petitions arise out of an election held on 27th August 1928, to fill three vacancies in the 3rd Ward of the Wallajah Municipality. The election was conducted by the Chairman and the result, so far as it concernes us, stood as follows:

		Votes.	
1.	T. K. Ratnavelu Chetti ...	170	Elected.
2.	M. Lakshmana Iyer ...	127	,,
3.	K. S. Mallappa Chettiar ...	123	,,
4.	S. Rajam Iyyar ...	116	,,
5.	P. Venkataswami Naidu ...	109	,,

Accordingly 1, 2 and 3 were declared elected. An election petition (O. P. 11 of 28) was then filed by S. Rajam Ayyar (No. 4) in the Subordinate Judge's Court, Vellore, alleging that the Chairman had shown undue partiality, that he had counted votes in favour of the successful candidates which ought to have been rejected, that he employed an inadequate staff, that the results were announced without checking or verification, and that if there had been subsequent check the petitioner and other candidates who had failed would have been elected. This petition was filed on 3rd September, and on 24th October, before the hearing had commenced, the petitioner applied for a recount (I. A. No. 699 of 28). This was granted, and the recount was carried out by a Commissioner with the following result:

		Votes.	
1.	T. K. Ratnavelu Chetti ...	160	Elected.
2.	S. Rajam Iyyar ...	124	,,
3.	P. Venkataswami Naidu ...	123	,,
4.	M. Lakshmana Iyer ...	120	,,
5.	K. S. Mallappa Chettiar ...	116	,,

It will be seen that 4 and 5 in the prior list have displaced Nos. 2 and 3. The two candidates who were now defeated, M. Lakshmana Iyer and K. S. Mallappa Chettiar, thereupon applied (I. A. No. 752 of 28) for a scrutiny of the ballot papers, with a view to ascertain in whether they had been tampered with, but this was disallowed by the lower Court.

In arguing the main revision petition the contentions are raised that the learned Sub-Judge ordered the recount in circumstances not sufficient to give him jurisdiction, and that he was in error in not directing the further scrutiny asked for. On the first point it is urged, more specifically, that a Court before ordering a recount must have evidence before it that the original Court was or may have been incorrect. Mr. K. S.

Krishnaswami Iyengar, has recourse to English law in support of this position. In the *Stepney case* (4 *O' M. & H.* 34) the questions which arose were as to the stage in the proceedings at which a recount could be applied for and ordered, which does not now concern us and whether or not it could be claimed as a right. Denman, J. in delivering judgment, referring to an interlocutory conversation during the course of the hearing, says:

"We decided against the contention that the respondent was entitled to a recount as a matter of right, but offered to hear any evidence tending to show there there had been a mistake on the part of the returning officer. We heard witnesses on both sides upon the point, and were satisfied, I may say mainly upon the evidence of one of the witnesses called by the petitioner, that there were strong grounds for thinking that the return could not be strictly relied upon. We therefore determined upon directing a recount . . . . . ."

This case forms the sole cited authority for the exposition of the law on this point in Halsbury (Vol 12, para. 891).

"A recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of the returning officer the Court will make on order for a recount."

In Rogers on Elections, 19th Edition, Vol. 2, p. 301, it is stated that:

"The practice now is to order a recount before the trial where there is reason to believe there has been a miscount. Application for it should be made by summons supported by affidavits showing grounds.

The form of order for recount (No. 35 at p. 933) of the same Volume) contemplates the order being passed "upon hearing counsel for the petitioner and respondent and upon reading the affidavits of, etc."

Thus although in the *Stepney case* oral evidence was taken, it is enough to support the application by affidavit.

Let us now see what preceded grant of the application in the present case, I have already summarized the allegations which petitioner made in his main petition. I will now quote the following verbatim extracts from it:

"The Chairman deputed only one clerk to mark the votes secured by all the candidates when he ought to have employed more than one clerk . . . . . There was no subsequent check or verification of the votes marked by the clerk. The results were announced without checking or verification. If there had been subsequent check petitioner and other candidates who failed in the election would have been elected."

In his affidavit in support of his application for a recount he says:

"I have stated in my petition that the Chairman showed undue partiality and counted many votes in favour of the successful candidates which ought to have bsen rejected . . . . . I believe that if the votes were counted properly, I would have been elected."

In the counter affidavit it was objected that the petitioner was not entitled to the relief prayed for before he had satisfied the Court of the irregularities complained of. The learned Subordinate Judge in the course of his order, after quoting the passage in Rogers which I have given says:

"A misconduct is alleged by the petitioner and this application is aupported by a verified petition. I am therefore satisfied that there is a reasonable ground for the petitioner's belief that there has been a miscount."

Reading together the affidavit with the original petition, we find what that reasonable ground is, and if the Court considered the ground for the petitioner's belief to be reasonable, it must have felt, I presume, that there was room to doubt the correctness of the Court. It is not for me, dealing with this case in revision, to weigh the grounds upon which the Court acted. I have only to see that action was not marked by lack of jurisdiction or by material irregularity, in its exercise. It is quite clear that the learned Subordinate Judge was under no misconception as to what at any rate the English Law was, and applied his mind to the question whether or not a recount should be granted. It need hardly be said that from the nature of the case, proof that the count at the election was wrong cannot be given before the recount takes place. Usually nothing more can be alleged than cause to suspect the original count. An overstrict insistence that an application should be supported by evidence of miscounting is therefore unwarrantable. I consider accordingly that there was a sufficient compliance with the English procedure applying to this matter. Nor, looking purely to Indian Law, do I discover any irregularity. R. 6, Election Dispute Rules for District Municipalities renders the procedure laid down by the Civil P. C., applicable; and under O. 19, R. 2 of the Code evidence may be given by affidavit upon any application. From this point of view, the lower Court was dealing with the equivalent of an interlocutory application in a suit, and so far as I can see no

question of jurisdiction is raised by the manner in which it dealt with it.

It is then said that having allowed the recount the learned Sub-Judge should have ordered the further scrutiny asked for. Into the merits of the case for this, and of the order dismissing the application, it is not permissible for a revising Court to enter: see the Full Bench case *M. Appayya Gounder* v. *Dawood Sahib* (1). I can only say therefore that the order appears to have been passed with jurisdiction and so is final.

One of the results of the recount was, as has been seen, to provide P. Venkataswami Naidu with a seat. This man was a party (respondent 7) to the petition, and under R. 12 (2) (a) it was competent to the Court to declare him duly elected. It is pointed out that he put in an application (I. A. No. 806 of 1928) to which he made only the three originally successful candidates parties, and it is urged that it is bad for non-joinder of the remainder. I doubt whether any such application was in fact necessary; but a sufficient answer is that the objection comes from two of those who were made parties.

C. R. Ps. Nos. 1612, 1613 and 1704 of 1928 are accordingly dismissed with costs to respondents in C. R. P. 1704.

There remains C. R. P. 4 of 1929, preferred by the Chairman. He had been made a party to the original petition, and in declaring the petitioner and respondent 7 in those proceedings duly elected the lower Court ordered that the Chairman should pay their costs. The learned Subordinate Judge found justification for this course in the carelessness evinced by the Chairman in counting the votes. The propriety of this order is open to the gravest doubt, because the question of the Chairman's personal culpability was not in issue and not tried. It is quite possible, for all that the enquiry shows, that he was the victim of misconduct on the part of others. These, however, it may be said, are not grounds for interference in revision; and I turn to a more fundamental objection to this part of the order. The Chairman, it is contended, was not a proper party to the petition; and the Court should have struck his name out. It is no doubt true that in England a returning officer may be impleaded as a respondent (Hals. 12, 821 and Rogers, Vol. 2, 266). But there is ground to hold that this is not the law in India. Under R. 12, Municipal Council may appoint a legal practitioner or other person to attend and take such part in the inquiry as the Judge may allow. That does not of course in terms preclude a petitioner from making the Chairman a party, but it does suggest that the framers of the rules did not contemplate that he should do so. There is a statement in a report on a petition decided by the Election Commissioners of the Punjab *Govardhan Das* v. *Lal Chand* (2). that there is no provision in the Indian as there is in the English Law for the returning officer being made a respondent, and that, so far as it goes, appears to be correct. In *Ramakrishna Reddi* v. *Nooney Panakalu* (*A. I. R.* 1928 *Mad.* 1129), it was held by Jackson, J., that a Chairman is not a proper party to an election petition and that the Court ought to have struck out his name. The point has not been so put in the arguments, but I conceive that, by force of R. 6, the Court must guide itself by the terms of O. 1, R. 3, Civil P. C., and here no right to relief was alleged to exist against the Chairman, so that he was not a proper party. On this view the order making him liable for costs cannot be supported and I set it aside, petitioner will recover his costs of this petition from respondents.

P.R.S./V.S. *Order accordingly.*

(1) [1925] 1927 M. W. N. 842 (F.P.).

(2) [1920] 61 I. C. 315.

A. I. R. 1930 Madras 197

WALLACE, J.

(*Munaluri*) *Narayanamoorthi* and *another*—Plaintiffs—Appellants.

(*Dwadasi*) *Vumamaheswaram* and *others*—Defendants—Respondents.

Second Appeal No. 212 of 1926, Decided on 27th September 1929, from decree of Sub-Judge, Masulipatam, in Appeal Suit No. 89 of 1925.

(a) Practice — New Plea — Attempts to raise in second appeal points which are not in pleadings are not permitted.

Attempts to raise in second appeal points which are not even in the pleadings and which the other side has never been called upon to meet are not to be lightly permitted in second appeal : *A. I. R.* 1929 *P. C.* 158 : *Rel. on.* [P 198 C 2]

(b) Negotiable Instruments Act, S. 9 — Promissory note not in actual possession of person—He cannot release it to third person so as to make him holder in due course.

Where in a partition a promissory-note is simply allotted to a person but which note never comes into his possession, and the note is payable to a third person and not to bearer, the former person cannot be a holder in due course; that being so, he cannot make his assignees by a release deed holders in due course. [P 199 C 1]

(c) Negotiable Instruments Act, Ss. 9 and 36—Payee, endorsee or bearer only can sue on promissory-note.

No one can sue on a negotiable instrument as holder unless he is named therein as the payee or unless he becomes entitled to it as endorsee or bearer: 30 *Mad.* 88 (*F. B.*), *Rel. on.* [P 199 C 1]

V. Govindarajachari—for Appellants.

Ch. Raghava Rao—for Respondents.

Judgment.—This second appeal is against the decision of the lower appellate Court in the matter of a promissory note claim. The promissory note dated 9th June 1920 was executed by defendant 1 in favour of plaintiff 1 on behalf of the joint family of which he was the manager. In a partition suit decree, this promissory note was allotted to the share of one Balkrishnayya although the promissory note appears to have remained with plaintiff 1. On 14th September 1922, Balkrishnayya executed a release deed relinquishing his rights in the suit note in favour of both the plaintiffs. Both the plaintiffs filed this suit to recover the full amount due upon the note. The defence pleaded was a discharge to Balakrishnayya partly by cash and partly by execution of another promissory note. The trial Court held that the payment pleaded by the defendants was true but that it was not binding on the plaintiffs. The lower appellate Court agreed in holding that the payment was true but held further that the plaintiffs had no title to sue, not being holders in due course. It therefore dismissed the suit and the plaintiffs appeal.

The first contention urged by them is that as the promissory note is in the name of plaintiff 1 and has not been endorsed by him to any one else, he is the holder and entitled to recover from the defendants. This to my mind is entirely a new case set up here for the first time. It may be a good case or a bad case, but the defendants have never been given an opportunity of meeting it. It is argued that this is a pure question of law but clearly that is not so. I cannot speculate as to what would have been the defendants' defence if plaintiff 1 alone had sued upon the note. Attempts to raise in second appeal points which are not even in the pleadings and which the other side has never been called upon to meet are not to be lightly permitted in second appeal. The Privy Council has lately condemned such a practice:

"It appears to their Lordships to be highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court." *James R. R. Skinner* v. *Nannihal Singh* (1).

That this present contention is a new case is clear from a perusal of the pleadings and the judgment of the lower Courts. There is no hint in the plaint that plaintiff 1 has any cause of action apart from that of plaintiff 2. The manner in which the plaintiffs became "absolute hukdars" of the promissory note is stated in paragraph 6 to be the release deed. The only prayer in the plaint is to pay the suit amount to both the plaintiffs. There is no issue whatever on this present point and the frame of the only issue shows that it was never raised. The only issue is:

"whether the discharge set up by the defendants is true and binding on the plaintiffs."

If there had been any case that plaintiff 1 alone was entitled to sue as holder the plea of discharge to some one else who never was holder was irrelevant and could not have arisen. A perusal of the judgments of both Courts shows also that the present contention was never raised there, and neither Court has given any finding which can remotely be related to such a contention. I therefore refuse to allow this contention to be raised at this stage.

We are then concerned with the joint rights of both plaintiffs to sue on the footing of the release deed. Plaintiff 1's rights in this matter are no more than plaintiff 2's. So it will be convenient to ask what rights plaintiff 2 now has to sue upon the promissory note. His right is derivable, if

(1) A. I. R. 1929 P. C. 158=51 All. 367=56 I. A. 192 (P. C.).

anywhere, from the release deed which canveyed to him the right which Balakrishnayya had in the promissory note. What right had Balakrishnayya? The note was not endorsed to him, so that he is not a holder by endorsements. Is he otherwise a holder in due course? It must be held that he clearly was not. A holder in due course must have come into possession of the note if payable to bearer or be an endorsee or payee if payable to the payee. Balakrishnayya never came into possession of the note and in any case the note is payable to plaintiff 1 and not to bearer, and the note was never endorsed to him. He cannot therefore be a holder in due course. That being so, he cannot make his assignees by a release deed holders in due course. The lower appellate Court is therefore quite correct in deciding that the plaintiffs are not holders in due course.

Nor are they joint holders. Plaintiff 2's name does not appear upon the promissory note. No one can sue on a negotiable instrument as holder unless he is named therein as the payee or unless he becomes entitled to it as endorsee or bearer: see *Subba Narayan Vathiyar* v. *Ramaswami Ayyar* (2) which is a binding authority on me.

The only right that plaintiff 2 and therefore plaintiff 1 can have is any right which he may have acquired from Balakrishnayya by the assignment itself. That a party can acquire such rights in a negotiable instrument has been held by this Court in several reported cases, the ratio decidendi being that such an assignment is an assignment of a chose in action. No doubt there has been some difference of opinion in this Court as to whether a suit lies on a promissory note by a party as an assignee of a chose in action: early cases, *Pattal Ambadi Marhar* v. *Krishna* (3) *Abhoy Chetti* v. *Ramachandra Rao* (4) *Arunachala Reddi* v. *Reddy Subba* (5), and *Ulagappa Chetty* v. *Ramnathan Chetty* (6) saying that he cannot sue, later cases *Muhammad Kumarali* v. *Ranga Rao* (7), *Muthar Sahib* v. *Kadir Sahib* (8), and *Venkatadri* v. *Lakshminarasimha* (9) and *Kutalingum Pillai* v. *Pakiyam Fernandez* (10) saying that he can sue, subject to the condition that he takes over the equities to which his assignor was subject. *Subramanian Chetty* v. *Alagappa Chetty* (11), *Sowcar Lodd Govindoss* v. *Munappa Naidu* (12) and *Ramnathan Chetty* v. *Katha Velan* (13), lay down that a negotiable instrument may pass by operation of law without endorsement. The plaintiffs ask me in consequence of this difference of opinion to refer the present appeal to a Full Bench, but clearly that is not necessary for a decision of this case since on neither view can the plaintiffs succeed in their claim. If they cannot sue on the assignment as assignees, they cannot sue at all, since they are not suing as holders, nor was their assignor, Balakrishnayya, from whom they derived their rights as holders. The plaintiffs therefore must sue as assignees of a chose in action or be non-suited and it is only if I follow the cases which rule that they can that the plaintiffs have any case.

Such an assignment only tranfers to the assignee such rights as the assignor had at the time and not the full rights of a holder or of a holder in due course. If the plaintiffs are to be given any relief as assignees of a chose in action, they can only take what Balakrishnnayya had to give, namely the right to recover the unpaid balance of the promissory note amount. But again the question arises if they can be given that relief in this suit, and I do not see how that can be done. Both the lower Courts have found on the facts that the suit promissory note has been fully discharged by part payment and by the execution of a fresh promissory note, and in the lower appellate Court the present appellants did not seriously dispute that. Therefore the promissory note on which they now take their

(2) [1907] 30 Mad. 88=16 M. L. J. 508 (F. B.).
(3) [1888] 11 Mad. 290.
(4) [1894] 17 Mad. 461.
(5) [1907] 17 M. L. J. 393.
(6) [1916] 3 M. L. W. 171=32 I. C. 821.
(7) [1901] 24 Mad. 654.
(8) [1905] 28 Mad. 544=15 M. L. J. 384.
(9) [1910] 21 M. L. J. 80=8 I. C. 33=(1910) M. W. N. 824.
(10) [1910] 21 M. L. J. 422=8 I. C. 17 (1910) M. W. N. 733.
(11) [1907] 30 Mad. 441=17 M. L. J. 414.
(12) [1908] 31 Mad. 534=4 M. L. T. 341.
(13) [1918] 41 Mad. 353=33 M. L. J. 627=6 M. L. W. 753=42 I. C. 934=(1917) M. W. N. 843.

stand has been discharged and is no longer in force. It is not a case where a mere part payment has been made and the balance is still owing on the note itself. It is a case where the note sued upon is dead in law and therefore cannot be a source of any legal rights. Any relief on the footing of the balance still due on the original note can only be granted either by having the fresh note in favour of Balakrishnayya cancelled or by having it endorsed to the plaintiffs. But Balakrishnayya is not a party to this suit, so that neither course is open to me here. I may observe also that this present claim was never raised before the lower appellate Court and has not been raised in the grounds of appeal here.

The appeal must therefore fail in toto and is dismissed with costs.

P.R.S./V.S. *Appeal dismissed*

A. I. R. 1930 Madras 200

WALLER AND PANDALAI, JJ.

Gulam Muhammad Ali—Appellant.

v.

Corporation of Madras—Respondent.

Case Referred No. 3 of 1928, Decided on 19th March 1929, by Chief Judge, Court of Small Causes, Madras, for decision of High Court.

(a) Madras City Municipal Act (4 of 1919), S. 111—S. 111 makes liable persons in active pursuits only—Liability ceases on retirement.

Intention of S. 111 s that any person engaged in active pursuit of a profession, art, trade or calling or holding any appointment, is liable to pay profession tax if the income he enjoys therefrom brings him within any of the clauses specified in the schedule. If and when he retires he ceases to be liable. [P 201 C 1]

(b) Madras City Municipal Act (4 of 1919), S. 111, Expln. 2—"Pension" covers also political pensions.

The word pension is used generally and without any qualifications and must be held to cover political pensions as well as pensions in the ordinary sense and consequently a periodical payment made by the State for the support of title conferred by it comes within the definition of "pension." [P 201 C 2]

(c) Madras City Municipality Act (4 of 1919), S. 113—Tax becomes due on assessment.

Profession tax cannot be said to be due till the proper authority has assessed the same by the name of assessee being placed in the proper class. [P 202 C 2]

(d) Madras City Municipal Act (4 of 1919), S. 113—Assessment must be made during period and period of limitation begins to run from date of assessment.

Assessment of taxes payable by each individual is a contemporaneous operation within the period of taxation (year or half year) and the power of assessment conferred by R. 8, Taxation rules, to be properly exercised must be exercised within the half year to which the assessment relates and not retrospectively for several periods together and period of limitation for any suit for such tax begins to run from such date of assessment. [P 204 C 1, 2]

(e) Interpretation of Statutes— Words of enactment clear and imperative—No considerations of inconvenience or hardship can arise—But in absence of express indication consideration of hardship and inconvenience arises—Statutes imposing pecuniary burden must be strictly construed and in case of doubt must be construed in favour of the subject—The principle of strict construction is less applicable in case of public representative bodies for public purpose.

When the words of enactments are clear and imperative, considerations of inconvenience or hardship have no place in its application to circumstances falling within the words. But where there is no express indication in an enactment as to whether the powers given by it were meant to be used in particular circumstances, the fact that great hardship and inconvenience would result thereby is a reason for so construing the words as to meet all attempts to abuse the power, either by exercising them in cases not intended by the statute, or by refusing to exercise them when the occasion for their exercise has arisen. Then again statutes which impose pecuniary burdens are subject to the rule of strict construction and in a case of reasonable doubt the construction most beneficial to the subject is to be adopted, though the principle of strict construction is less applicable where powers are conferred on public representative bodies for essentially public purposes. [P 205 C 2]

T. Rangachariar and *M. Subbaroya Ayyar*—for Appellant.

S. Rangaswami Iyengar—for Respondent.

Judgment.—The questions referred to us under R. 17, Taxation Rules, Madras City Municipal Act of 1919, are three in number :

(1) Whether the payments made by the Government to the Prince of Arcot are in the nature of pension and he is therefore a person in receipt of a pension within the meaning of Expl. 2 to S. 111, City Municipal Act, 1919?

(2) Does the liability of any person to pay profession tax for any half year arise immediately on the expiry of the sixty days mentioned in S. 113, or does it arise only upon his being assessed by the Commissioner for that half year under R. 8, Taxation Rules and served with notice of such assessment?

(3) Is the assessment to profession tax of the Prince of Arcot under R. 8, Taxation Rules and S. 113, City Municipal Act, made on

15th September 1926, invalid for the ten half years commencing from the second half year of 1920-21 ?

The first question is whether the periodical payments made by the Government to the Prince of Arcot are equivalent to receipt by him of a "pension" within the meaning of explanation 2 to S. 111, Madras City Municipal Act. The material part of that section runs as follows :

" Every person not liable for the companies' tax, who, within the City and for the period prescribed in S. 113, exercises a profession, art, trade, or calling or holds any appointment, public or private, bringing him within one or more of the classes of persons specified in the Taxation Rules in Sch. 4 shall pay by way of license fee, and in addition to any other license fee that may be leviable under this Act, a tax as determined under the said Rules."

The intention of the sections seems clear enough. Any person engaged in the active pursuit of a profession, art, trade or calling or holding any appointment, is liable to pay profession tax, if the income he enjoys therefrom brings him within any of the clauses specified in the schedule. If and when he retires he ceases to be liable. So far, however, as the holders of appointments are concerned, Expln. 2 provides that a person in receipt of a pension paid from any source shall be deemed to be person holding an appointment within the meaning of the section. In other words, persons who have once held appointments are deemed to hold them for ever, while retired merchants, bankers, doctors and lawyers living on their invested funds seem to escape. S. 93, District Municipalities Act, draws all classes in and makes, as it should, a distinction between holding an appointment and enjoying a pension. The learned Chief Judge has gone at length into the history of the negotiations between the Government and the Nawab of the Carnatic, which culminated in the agreement of 1867 by which the allowance now in question was fixed. It is not necessary for us to do more than to refer to Ex. D the final letter of the Chief Secretary to the Government of Madras, recording the agreement. The allowance is therein described as "settled on the title," "for the support of the title," "attached to the title." Mr. Rangachariar relies on these expressions as showing that the allowance is no more than an apparage to the title and is not a pension properly so called. Periodical payments made by the State for the support of a title conferred by it certainly come within the definition of "pension." One of the definitions of the word in the Oxford Dictionary is :

" a regular payment to persons of rank . . . . . to enable them to maintain their state."

That definition covers the present case exactly. From another point of view, it is equally clear that the allowance is a pension. The consideration for it was the surrender by the Prince of certain rights. Webster's Distionary gives, as one of the definitions of "pension." :

" a stated allowance or stipend made in consideration . . . . . of the surrender of rights."

Several decisions have been cited before us, wherein it was held that certain allowances paid by Government were political pensions. We think it unnecessary to refer to them. It seems to us perfectly clear that the allowance in question is a political pension. Mr. Rangachariar contends that the word "pension" in exception 2 should be limited to allowances drawn by retired holders of appointments in consideration of past services. The word is not defined in the Act, but we see no reason so to limit its application. It is used generally and without any qualification and must be held to cover political pensions, as well as pensions in the ordinary sense. The first question is answered in the affirmative.

The 2nd and 3rd questions referred may be disposed of together. They raise the question whether the assessment of the appellant made on 15th September 1926, for ten half years commencing from the second half year of 1920-21 and purporting to be made under R. 8, Taxation Rules and S. 113, City Municipal Act, was valid.

The appellant was on 15th September 1926 (i. e.,) within the 1st half year of 1926-27, assessed to profession tax for that half year and 11 previous half years or 6 years in all. The reference relates only to the first ten half years of the above period apparently because the appellant did not question the opinion of the learned Chief Judge of the Small Causes Court who heard this matter that it was competent to the respondent to assess the appellant for the half year in which the assessment took place and for

one previous half year, or a period of a year in all. It is not disputed that the respondent was authorised, if the appellant was otherwise liable to profession tax, to assess him for the half year in which the assessment was made.

The dispute was about the eleven previous half years and though the reference expressly relates to the first 10 of those half years, if the opinion of this Court in the matter referred affects the assessment for the eleventh half year which has been left out from the reference, it is competent to this Court under R. 18, Taxation Rules, to pass such order as it thinks fit.

The argument for the respondent Corporation is firstly that profession tax becomes due and owing as soon as the minimum period of 60 days required by S. 113 has expired even without anything done on the part of the Corporation to assess it and inform the assessee of the amount payable and secondly that even if the tax becomes due and owing only after assessment and intimation of the same to the assessee, it is open to the Corporation to assess a person to the tax at any future time within six years after the expiration of the half year for which the assessment is made.

We think that these contentions cannot be upheld. In the first place the profession tax becomes due and owing not merely by the exercise of the profession, art, trade or calling, during the period required by S. 113, but by the assessment to the tax based upon such exercise. Reliance is placed on the words in that section that :

"if the tax due in respect of the half year is not paid, the Commissioner shall cause a notice to be served on such person."

But this section must be read with other provisions of the Act. By S. 138 the rules and tables embodied in Sch. 4, shall be read as part of Chap. 5 in which the sections relating to profession tax and other taxes occur. By S. 111, profession tax is imposed upon persons who fall :

"within one or more of the classes of persons specified in the Taxation Rules in Sch. 4,"

and the amount payable is "a tax as determined under the said rules." R. 8, Sch. 4, provides that persons shall be assessed by the Commissioner to the profession tax under one of the 9 classes therein specified on a scale to be determined within certain limits by the Corporation from time to time. By R. 9 the Commissioner is authorized in the case of persons not drawing a fixed salary to determine the class in which a persons falls on certain general considerations but without calling for accounts from the assessee. Rule 12 gives an assessee to profession tax who is dissatisfied with the assessment by the Commissioner the right to apply to him for revision, provided the application is delivered to the Municipal Office within 15 days from the date of the service of the notice under S. 113. This indicates clearly that the tax said to be "due" in S. 113, is that to which the assessee has been first assessed under the powers conferred by R. 8. It also shows that the notice under S. 113 is the initial and essential step in the process of final determination of the tax according to the provisions for revision of the assessment; for until that notice is served and for 15 days thereafter the right of claiming revision is preserved. That notice has another importance because under R. 22, the tax demanded may be distrained, for if it is unpaid for 15 days and the omission is not satisfactorily explained. R. 14 provides that if the assessee is dissatisfied with the orders of the Commissioner on an application for revision, the application must be heard and decided by the Standing Committee and that a copy of the Committee's decision should be sent to the applicant within two days thereof. R. 15 then confers on the assessee a right of appeal to the Small Cause Court provided notice of appeal is given to the Corporation in 10 days and the appeal itself is presented in 14 days from the date of the decision of Standing Committee and the applicant has paid in the case of a tax leviable by half yearly instalments (profession tax is such a tax) the half yearly instalment due under the order appealed against. From the above provisions it is clear that the tax is not due till the Commission has assessed the person liable and that even then it is only provisionally fixed for. It is liable to revision in the manner mentioned above.

A reference to the corresponding provision of the Acts 1 of 1884 and 3 of 1904 shows that the machinery of assessment and revision which was provided for in those Acts in the body of the Act is in the present Act of 1919 relegated

to Sch. 4. The comparison is instructive as showing that the classification or assessment by the Commissioner is as essential now as it was under the former Acts. A bird's eye view of the comparative provisions of the two earlier Acts will be found in *Veeraraghavulu* v. *President, Corporation oi Madras* (1), at p. 131. Under S. 101, of the Act of 1884 corresponding to S. 118 of the Act of 1900 the President was required to keep lists of persons liable to pay profession tax and other taxes. In S. 4 of the present Act, R. 1 requires the Commissioner to prepare and maintain property tax registers. S. 103 of the Act of 1884 corresponding to S. 120 of the Act of 1904 made persons exercising a profession or holding an appointment in the City liable to pay profession tax. S. 111 of the present Act corresponds to this. S. 104 of the Act of 1884 corresponding to S. 121 of the Act of 1904 empowered the President to determine in which of the scheduled classes any person was to be placed and to revise such classification from time to time. Now R. 8, Sch. 4, empowers the Commissioner to assess persons to profession tax under one of the nine scheduled classes and R. 14 empowers him to revise the classification.

Section 106 of the Act of 1884 corresponding to S. 125 empowered the President in case the tax due on assessment or revision was unpaid, to send a notice that in case the tax was unpaid for 15 days after service of the notice the defaulter will be prosecuted and those sections empowered such prosecution. S. 107 of the Act of 1884 corresponding to S. 420 of the Act of 1904 empowered the Magistrate to impose a penalty of twice the amount of the tax. In the present Act prosecution for non-payment of profession tax has been done away with but the notice mentioned in S. 113 corresponds to the notice mentioned above and the present notice has two objects. It enables the assessee if he so desires to apply in 15 days to get the assessment revised and the Corporation, in case the tax remains unpaid for 15 days without good cause to distrain on the defaulter's goods. It follows that neither under the old Acts nor under the present can the profession tax be said to be 'due' till the proper authority has assessed the same by the name of the assessee being placed in the proper class. Under S. 370 (a) of the present Act such act of classification or assessment should be evidenced by a writing signed by the Commissioner or by some Municipal Official delegated by him in writing under S. 16 and it is noteworthy that under this last section the power of revision given to the Commissioner by R. 14 cannot be delegated.

But it is urged that no time is fixed for the Commissioner to make the assessment and that it is therefore open to him to make assessments backward for a period of six years. This limit on the alleged power of backward assessment is suggested on the ground that the period of limitations for bringing a suit under S. 396 for a tax after it has become due and owing is six years. But, if the power of backward assessment exists, the limit suggested for its exercise disappears. For the right to sue accrues only after the tax has become due and if it becomes due, as we have held it does, only on assessment by the Commissioner the period of limitation for any suit must begin from the date of the assessment. In other words the contention for the Corporation leads logically to the result that, though once a tax is assessed and has become due, the Corporation has only six years to recover it by suit, yet the Commissioner is authorised to put off assessing persons to profession tax for an unlimited period and so put off indefinitely the due date of the tax and the liability of the assessee. The startling nature of this result is what compels the respondent to impose on himself a supposed limit, really illusory, of six years for the exercise of the power contended for. By itself this would be a strong ground for insisting upon explicit and clear foundation in the provisions of the Act and the rules thereunder for the existence of such a power. It is admitted that there is no express provision in the Act and the rules which confers any such authority. But it is said that there is also nothing which negatives it and in the absence of any such prohibition the authority must it is argued, be deemed to exist. Both on an examination of the scheme and purpose of the City Municipal Act and on general grounds of construction of simi-

(1) [1910] 34 Mad. 180=20 M. L. J. 773=7 I. C. 748=(1910) M. W. N. 583.

lar enactments we are unable to read, by implication into that Act, the power contended for.

The scheme of imposition, assessment and collection of taxes laid down in the Act would seem to show that while the rate of taxation is fixed for each year begining 1st April by the Council at the Budget meeting in the February previous (S. 156) the assessment of taxes payable by each individual is a contemporaneous operation within the period of taxation (year or half year) in which while the Commissioner is afforded facilities for obtaining all relevant information on which assessment is to be based (see Ss. 114, 115 and 368) the assessee is required within a very short time after the assessment to take all his objections to the assessment proposed (R. 12, Taxation Rules). It is hardly consistent with this scheme that the tax fixed by the Council, say for 1920-21, in February 1920 should have to be assessed and realised from the individual tax payers six years (as have pointed out an unlimited number of years) later, when the Commissioner charged with the duty of assessment would find that all relevant information has ceased to be available and the assessee might long ago have ceased to exercise the profession and enjoy the income or salary from which he might be expected to pay the tax. In the case of companies tax to which similar provisions to those applicable to profession tax are applicable, the incongruity is still more marked. No big concern like a limited company with obligations to its shareholders which has to produce a balance sheet in each working year and on the result of that balance sheet to declare dividends to its shareholders could be carried on if its Municipal assessment in that year is uncertain and is liable to be suddenly demanded for several years together at a perfectly unknown and indefinite date. The learned Chief Judge has referred to other aspects of the hardship to which assessees would be put if the power contended for by the Corporation were upheld. We think it unnecessary to refer to them.

In R. (6), Sch. 4 of the Act, it is expressly provided that when the Commissioner makes an amendment of the property tax register as he is empowered to do under R. (3) by altering, adding or deleting items therein, such amendment shall be deemed to have taken effect from the earliest date in the current year on which the circumstances justifying the amendment existed. This rule is remarkable both for what it enacts and for what it forbids. In the case of property tax if a property has escaped taxation for a period of years, the Commissioner may in any subsequent year by amending the register assess it to the tax. But the rule says that the tax is to be operative only from the earliest date in the current year in which the omission was rectified. Similarly, if a property has been taxed too low, the Commissioner may amend the register. But in that case also the enhanced tax due to the amendment takes effect only from the earliest date in the year current when the amendment was made on which the property was liable to the enahanced tax. The careful prohibition against retrospective assessment in the case of property tax beyond the beginning of the current year is to our mind a very strong indication that in the case of other taxes like the profession tax retrospective assessment to a greater extent was not contemplated. Property tax is a yearly tax though payable half yearly. Profession tax is a half yearly tax. With this difference, if the analogy of the property tax may be used, the inference would seem to be that the power of assessment conferred by R. 8, Taxation Rules, to be properly exercised must be exercised within the half year to which the assessment relates.

Further, the companies tax imposed by S. 110 and the profession tax imposed by S. 111 are expressly by those sections levied:

"by way of license fee and in addition to any other license fee that may be leviable under this Act."

The tax on carriages and animals imposed by S. 116 is another instance of a license fee described as a tax. This is made clear by S. 121 which says that when the tax due on any carriage or animal is paid the Commissioner shall grant the person a license to keep such carriage or animal for the period to which the payment relates and by S. 360 which speaks of the license under S. 121 in connexion with the prosecution of a defaulter. The other license fee refer-

red to are those leviable under Cap. 12 of the Act and Sch. 4 thereof read with S. 365 (2). The essence of a license is that it is a permission which must be usually obtained before the thing licensed is done (Wharton's Law Lexicon, p. 428). The City Municipal Act in several sections (e. g., Ss. 287, 290 and 295) requires that the license mentioned therein should be obtained in respect of existing undertakings within the first month of the year and in respect of new undertakings before they begin and it is an offence to carry on an undertaking which requires a license, without it. In the case of such licenses, those who ought to get them are expected to apply for and obtain them on payment of the fees fixed by the Council under S. 365 (2), In default, they stand the risk of prosecution and the Magistrate is required in case of conviction to recover in addition to any fine that may be imposed the license fee and pay it over to the Corporation. But this coercive recovery of the fee does not entitle the convicted person to the license which if wanted must be obtained by further payment, S. 365 (8) and (9). In the case of license fees described as companies tax and profession the amount of which depends on the rates fixed by the Council for the classification of the particular individual in one of the several classes (and this is true to a certain extent in respect of the tax on vehicles and animals) the fact that the levy is still declared to be by way of license fee strengthens the inference that the assessment is intended to be made before or during the period to which it relates and could not have been intended to be made long afterwards retrospectively for several periods together.

When the words of an enactment are clear and imperative, considerations of inconvenience or hardship have no place in its application to circumstances falling within the words. But where there is no express indication in an enactment as to whether the powers given by it were meant to be used in particular circumstances, the fact that great hardship and inconveniece would result thereby is a reason for so construing the words as to meet all attempts to abuse the power either by exercising them in cases not intended by the statute or by refusing to exercise them when the occasion for their exercise has arisen: Maxwell on Interpretation of Statutes 10th. 6. p. 226. Statutes which impose pecuniary burdens are subject to the rule of strict construction and in a case of reasonable doubt the construction most beneficial to the subject is to be adopted: ibid pp. 503 and 504 though the principle of strict construction is less applicable where the powers are conferred on public representative bodies for essentially public purposes: *ibid p.* 530. The only inconvenience that may be urged to result from the Corporation not having the power contended for is that some persons who may have escaped taxation to profession tax in previous years cannot be assessed thereto in subsequent years. But the inconvenience, if such, it really is, already exists in respect to property tax, far the most important source of municipal revenue. And after all if the municipal executive is vigilant and efficient such cases must be comparatively rare. On the other hand, a power to assess persons for many years retrospectively if granted is more likely to encourage slackness and inefficiency on the part of the municipal executive and also will produce very great hardships on those who are suddenly called upon to pay in a lump sum the taxes which ought to be met out of current income. The present case in which the appellant was called upon to pay in addition to the tax for the current half year a sum of Rs. 4,600 and odd on account of eleven and half years' arrears is a good illustration. We can find no justification for this either in the express terms of the Act or in any reasonable construction of its intention. The decision in *Gill* v. *Meller* and *Gill* v. *Monday* (2) is no authority in favour of the respondent as in that case the necessary steps had been taken in previous years to make the rate an arrear and all that remained was its collection. The decision was merely that when a rate is duly made and published, it is the duty of the parties concerned, to seek the collector and pay it.

Having regard to the difference between the procedure prescribed for making and publishing the rates according to the English Acts and that pre-

(2) [1924] 1 K. B. 97.

scribed for the assessment of property tax under the City Municipal Act, the appellant not having been assessed at all in respect of the previous back years before 15th September 1926, there were no arrears before that date.

Our conclusion on the 2nd and 3rd questions referred is that liability to pay profession tax arises only after assessment under R. 8, Taxation Rules, and that the appellant Prince of Arcot not having been assessed in respect of the eleven and half years commencing from the 2nd half year of 1920-21 within several half years, the assessment of 15th September 1926 was invalid in respect of those eleven and half years.

P.R.S./V.B. *Reference answered.*

A. I. R. 1930 Madras 206

ANANTHAKRISHNA AYYAR, J.

M. R. Sethuratnam Iyer and *others*—Plaintiffs—Appellants.

v.

Chinna Solan—Defendant—Respondent.

Second Appeal No. 44 of 1926, Decided on 4th October 1929, from decree of Sub-Judge, Trichinopoly, in Appeal No. 6 of 1925.

(a) Hindu Law—Joint family—Manager—Decree in previous suit against father not expressly described as manager—Decree is binding on sons in subsequent suit as res judicata—Civil P. C., S. 11, Expl. 6.

The circumstances that neither the father of *A*, *B* and *C*, nor *C* himself, who were parties to a prior suit, was described expressly as manager of the family, does not by itself make the decision in the prior suit not binding in a subsequent suit on *A*, *B* and *C* who are members of an undivided family. To such a case the provisions of S. 11, Expln. 6, Civil P. C., apply and the decision in prior suit becomes res judicata as against *A*, *B* and *C*: *A. I. R.* 1927 *P. C.* 56; 30 *Mad.* 324 and 22 *Mad.* 461, *Rel. on.*

[P 207 C 2, P 208 C 1]

(b) Limitation Act, Art. 142—Delivery of properties given to judgment-creditor through Court—Limitation runs from such delivery.

Even if the judgment-debtors continue to be in the possession of the properties in spite of the delivery of the properties made through Court, yet, as against the judgment-debtors to the suit and persons represented by them, the effect of such delivery should be taken to be that the decree-holder is in possession; and consequently a fresh cause of action arises against the judgment-debtors, and limitation begins to run only from the date of the delivery made through Court: 27 *Mad.* 262; and *A. I. R.* 1917 *P. C.* 197, *Rel on.* 5 *Cal.* 584 and 17 *M.L.J.* 598, and *A. I. R.* 1927 *Mad.* 849, *Ref.*

[P 208 C 2]

M. S. Vaidyanatha Iyer—for Appellants.

V. N. Venkatavaradachari—for Respondents.

Judgment.—On the allegations that the plaintiffs' father obtained a decree against the father of the present defendants and also against defendant 3, in O. S. No. 1180 of 1904, for the suit lands, and took delivery thereof on 27th September 1908, through Court in execution of the decree, and that in 1909 the defendants trespassed upon about 2 acres of the said lands and in 1917 upon about 5 more acres and that they were also attempting to disturb the plaintiff's enjoyment of the lands in B schedule, the plaintiffs instituted the original suit for possession of the A schedule lands, and for an injunction and if necessary also possession of the B schedule lands, attached to the plaint, with mesne profits.

Of defendants 1, 2 and 3, who are brothers, defendant 3 disclaimed all interest in the suit lands, and defendant 2 was subsequently exonerated by the plaintiffs, and defendant 1, the really contesting defendant in the suit alleged that the lands belonged to the defendants, that in the partition which took place 25 years prior to the suit most of the suit lands fell to defendant 1's share that after the death of their father the defendants were in possession of his properties also, that the decree in the prior suit was not binding on the defendants, that the plaintiff's father never took actual delivery of the plaint lands in execution of the prior decree, and that the suit was barred by limitation. There was also a further plea raised in the additional written statement of defendant 1 that the suit for injunction in respect of B schedule properties was not maintainable as the plaintiffs were not in possession of the same.

Six issues were framed by the District Munsif, issue 1 raising the question of alleged trespass and also limitation; issue 2, raised the question of partition; issue 3 raised the question whether defendants 1 and 2 were precluded from putting forward the pleas by reason of the decision in O. S. No. 1180 of 1904; issue 4 raised the question whether the plaintiff was entitled to an injunction in respect of B schedule lands; and issue 5 was whether defendants 1 and 2 has acquired title by reason of adverse

possession of both warams as contended by them; and issue 6 raised the question of the relief to which the plaintiffs were entitled.

The District Munsif found that the partition set up by the defendants was not proved, that the trespass alleged by the plaintiff was proved, and that the suit was not barred by limitation as it was filed within 12 years from the date of the delivery of the lands to the plaintiffs' father in execution of the decree in the prior suit. The plaintiffs were given a decree for the possession of the suit lands (both A and B schedules) with mesne profits.

Defendant 1 preferred an appeal from the District Munsif's decree. The learned Additional Subordinate Judge reversed the decision of the District Munsif and dismissed the suit. The plaintiffs have preferred the present second appeal. The learned Additional Subordinate Judge upheld the decree of the District Munsif that the partition set up by the defendants had not been proved. That is a finding of fact and must be accepted. As I understand the learned Additional Subordinate Judge's judgment, he reversed the decision of the 1st Court by reason of his findings upon 2 points viz., that defendants 1 and 2 were not bound by the decree in the prior suit, and that plaintiffs had no possession within 12 years prior to the present suit. It is therefore necessary to consider those two points at some length.

The prior suit was instituted by the plaintiffs' father against the defendants' father (Korattayyan) who was defendant 82 in the prior suit, and the present defendant 3 who was defendant 83 in the prior suit. The defendants' father is said to have been very old at the time, and defendant 3, the next senior most male member of the family and the eldest son of Korattayyan, was also a party to the suit. The defendants' father having died, the litigation was continued against his representatives, defendant 83 (the present defendant 3), already on record. The previous suit was contested by the defendants but the then plaintiff was given a decree by the District Munsif. The learned Additional Subordinate Judge held that defendants 1 and 2 were not bound by that decree because neither the defendants' father nor defendant 3 was sued as manager, the learned Judge's view evidently being that unless they were sued expressly as managers, that decree could not be binding upon defendants 1 and 2. His reasoning is contained in para 10 of his judgment:

"Besides, there are no indications to show that either defendant 3, or the father of defendants 1 to 3 was sued as manager. If the father was sued in his capacity as manager, defendant 3 would have been an unnecessary party. If defendant 3 was the manager their father would have been unnecessary. The plaintiffs' father had to file a number of suits; apparently he was not aware of the existence of these defendants. But I do not think that the evidence justifies in inference that either defendant 3 or defendant 3's father was sued as manager of the family of defendants. I find that defendants 1 and 2 were not bound by the decree."

I think the learned Subordinate Judge's decision of this point is unsustainable. The circumstance that neither the father of the present defendants nor defendant 3 was expressly described in the prior plaint as manager is not conclusive to show that the decision is not binding on defendants 1 and 2. The decision in *Kunjan Chetty* v. *Sidda Pillai* (1) and *Subbanna Bhatta* v. *Subbanna* (2), are authorities in support of this position. As remarked by Benson and Wallis, JJ. in *Subbanna Bhatta* v. *Subbanna* (2) at p. 326:

"Further, where as here, the managing member is sued for the purpose of charging the joint family property, we think, he must be considered to be sued as a representative of the joint family even if it is not so expressly stated in the plaint."

As remarked by Subramanya Ayyar and Benson, JJ., in the case reported in *Kunjan Chetty* v. *Sidda Pillai* (1) at p. 462:

"If the father is manager and the question in issue is one which equally affects him and the other members of the family, and if the suit is properly defended, the adjudication will bind all the persons interested along with the father for the reason that, in that case, it must be presumed that the father represents the interest of all."

Thus the circumstances that neither the defendants' father nor defendant 3 who were parties to the prior suit was described expressly as manager of the family, does not by itself make the decision in the prior suit not binding on the present defendants who were members of an undivided family. Further

(1) [1899] 22 Mad. 461.
(2) [1907] 30 Mad. 321=17 M. L. J. 180.

the provisions of S. 11, Expl. 6, Civil P. C., have also to be considered in this connexion, to see whether the prior decision is res judicata against the present defendants:

"Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right, shall, for the purpose of this section (S. 11) be deemed to claim under the persons so litigating."

As decided by the Privy Council in the case reported in *Lingan Gowda* v. *Bastan Gowda* (3) a decree obtained by or against the managing member of the joint Hindu family is binding upon minor members of the family, under S. 11 Expl. 6, if it appears to the Court that the manager was acting in the former litigation on behalf of the minors in their interests. Their Lordships observed at p. 453 (*of* 51 *Bom.*) :

"In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he comes of age and then bring an action or bring an action by his guardian before ; and in each of these cases, therefore, the Court looks to the Expl. 6, S. 11, Civil P.C. to see whether or not the leading member of the family has been acting either on behalf of minors in their interest. or if they are majors, with the assent of the majors."

The finding of the lower Court as regards the binding nature of the decree in the previous suit could not I think be supported.

The decision of the learned Subordinate Judge on the question of limitation also is, I think, unsustainable. If the decree was binding on the joint family, including the present defendants, then the delivery of possession made to the decree-holder of that decree was also equally binding on the joint family. The learned District Munsiff in the present case came to the conclusion that under Ex. B the lands included in the decree were actually delivered to the decree-holder (father of the present plaintiffs) on 27th September 1908. The present suit was filed on 27th September 1920 and is prima facie not barred by limitation. From the learned Subordinate Judge's judgment, it is not quite clear whether he was or was not satisfied that the decree-holder got actual possession in execution and was in possession for a time, however short, of the said properties after the delivery made to him through Court under Ex. B. It is observed in paras. 16 and 18 of the lower appellate Court's judgment that :

"the evidence is hardly satisfactory to show that the plaintiffs or their lessee or their servants ever enjoyed the property in pursuance of the delivery under Ex. B."

The question to be considered is not whether the decree-holder or his servants "actually enjoyed" the property (para. 16) but whether they were in possession by virtue of the delivery made through Court. There is difference between "possession" and 'enjoyment'. Even if the defendants continued to be in the possession of the properties in spite of the delivery of the properties made through Court yet, as against the defendants to the suit and persons represented by them, the effect of such delivery should be taken to be that the decree-holder was in possession ; and consequently a fresh cause of action would arise against the defendants, and limitation would begin to run only from the date of the delivery made through Court. This is made clear by the observations of Sir S. Subramanya Ayyar, Offig. C. J. and Bhashyam Iyengar, J., in the case reported in *K. K. Venkatakrishna Row* v. *V. Venkappa* (4) at p. 270 :

"If the judgment-debtor is in possession, such delivery operates as a delivery of actual possession."

The recent decision of a Bench of two learned Judges of this Court (Waller and Madhavan Nair, JJ.) in the case reported in *Kamayya* v. *Mahalakshmi* (5) also supports this proposition. In that case, the plaintiff obtained a decree for possession and applied for delivery. He obtained only symbolical possession and not actual possession. The defendant was in possession both before and after the delivery for a total period of about 20 years. Plaintiff waited for nearly 12 years from the date of the symbolical delivery and then brought a suit against the same defendant for recovery of possession. The learned Judges held that the suit was not barred by limitation, as the symbolical delivery gave rise to fresh period of limitation as against the judgment-debtor who was not entitled to deny that he was dispossessed, even though he was not actually evicted. In fact the Privy Council in the case repor-

(3) A. I. R. 1927 P. C. 56=51 Bom. 450=54 I. A. 122 (P. C.).

(4) [1904] 27 Mad. 262.

(5) A. I. R. 1927 Mad. 849.

ted in *Radha Krishna* v. *Ram Bahadur* (6) held that symbolical possession was sufficient to interrupt adverse possession, if the adverse possessors were parties to the proceedings in which it was given. The Privy Council approved of the decision of a Full Bench of five learned Judges of the Calcutta High Court, in the case reported in *Juggobhundhu Mukerjee* v. *Ramchander Bysack* (7). This has been the view followed by this High Court in the cases reported in *Govind Bidiraj* v. *Venkata Sastrulu* (8) and *D. Kamayya* v. *B. Mahalakshmi* (9). The finding of the learned Subordinate Judge on the question of limitation is therefore unsustainable.

It therefore follows that even if the decree-holder did not obtain actual possession, a fresh cause of action arises from the date of the delivery made in execution, and so the present suit is not barred. As the decision of the lower appellate Court has proceeded on erroneous principles, I reverse that decision and remand the appeal to the lower Court for fresh disposal according to law on the evidence on record having regard to the observations contained in this judgment. The costs of the second appeal will abide and follow the result of the decision of the appeal on remand. The court-fee paid on the second appeal memorandum will be refunded to the appellants.

P.R.S./V.S. *Appeal remanded.*

(6) A. I. R. 1917 P. C. 197.
(7) [1880] 5 Cal. 584=5 C. L. R. 548 (F.B.).
(8) [1907] 17 M. L. J. 598.
(9) A. I. R. 1927 Mad. 849.

* * A. I. R. 1930 Madras 209

Full Bench

KUMARASWAMY SASTRI, CURGENVEN AND WALSH, JJ.

T. M. M. Sankaralinga Nadar and *Brothers*—Petitioners.

v.

Commr. of Income-tax, Madras—Respondent.

O. P. Nos. 177 and 178 of 1928, Decided on 23rd October 1929.

*** * (a) Income-tax Act (1922), Ss. 22 (4) and 37—Decision regarding assessment arrived at after investigation and enquiry—Income-tax authorities are competent to reopen the decision—Income-tax authorities are not Courts and hence principle of res judicata does not apply to them—Civil P. C. S. 11.**

When in a previous year of assessment a decision is arrived at after investigation and enquiry, that certain amounts standing in the name of certain ladies in the petitioner's accounts, were stridhanam amounts belonging to them, and as such the interest paid in respect of the said amounts, is held to be a valid deduction, it is still open to the Income-tax authorities to reopen the question of the ownership of the amounts in a subsequent year of assessment, and the authorities not constituting a Court, are not barred by principle of res judicata. (*Case law discussed*). [P 210 C 2, P 213 C 2]

*** * (b) Income-tax Act (1922), S. 23 (4)—Income-tax officer cannot arbitrarily change assessment—He should be guided by principles of natural justice—If fresh evidence is available, he can come to different conclusions.**

Where Income-tax Officials have after enquiry proceeded to assess the assessee on a certain basis, though they may be entitled to reopen the enquiry they cannot arbitrarily change the assessment simply on the ground that the succeeding officer does not agree with the preceding officer's finding. The principles of natural justice or judicial dealing which Courts impose upon Income-tax Officers would prevent them capriciously setting aside the order of their predecessors based on an enquiry. But if fresh facts come to light which on an investigation would entitle the Income-tax Officers to come to a different conclusion from that of his predecessor he is entitled to reopen the question. [P 214 C 2, P 215 C 1]

*** * (c) Income-tax Act (1922), Ss. 22 and 23—Proviso to S. 22 (4) read with S 23 (4) limits power of Income-tax Officer to call for accounts—But when testing allegations of assessee made in the return he can call for any evidence including accounts—On non-production of accounts presumptions can be drawn under Evidence Act S. 114 Illus. (g) and (h).**

The proviso to sub-S. (4) S. 22 when read with S. 23 (4) only limits the power to call for accounts for more than three years prior to the previous year when the Income-tax Officer has to make the assessment to the best of his judgment where the conditions mentioned in S. 23 (4) exist. Where, however, during the course of the enquiry the Income-tax Officer is not going to make the assessment to the best of his judgment owing to want of materials but proceeds to make an enquiry as regards the truth or otherwise of the allegations made by the assessee in his return there is nothing to prevent the Income-tax Officer from requiring the assessee to produce any evidence including accounts. And on non-production of the account books the case will be governed by Evidence Act, S. 114, Illus. (g) and (h). [P 215 C 2]

K. S. K. Aiyangar for *Nataraja Nadar* and *V. V. S. Aiyangar*—for the Petitioners.

M. Patanjali Sastri—for Commissioner of Income-tax.

Judgment.—The assessees are a Hindu joint family and were sought to

be assessed for the year 1926-27 as members of a joint family. They claimed an allowance for interest which they said was paid on sums of money standing in the books as borrowings from the wives of the male members. These sums according to the assessees have been standing for several years in their books as moneys which belonged to the ladies and which they lent to the firm and on which interest has been paid to them. So far as the female members are concerned, it is not disputed that they were being taxed separately as if the interest paid to them was income which they derived from moneys which they lent to the firm. This was going till 1923 when the Income-tax Officer instituted enquiry as to whether these sums were really loans to the trade made by the female members. Notice was given, enquiry was held, affidavits were filed and the Income-tax Officer came to the conclusion that these were loans and the allowance was made for interest which was paid to the female members of the family. This went on according to the petitioners till the accounting year 1925-26. In 1926-27 enquiry was again opened on this question. The Income-tax Officer wanted to reopen the question and he asked the assessees to produce the accounts from 1917-20. A combined notice was issued under S. 22 (4) and 23 (2). The accounts from 1917-20 were not produced, it being alleged that the books were not available as they were lost. Upon that the Income-tax Officer of Sattur disallowed the claim made for reduction on account of interest paid to the female members and his note is:

"Interest payments to the asseesee's female relations have been disallowed as the assessees have withheld the production of earlier books which alone will show whether the amounts standing to their credit are their own stridhanam amounts or not."

He evidently acted on the mere fact of non-production of the account books. An appeal was made to the Assistant Commissioner of Income-tax who after setting out all the facts in para. 2 of his order held that the Income-tax Officer was not precluded from reopening the question. He made further enquiries, examined the parents and relations of the ladies and came to the conclusion for the reasons given by him that these amounts were not proved to be the stridhanam moneys of the ladies lent to the firm. He upheld the Income-tax Officer's decision. Then there was an appeal to the Commissioner and he upheld the order of the Assistant Commissioner and refused to refer the questions asked on the ground that no questions of law arose. On a petition to the High Court he was ordered to refer the following questions:

(a) Whether when in a previous year of assessment a decision was arrived at after investigation and enquiry that certain amounts standing in the name of certain ladies in the petitioners' accounts were the stridhanam amounts belonging to them and as such the interest paid in respect of the said amounts was held to be a valid deduction, it is open to the Income-tax authorities to reopen the question of the ownership of the amounts in a subsequent year of assessment and whether the authorities are not barred by principle of res judicata or otherwise from reopening the said question.

(b) Whether when amounts are shown in the assessee's account books as the amounts belonging to certain ladies of the family and the Income-tax authorities have treated the said amounts for several years as such and when they have assessed the ladies separately in respect of the said amount on that basis, it is competent for the authorities to levy assessment in respect of the very same amount on the petitioners, the assessment on the ladies having become final not having been set aside by appropriate proceedings.

(c) Whether in the absence of any affirmative evidence on the part of the Crown it is open to the authorities to presume that the amounts standing prima facie in the name of the ladies belonged to the petitioners.

(d) Whether there was any legal evidence before the Income-tax Officer and the Assistant Commissioner in support of their findings as to the ownership of the said amounts.

(e) Whether there is any jurisdiction for the Income tax authorities purporting to act under S. 37 of the Act to call upon an assessee to produce accounts relating to a period prior to three years of assessment and whether any inference can be drawn against the assessee by reason of non-production thereof of such accounts.

(f) Whether when goods are sent to an assessee for the purpose of sale on commission and a certain small amount is charged on the consignor for each bag sent as and from mahimai which is paid over by the assessee either immediately or subsequently to the trustees of the mahimai fund (sic) intact, the said amount is liable to be assessed for income-tax.

(g) Whether when debts are actually written off by the assessees as an irrecoverable bad debt it is open to the authorities to disallow a deduction in respect of the same on the ground that the origin of the debt has not been proved.

It is argued before us that where an Income-tax Officer holds an enquiry and comes to a decision that decision has the force of res judicata and precludes the question being reopened subsequently and that even if not res judicata it operates as an estoppel; secondly, that the Income-tax Officer was not entitled to call for accounts relating to a period more than three years prior to the previous year as he is prohibited from doing so by the proviso to S. 22 (4); that the requisition for the production of the account books for the years 1917-20 was therefore illegal and consequently no adverse inference can be drawn from the non-production of the account books nor can the non-production be made the basis of an assessment and that in the present case the Income-tax Officer having proceeded mainly on that ground alone the assessment levied by him on that footing is illegal.

As regards the question of res judicata we do not think the contention can be accepted. The argument for the petitioners is that where an authority is constituted by a statute for determining judicially the legal rights and obligations of parties whether inter se or between themselves and the Crown and where that authority has to determine not only whether an obligation exists but also the measure of that obligation. that authority is a Court and the decisions of that authority are final and conclusive subject to such remedies by way of appeal or otherwise as are conferred by law. For this broad proposition there is no authority.

So far as the Income-tax Act is concerned, there is nothing in the Act which states that an Income-tax Officer proceeding to assess the income of an assessee and to determine the amount of such assessment is a Court. On the contrary the provisions of S. 37 suggest that except for certain purposes the Income-tax Officer is not a Court.

Section 37 states that the Income-tax Officers specified therein shall for the purpose of Chap. 4 have same powers as are vested in a Court under the Civil Procedure Code when trying a suit in respect of the following matters, namely; (a) enforcing the attendance of any persons and examining him on oath or affirmation; (b) compelling the production of accounts and (c) issuing commissions for the examination of witnesses and that any proceeding before an Income-tax Officer, Assistant Commissioner or Commissioner under this chapter shall be deemed to be a "judicial proceeding" within the meaning of Ss. 193 and 228, I. P. C.

If an Income-tax Officer in making an investigation was a Court, there is no necessity for the provisions of S. 37. It is only for the purposes stated in that section that he is to be deemed a Court.

In *Lal Mohan Poddar* v. *Emperor* (1) it was held that a proceeding before an Income-tax Officer on the production of account books pursuant to a notice under S. 23 (2), Income-tax Act, is a judicial proceeding only for the purposes of Ss. 193 and 228 but not of S. 196 of the Penal Code and that a conviction under S. 196 for the production of false accounts is bad in law. The learned Judges (C. C. Ghose and Cammiade, JJ.) observed;

"As we read S. 37, it seems to us to be clear that the legislature has for the purpose of punishing offences under Ss. 193 and 228 of the Penal Code (and under no others) converted proceedings before the officers mentioned therein, which are not judicial proceedings ordinarily, into judicial proceedings."

In *In re, Harmukh Rai Dulichand* (2) the question arose whether an Income-tax Officer is a Court. Rankin, C. J., observed:

"It has been said that the Income-tax Officer must proceed in a judicial manner and S. 37 has been mentioned in this connexion. Fundamentally, no doubt the Income-tax Officer must proceed in a judicial spirit and come to a judicial conclusion upon properly as-

(1) A. I. R. 1927 Cal. 724=55 Cal. 423.
(2) A. I. R. 1928 Cal. 587=56 Cal. 39 (S. B.).

certained facts though I would point out that the Income-tax Officer is not a Court, he has not the procedure of a Court, and he is to some extent a party or Judge in his own case."

In *Mahader Ganesh* v. *Secretary of State* (3) the question was whether an officer acting under the Sea Customs Act, 1878, and adjudicating on the question whether a certain property was to be confiscated was a Court and it was held that he was not a Court. Sir Norman Macleod, C. J., observed :

"I have no doubt that the Collector, who is not bound to adjudge on confiscation and penalty as if the matter was proceedings in a Court of law according to the provisions of the Civil or Criminal Procedure Code, dealt with the various statements before him in a careful and judicial manner."

The question again arose for decision on a reference in *Commr. of Income-tax, Madras* v. *Massey & Co. Ltd. Madras* (4) where the question referred was whether the decision of an Income-tax Officer in a previous enquiry constituted the matter res judicata and the Full Bench answered the question in the negative. Though there is no discussion in the judgment of this question as the Judges evidently thought it was not argueable it cannot be said that because no reasons are given in the judgment the opinion is not binding on us. It was an answer to a question referred and not merely obiter.

Reference has been made to *In re, Nataraja Ayyar* (5), where the question was as regards the power of the High Court to issue a writ of certiorari against an Income-tax Officer who instituted criminal proceedings under S. 476, Criminal P. C. Sundara Ayyar, J., was of opinion that the High Court has no jurisdiction. Sadasiva Ayyar, J. was of opinion that the High Court had jurisdiction. There are some observations in the judgment of both the learned Judges which, it is argued, support the contention of the petitioners that the Income-tax Officer is a Court. The facts were that the Income-tax Officer issued a notice under S. 476, Criminal P. C., to show cause why the petitioner should not be prosecuted for making a false statement.

Section 37, Income-tax Act, states that the proceedings under Chap. 4 which refer to assessment should be deemed to be judicial proceedings within the meaning of Ss. 193 and 228, I.P.C. So that, where proceedings are sought to be taken for perjury it may well be contended that so far as the proceedings are concerned, the Income-tax Officer should be deemed to be a Court attracting the provisions of the Code as regards revision and appeal to the High Court. So far as we can see, the question was not raised nor was it necessary to be raised as to whether an Income-tax Officer was a Court when he assessed parties to income-tax. The contention of the petitioner was that the Income-tax Officer in determining the appeal did not act as a Court, that he had no jurisdiction to pass an order under S. 476, Criminal P. C., and that even if he was a Court, he had no jurisdiction to pass the order long after the proceedings terminated. The Public Prosecutor stated that there was no power in the High Court to issue a writ of certiorari for various reasons. It was unnecessary for the purpose of that case to decide whether an Income-tax Officer proceeding to assess an assessee was a Court. And if the observations of the learned Judges can be said to lay down any such broad proposition we would respectfully dissent from it.

In this connexion we may state that the Income-tax Department has been held in England to be only a department of the executive and not to be a Court of Justice.

In *Local Government Board* v. *Arlidge* (6), Viscount Haldane, observed :

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of Law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. . . . . When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work effectively."

(3) A. I. R. 1922 Bom. 30=46 Bom. 752.
(4) A. I. R. 1929 Mad. 453 (F. B.).
(5) [1912] 36 Mad. 72=23 M.L.J. 393=16 I.C. 755=(1912) M.W.N. 1012.
(6) [1915] A.C. 120=84 L.J. K.B. 72=30 T.L. R. 672=12 L.G.R. 1109=79 J.P. 97=111 L.T. 905.

Lord Shaw observed :

The words 'natural justice' occur in arguments and sometimes in judicial pronouncements in such cases. My Lords, when a central administrative Board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term 'natural justice' means that a result or process should be just, it is a harmless though it may be high sounding expression."

There can be little doubt that Income-tax Officers in conducting enquiries have to act judicially and to exercise their discretion not capriciously but on recognized judicial principles but that would not constitute the officer making the enquiry a Court.

Reference has been made to *Hill* v. *Clifford* (7). In this case, the General Medical Council acting under the powers of the Dentists Act 1878, made an order directing that the name of one Clifford should be struck off the Register of Dentists on the ground that he had been guilty of professional misconduct. Thereupon his partner gave notice determining the partnership. Suits were filed to determine the validity of the nctice and the order of the Medical Council was tendered in evidence. Warrington, J., rejected it and decreed the action of the plaintiff. It was held by Cozens Hardy M. R. and Buckeley, L. J., that the order was admissible as prima facie evidence of the fact that Clifford was guilty of acts unfamous or disgraceful in a professional sense. The President Sir Corell Barness was of opinion that the order was admissible as evidence and conclusive evidence of the fact that the defendant's name had been erased from the register by order of the Council against the defendant for some purposes other than the truth of the fact of misconduct to show the grounds upon which it was made. All that this case decides is that the orders of the Medical Council is relevant evidence. It does not support the contention that the Council was a Court. As regards statutory bodies exercising quasi judicial function, the law is thus stated in Halsbury's Laws of England p. 362.

"The doctrine of estoppel by record has been extended by analogy to the decisions of all tribunals which have jurisdiction, whether by the law of this country, or by the consent of parties, or by the law of the country to whose tribunals the parties have, or may be presumed from their conduct to have submitted themselves."

In para. 507 it is observed :

"The principle of conclusiveness has been applied to decisions not of record in numerous cases, of which the following are examples : a sentence of expulsion passed by a College ; of deprivation by a College Visitor ; of trustees dismissing a schoolmaster ; an order of the General Medical Council ; the award of an arbitrator. So orders of Commissioners of servers (not made between the parties litigant) have been held admissible as evidence of reputation, on the express ground that they were adjudications of a Court of competent jurisdiction over the subject matter."

We are of opinion that an Income-tax Officer proceeding to assess an assessee after making an enquiry as contemplated by the Income-tax Act is not a Court and that it cannot be said that the doctrine of res judicata applicable to the decisions of civil Courts applies.

In this connexion we may refer to two cases one cited on behalf of the petitioners and the other on behalf of the respondent.

Reference has been made by Mr. Krishnaswami Iyengar for the petitioners to *Hoystead* v. *Commissioners of Taxation* (8). The question there was whether the beneficiaries were joint owners. The High Court in a previous assessment proceedings had held that six deductions of £5,000 should be made on that footing. In the subsequent year the Commissioner allowed only one deduction contending that the beneficiaries were not joint owners within the meaning of the Act. Upon a case stated the Court in Australia upheld the contention that only one deduction of £5,000 ought to be made. But their Lordships of the Privy Council reversed the decision on the ground that the previous proceedings estopped the Commissioner from contending that only one and not six deductions should be made. Reliance was placed on the following passage in the judgment of Lord Shaw.

(7) [1907] 2 Ch. 236=97 L.T. 266=76 L J. Ch. 627=23 T.L.R. 601.

(8) [1926] A. C. 155.

"Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be the proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances . . . . . Thirdly, the same principle namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."

For the Commissioner of Income-tax, reference has been made to *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (9), the question related to the valuation under the Local Government Act, 1919, of New South Wales. There was an adjudication as to valuation for a previous year and the question arose as to the valuation for the subsequent year. The point of res judicata was raised on the ground that the adjudication by the Court for the previous year would be conclusive as regards the subsequent years. Lord Carson in rejecting this contention stated:

"It was also contended before this Board on behalf of the respondents that having regard to the said decisions of the High Court of Australia the question raised by this appeal is res judicata as between the appellants and the respondents, and the appellants are estopped from contending that such decision of the High Court of Australia is wrong. It has been pointed out that no such question was raised or pleaded either before the District Court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could be disputed. The present case relates to a new question, namely the valuation for a different year and the liability for that year. It is not eadem questio, and therefore the principle of res judicata cannot apply."

The principle to be deduced from these two cases is that where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, e. g., whether a certain property is trust property or not it has nothing to do with fluctuations in the income, such question, if decided by Court on a reference made to it would be res judicata in that the same question cannot be subsequently agitated. But if the question is decided by a Court on a reference which depends upon considerations which may vary from year to year, e.g., the case in *Broken Hill Proprietary Co* v. *Broken Hill Municipal Council* (9) in which the average valuation had to be taken, there could be no question of res judicata.

The next question is whether even assuming that the matter is not res judicata, it would not create an estoppel by record against the Income-tax Officials.

In this connexion the argument of Mr. Krishnaswami Iyengar, is that even treating the Income-tax Officials as a quasi judicial body and not a Court, the principles of natural justice and expediency ought to prevent Income-tax Officers from going back on their previous decisions. Reference has been made to the passage in Halsbury's Laws of England I have already quoted.

It seems to us that where Income-tax Officials have after enquiry proceeded to assess the assessee on a certain basis, though they may be entitled to reopen the enquiry they cannot arbitrarily change the assessment simply on the ground that the succeeding officer does not agree with the preceding officer's finding. The position is just like the position of any two parties who have proceeded on a certain basis in their relations. It may be open to one party to reopen the matter. But if he wants to do so, there should be facts which would entitle him to do it. If fresh facts come to light which on an investigation would entitle the Income tax Officer to come to a different conclusion from that of his predecessor, we think he is entitled to reopen the question. But if there are no fresh facts, it is difficult to see how he can arbitrarily go behind the finding of his predecessor. The same principles of natural justice or judicial deal-

(9) [1926] A. C. 94.

ing which Courts impose upon Income-tax Officers would prevent them capriciously setting aside the orders of their predecessors based on enquiry. In the present case if there were no fresh facts, we do not think the Income-tax Officer can simply say that he would not be bound by the order of his predecessor affecting a question like the present, namely, whether a certain sum is the capital of the firm or a loan. But if on investigation any additional facts come to his notice which he considers sufficient, he would be entitled to act upon that additional information and we do not think the Courts of justice can interfere. If there is evidence on which he could have acted and it is not for the Court to constitute itself into a Court of appeal and see whether that evidence is sufficient or insufficient.

As regards the question as to the power of the Income-tax Officer to demand the production of accounts beyond three preceding years the provisions of Ss. 22, 23 and 37 have to be considered, The contention for the petitioners is that in no case can accounts for over three years be called for whatever may be the nature of the enquiry. For the Commissioner of Income-tax it is contended that the limitation as to three years applies to cases where the officer proceeds to assess under S. 23 (4) and that in other cases the Income-tax Officer is not precluded from calling for evidence.

Sections 22 and 23 deal with the return of the income furnished by the assessee for the purpose of being assessed. Sub-S. (2) empowers the Income-tax Officer to serve a notice upon the assessee requiring him to furnish within the period specified therein a return in the prescribed form of his total income during the previous year. Sub-S. (4) enables the officer to require the assessee to produce such accounts or documents as the officer may require. So far as the accounts are concerned, the proviso says that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous years.

Section 23, sub-S. (4) deals with cases where the Income-tax Officer is empowered to make an assessment to the best of his judgment and it says that he can do so if the assessee fails to make his return under sub-S. (1) or sub-S. (2), S. 22 as the case may be, or fails to comply with all the terms of the notice issued under sub-S. (4) of the same section, or having made a return fails to comply with all the terms of the notice issued under sub-S. (2), S. 23, which refers to the appearance of the person submitting the return at the office of the Income-tax Officer and the production of any evidence on which such person may rely. Under sub-S. (2), S. 23, it is the evidence which the assessee has to rely on that is required to be produced.

Section 37 refers to the power to take evidence and empowers the officer to enforce the attendance of any person, and to examine him on oath or affirmation, to compel the production of documents and to issue commissions for the examination of witnesses.

Reading these sections together we think that the proviso to sub-S. (4), S. 22, when read with S. 23, sub-S. (4), only limits the power to call for accounts for more than three years prior to the previous year, when the Income-tax Officer has to make the assessment to the best of his judgment where the conditions mentioned in sub-S. (4), S. 23 exist. Where, however, during the course of an enquiry the Income-tax Officer is not going to make the assessment to the best of his judgment owing to want of material but proceeds to make an enquiry as regards the truth or otherwise of the allegations made by the assessee in his return in order to determine whether the assessee has made out his allegations, there is nothing to prevent the Income-tax Officer from requiring the assessee to produce any evidence including accounts. I will be unreasonable to support that where, for example, an assessee claims certain deductions and the Income-tax Officer wants to make an enquiry into the truth or otherwise of the allegations, it is open to the assessee to refuse to produce any accounts beyond the three years fixed in the proviso to sub-S. (4), S. 22, and require the Income-tax Officer to come to a decision on the materials afforded by the three years' accounts.

As regards the presumption to be drawn from the non-production of the accounts books, we think the case will be governed by S. 114, Evidence Act

Illus. (g) and (h) refer to cases of non-production of accounts and documents and refusal to answer questions.

Where an assessment is made under S. 23 (4) it is difficult to see how an Income-tax Officer can call for the production of books beyond the period specified in the proviso to S. 22 and then draw an adverse inference for the purpose of penal assessment. It will really be defeating the protection given by S. 22 (4). But where the accounts are called for otherwise than for that purpose, there is no reason why the presumption should not be drawn as in any ordinary case.

In this case the accounts were called for during the course of the enquiry as to whether the deduction claimed by the assessee should be granted or not, and we think that the Income-tax Officer was entitled to draw an adverse inference owing to the non-production of the account books. It is a question of fact whether the books were available or not. The assessee says they were lost or destroyed but the Income-tax Officer does not believe it. It is not for us to say whether the Income-tax Officer was justified or not in his conclusion.

This disposes of all the points argued before us. The petitioners will pay the respondent Rs. 250, for costs.

P.R.S./V.S. *Reference answered.*

A. I. R. 1930 Madras 216

CURGENVEN, J.

Ranganayaki Bai Ammal—Defendant—Petitioner.

v.

B. Shivarama Dubay and *another*—Plaintiffs—Respondents.

Civil Revn. Petn. No. 316 of 1929, Decided on 7th October 1929, from order of Dist. Judge, Madura, D/- 5th January 1929 in Original Suit No. 2 of 1928.

(a) Civil P. C., S. 115—Revision lies on preliminary decision over jurisdiction.

A decision upon a preliminary issue relating to jurisdiction is open to revision under S. 115: *A. I. R.* 1928 *Mad.* 416; *A. I. R.* 1925 *Mad.* 707 and 39 *Mad.* 195 (*F.B.*), *Rel. on.* [P 216 C 2 ; P 217 C 1]

(b) Madras Hindu Religious Endowment Act (1927), S. 73 (1)—Religious endowment not regarding muth or temple—No provision exists for removal of trustee of such endowment in S. 73 (1).

There is no provision for appointing or removing the trustee of a religious endowment, which is neither regarding a muth or a temple, in S. 73 (1), nor does the Act make such a provision elsewhere. [P 217 C 2]

(c) Madras Hindu Religious Endowment Act (1927), S. 73 (1) (d)—Scope.

Clause (d), S. 73 (1) does not enable the institution of any suit of a class unprovided for by the rest of the section. [P 217 C 2]

(d) Madras Hindu Religious Endowment Act (1927), S. 77—Endowments, part religious, part secular—After allocation by Board such endowment is controlled by Act—Trust before such allocation is governed by Civil P. C., S. 92.

The effect of S. 77 is to keep outside the operation of the Act any endowments, part religious, part secular, in respect of which the Board has not made an allocation to religious uses: when that has been done the portion allocated becomes religious endowment amenable to the provisions of the Act and until it is done, no portion is so amenable. If this be so, S. 73 (2) does not take the trust out of the operation of S. 92, Civil P. C. [P 218 C 1]

P. R. Ramakrishna Iyer—for Petitioner.

P. R. Ganapathi Iyer and *K. P. Panchapagesan*—for Respondents.

Judgment.—Two trustees of a certain charitable and religious trust sued their co-trustee for removal and for accounts in the District Court of Madura. The learned District Judge framed two preliminary issues with the first of which only we are here concerned. It runs thus:

"Whether the suit is maintainable under S. 92, Civil P. C., or under S. 73, Madras Act, 2 of 1927?"

This Civil Revision Petition has been preferred by the defendant against an affirmative finding upon this issue.

It is objected that a decision upon a preliminary issue relating to jurisdiction is not open to revision under S. 115, Civil P. C. The familiar argument in favour of revision is that if the petitioner is successful the trial of the rest of the suit would be saved, and the special objection to it is that if the petitioner waits until the suit has been disposed of he will have a right of appeal. The subject has come up most frequently in connexion with court-fees and a question of this kind was dealt with by a Bench of this Court in *Kulandai Pandichi* v. *Ramaswami Pandia* (1). The argument based on the eventual alternative of an appeal was considered but was not deemed of sufficient weight to preclude revision. Two other reported cases relate to a preliminary issue of jurisdiction, one decided by Krishnan, J.,

(1) A. I. R. 1928 Mad. 416=51 Mad. 664.

Janardhanan v. *Verghese* (2), and the other the Full Bench case in *Atchayya* v. *Seetharamachandra Rao* (3) where an appellate judgment which decided such an issue came up for revision. I think it must be said that there is now a course of decisions in favour of interference sufficiently marked to render it undesirable that a single Judge should take the opposite view.

Turning to the merits, the trust was created for a number of specified purposes, some secular and some religious, and the question which first arises is whether sub-S. 2, S. 73, Madras Hindu Religious Endowments Act, takes the suit out of the scope of S. 92, Civil P. C., and if so, whether power to institute such a suit is derivable from sub-S. 1 of the same section. The learned District Judge holds that S. 73 (2) is a bar to the application of S. 92 but he finds himself able to bring the suit within the scope of S. 73 (1).

Assuming the trust to be a 'religious endowment' as defined in the Act this view of the effect of S. 73 (2) is clearly right and accordingly, in the words of the subsection :

" no suit in respect of such administration or management shall be instituted except as provided by this Act. "

Admittedly S. 73 (1) is the only provision of the Act which can authorize such a suit. Under it :

" The Board of Committee having jurisdiction over any muth or temple or any person having interest and having obtained the consent of the Board may institute a suit . . ,"

and the first question is whether the plaintiffs in the present suit satisfy this description. To satisfy it, it must be held that they are 'persons having interest.' This phrase is defined in Cl. 9, S. 9 as follows :

" (a) in the case of a muth a disciple of the muth or a person of the religious persuasion to which the muth belongs, and ; (b) in the case of a temple, a person who is entitled to attend at the performance of worship or service in the temple or who is in the habit of attending such performance or of partaking in the benefit of the distribution of gifts thereat. "

Accordingly the subject matter of the interest is confined to a muth or a temple. The trust we have to deal with is certainly neither of these things, though it may be a religious endowment as defined in Cl. 11, S. 9, only by extending the meaning of S. 73, therefore, and concluding that where it speaks of a muth or a temple it may be taken also to mean a religious endowment can this obstacle be got over. Nor does difficulty arise only from the statutory definition of 'person having interest.' From the provision that a suit may be brought by the committee having jurisdiction over any muth or temple the section would seem to contemplate only suits relating to such foundations. I cannot avoid drawing the same inference from the manner in which the reliefs are set forth. The first relief is 'appointing or removing the trustee of a math or excepted temple.' There is no provision for appointing or removing the trustee of a religious endowment such as the present, nor do I find that the Act makes such a provision elsewhere. Reliefs (b), (c) and (d) do not, it is true, expressly confine themselves to muths or temples but it is difficult to avoid the conclusion that by implication they do so. The learned District Judge has found himself able to bring the suit within the section by force of relief (d):

" granting such further or other relief as the nature of the case may require. "

A comparison of this section with S. 92, Civil P. C., will show that the portion of it which sets out the classes of reliefs admissible has been closely moulded on that other section. I am unable to hold that Cl. (d), S. 73, enables the institution of any suit of a class unprovided for by the rest of the section. Fully therefore as I agree with the learned District Judge as to the canons of construction to be adopted in a case like this, I must hold that S. 73 (1) cannot be so construed as to comprise suits of this class. Endowments such as the present are dealt with to some extent by the Act, as by Ss. 41 to 44, but provision for suits such as the present appears to have been omitted by oversight, unless indeed it was not intended that such foundations should fall within the definition of religious endowment.

That a trust which has for its object the performance of subordinate services in a number of temples does in general satisfy the definition of religious endowment has not been disputed on either side. For the respondents, however, the point is raised that this endowment is

(2) A. I. R. 1925 Mad. 707.
(3) [1916] 39 Mad. 195=18 I. C. 555=24 M. L. J. 112 (F.B.).

not technically a religious endowment by virtue of the provisions of S. 77 of the Act. Besides a number of religious services, the trust comprises such objects as supplying rice to travellers, feeding Brahmins, maintaining a water pandal. In other words, its objects while mainly religious are also partly secular. Section 77 provides that where an endowment is of this character the Board may determine what portion of such endowment shall be allocated to religious uses and then occurs this sentence :

"Such portion shall thereafter be deemed to be a religious endowment and its administration shall be governed by the provisions of this Act."

It appears to me that the effect of this is to keep outside the operation of the Act any endowments part religious, part secular in respect of which the Board has not made an allocation to religious uses. When that has been done the portion allocated becomes a religious endowment amenable to the provisions of the Act and until it is done therefore no portion is so amenable. If this be so, S. 73 (2) does not take the trust out of the operation of S. 92, Civil P. C. Accordingly while setting aside the finding on the first issue I remand the suit for retrial upon that issue, the point for consideration being whether the endowment is or is not a 'religious endowment' by virtue of S. 77 of the Act, decision of which point will decide the question of jurisdiction. Costs to abide and follow the result.

P.R.S./V.S. *Suit remanded.*

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* A. I. R. 1930 Madras 218

RAMESAM AND CORNISH, JJ.

Raja Rama—Plaintiff—Appellant.

v.

Fakruddin Sahib and *others*—Defendants—Respondents.

Original Side Appeal No. 52 of 1926. Decided on 9th October 1929, from decree of Beasley, J., D/- 16th September 1925, in Civil Suit No. 628 of 1923.

(a) Succession Act, (1925), S. 211—Property vests in executor immediately upon testator's death.

The executor derives his title from the will, and immediately upon the testator's death his property vests in the executor, for the law knows no interval between the testator's death and the vesting of the property. *Whitehead* v. *Taylor*, 10 *A & E.* 210, *Foll.*; *Hewson* v. *Shelley*, (1914) 2 *Ch.* 13, *Rel. on.* [P 219 C 2]

(b) Succession Act (1925), S. 211—Executor can admit and dispose of claims against testator's estate—Executor can acknowledge debt within meaning of Limtation Act, S. 19.

An executor has the power as legal representative to admit and dispose of claims against the testator's estate, when he includes such a claim in Annexure B, Sch. 3, Court-fees Act, as owing from the testator and payable from his estate and he may be assumed to acknowledge liability of the estate for the debt within the meaning of S. 19, Limitation Act. [P 219 C 2]

(c) Succession Act (1925), S. 212—Administrator derives his title wholly from Court—Property vests in him only from time of grant.

The position of an administrator is different from that of an executor. The former derives his title wholly from the Court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. *Woolley* v. *Clark*, 5 *B & Ald.* 744, *Rel. on.* [P 219 C 2]

*** (d) Limitation Act. S. 19—Acknowledgment by administrator is not made effectual by subsequent letters of administration—Such admission tends to dimunition of estate—Succession Act (1925), S. 221.**

An act done by a party, who afterwards becomes administrator, to the prejudice of the estate is not made good by the subsequent administration ; for it is only in those cases where the act is for the benefit of the estate that the relation back exists. *Morgan* v. *Thomas*, 8 *Ex.* 302, *Rel. on.* [P 220 C 1]

An acknowledgment of liability professed to be made on behalf of a deceased's estate by a person whose power to make the acknowledgment solely depends upon his being the administrator of the deceased is not made effectual by his subsequently obtaining letters of administration. Such an intermediate act as the admission that a debt is due from the deceased's estate tends to the dimunition of the estate. [P 220 C 1]

(e) Limitation Act, S. 19—Acknowledgment of liability by heirs of Mahomedan prevents limitation.

Where an acknowledgment of liability is made by the petitioners for administration in their character of heirs, being the sons and widow of a Mahomedan, the acknowledgment has the effect of preventing limitation. [P 220 C 2]

(f) Limitation Act, S. 21 (2)—Acknowledgment by some devisees is ineffectual as against others.

Among devisees an acknowledgment by some does not keep alive the creditor's right against others who have not authorised the former to acknowledge liability on their behalf : *Fohdham* v. *Wallis*, 10 *Hare* 217, *Foll.* [P 221 C 1]

(g) Civil P. C., S. 35—Failure to present case properly in trial Court—Costs in trial Court refused.

Costs in the trial Court were refused to the successful appellant on the ground that it was due to his failure to present his case properly in the trial Court that judgment was given against him. [P 221 C 1]

M. S. Venkatarama Iyer—for Appellant.

Cornish, J.—This appeal raises the question whether a suit to recover money due on promissory notes against the defendants who are the sons, widows and a daughter of the deceased executant of the notes is barred by limitation.

It appears that the two notes in question were executed by one Hajee Imamuddin on 10th January 1917 and on the 21st February 1918, for Rs. 1,600 and Rs. 300, respectively. Imamuddin died in 1919. The plaintiff filed his suit against the defendants on 4th September 1923 to recover the amount due on the notes. The suit was, therefore, out of time unless in the meanwhile there had been an effectual acknowledgment of the liability so as to give a fresh starting point for limitation. It is alleged by the plaintiff, who is the appellant before us, that such an acknowledgment is to be found in a petition filed in this Court on 9th October 1919, for a grant of letters of administration, by defendants 1, 2 and 3 of whom defendants 1 and 2 are sons and defendant 3 a widow of the deceased executant of the notes. It is material to observe that S. 278, Succession Act of 1925, requires that a petitioner for letters of administration shall state in his application, inter alia the right in which the petitioner claims ; and S. 218 (1), Succession Act provides that ;

"If the deceased has died intestate and was ..... Mahomedan ..... administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate."

The petitioners here, being the sons and widow of the deceased, were the persons entitled by Mahomeden Law to the estate, or at least a part of the deceased's estate, and were in consequence entitled to the grant, and a joint grant of administration was in due course made to them. They, as required by the Court-fees Act, filed with their petition for a grant the form of valuation prescribed by Sch. 3 of the Act, stating in annexure A, the assets of which the deceased was possessed or to which he was entitled at the time of his death, and in annexure B :

"the debts owing from the deceased and payable by law out of the estate."

Among these debts were shown the amounts due on the two promissory notes above referred to. This valuation form on affidavit of assets is required for the purpose of assessing the court-fee payable in respect of the grant of letters of administration, and until the appropriate fee has been paid no grant can be issued. The question before us is whether the inclusion of the debts in annexture B amounts to an acknowledgment of liability in respect of the debt so as to extend the period of limitation for the plaintiff's suit.

There can, we think, be no doubt that that when an executor in his petition for probate includes a debt owing by his testator in annexure B, he must be deemed to acknowledge liability for that debt in his capacity of legal representative of the deceased. This arises from his position of executor. The executor derives his title from the will. Immediately upon the testator's death his property vests in the executor, for the law knows no interval between the testator's death and the vesting of the property : *Whitehead* v. *Taylor* (1). It follows that before and without obtaining probate the executor may do most things which appertain to his office : thus, he may take possession of the testator's property; he may pay, or take releases of, debts owing from the estate; and he may receive or release debts which are owing to it: Williams on Executors, Vol. 1, p. 200, 10th Edn. The grant of probate does not give him his title; it makes his title certain: *Hewson* v. *Shelley* (2). An executor, therefore, having the power as legal representative to admit and dispose of claims against the testator's estate, when he includes such a claim in annexure B as owing from the testator and payable from his estate, may be assumed to acknowledge liability of the estate for the debt. But the position of an administrator is very different. He derives his title wholly from the Court. He had none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant: *Woolley* v. *Clark* (3). Upon the issue of the grant,

(1) 10 A. & E. 210=2 P & D 367=4 Jur. 247 =9 L. J. Q. B. 65.
(2) [1914] 2 Ch. 13 = 83 L. J. Ch. 607 = 30 T. L. R. 402=58 S. J. 397=110 L. T. 785.
(3) 5 B & Ald. 744=1 D. & R. 409.

the administrator's title has relation back to the date of the deceased's death. S. 220, Succession Act, provides:

"Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment of his death."

But an act done by a party who afterwards becomes administrator to the prejudice of the estate is not made good by the subsequent administration; for it is only in those cases where the act is for the benefit of the estate that the relation back exists: see *Margan* v. *Thomas* (4). And this principle is embodied in S. 221, Succession Act, which states:

"Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate."

In our opinion, an acknowledgment of liability professed to be made on behalf of a deceased's estate by a person whose power to make the acknowledgment solely depends upon his being the administrator of the deceased is not made effectual by his subsequently obtaining letters of administration. Such an intermediate act as the admission that a debt was due from the deceased's estate would certainly tend to the diminution of the estate. This was the ground upon which the learned trial Judge decided the case when dismissing the plaintiff's suit as barred by limitation, and we entirely agree with him upon this ground.

But on appeal a new ground has been taken, namely, that the acknowledgment of liability here was made by the petitioners for administration in their character of heirs of the deceased, and the argument is that this acknowledgment has the effect of preventing limitation. After the judgment in the suit the plaintiff obtained leave from the appellate Court to amend his plaint so that he might have an opportunity of putting forward his real case, which, in the opinion of the appellate Court, he had not done before the learned trial Judge. We have, therefore, to deal with the appellant's case, as presented in his amended plaint. It is clear from the language of S. 218 (1), Succession Act, already referred to, that the right to a grant of administration follows the right of succession, and that in order to establish the right to a grant the petitioner must show that he is as an heir entitled to a share on the distribution of the deceased intestate's estate. It follows that this being the purpose of the description of the petitioners defendants 1, 2 and 3 as the sons and the widow of the deceased in their application for the grant, they must be taken to have made the acknowledgment of the liability for the debts set out in annexure B in their character of heirs. It is not suggested that any other character was open to them, so we are not here confronted with any complicated question of an acknowledgment made by individuals filling more than one character. The petition therefore contained not only an admission of assets, but the admission that the debts were payable out of those assets. As heirs the defendants could have been sued by the plaintiff, and they would be liable for the debts of the deceased to the extent of the assets received by them as heirs. This liability would in no wise be affected by the subsequent grant of letters of administration to some of them. The conclusion, then, at which we have arrived is that the acknowledgment of liability of the debt due to the plaintiff from the estate prevented the bar of limitation to his suit.

The only other question is whether the acknowledgment of liability by defendants 1, 2 and 3 serves to bind defendants 4 and 5. We do not think that it does. The acknowledgment by defendants 1, 2 and 3 could only be effective against the other two defendants if it could be shown that these two defendants authorized them to acknowledge liability on their behalf. But it is plain that no such authority can be implied, because at the time when the petition for administration was filed defendants 1 to 3 were disputing the claim of defendant 4 to be the widow of the deceased and of defendant 5 to be his legitimate daughter. And it appears from the written statement of defendants 4 and 5 that the status of these defendants was not established until 22nd July 1920, when a decree was passed by this Court in T. O. S. No. 21 of 1919. This decree was in a testamentary suit which resulted from the caveat entered by defendants 4 and 5 against the petition for administration filed by defendants 1 to 3. In

(4) 8 Ex. 302=22 L. J. Ex. 152=17 Jur. 283.

Fohdham v. *Wallis* (5) it was held that among devisees an acknowledgment by some did not keep alive the creditor's right against others who had availed themselves of the statute of limitation. "Looking at the question upon principle" said Turner V. C.:

"I do not see upon what ground, parties, who might have availed themselves of the statute and have neglected to do so, can insist upon contribution from other parties who have set up the statute, and have upon the footing of it, succeeding in repelling the demand against them."

In these circumstances, we are unable to find any possible ground for holding that defendants 4 and 5 are liable on account of the acknowledgment of liability made by defendants 1, 2 and 3. The recovery of the debt as against these two defendants is, therefore, barred. Reference has been made to an affidavit sworn by defendant 2, one of the administrators on 21st October 1921, in support of his application to the Court for leave to sell, as required by S. 307 (2), Succession Act, the immovable property of the deceased for the liquidation of the debts. This can have no bearing on the question of defendant 4's and 5's liability. For the purpose of S. 19 (1), Lim. Act, an acknowledgment of liability must be before the expiration of the period prescribed for the suit, and at the date of his application by defendant 2 the suit on the two promissory notes had already become barred against defendants 4 and 5.

The result is that we allow the appeal against defendants 1 to 3 but dismiss it as against defendants 4 and 5. There will be a decree for the amount due on the two pronotes with interest up to date, and with 6 per cent interest from date of the decree till payment, against defendants 1 to 3 to the extent of the assets received by them as their shares of the deceased's estate. Defendants 1 to 3 will pay the appellant the costs of this appeal. As there has been no appearance on behalf of defendants 4 and 5 to the appeal, we make no order as to costs in their favour. We do not give the appellant his costs in the Court of first instance as it was due to his failure to present his case there properly that judgment was given against him. The plaintiff will pay the costs of defendants 4 and 5 in the trial Court, but otherwise parties will bear their own costs.

P.R.S. V.S. *Appeal allowed.*

(5) [1852] 10 Hare 217.

A. I. R. 1930 Madras 221

JACKSON, J.

Doraisami Thevar — Defendant 2— Petitioner.

v.

Chidambaram Chettiar and *others*— Petitioners—Respondents.

Civil Revn. Petn. No. 829 of 1928, Decided on 17th October 1929, from order of Dist. Munsif, Mayavaram.

Civil P. C., O. 22, R. 3—Suit by benamidar in his own name—Parties cannot be brought on record—Evidence Act, S. 115.

If parties allow their benamidar to sue in his own name, and not in a representative character, they cannot come in on his death under O. 22, R. 3: *A. I. R.* 1918 *P. C.* 140, *Dist.* and 17 *M. L. J.* 116, *Rel. on.* [P 222 C 2]

K. S. Jayarama Iyer—for Petitioner.

M. Subbaraya Iyer and *S. Panchapagesa Sastri*—for Respondents.

Judgment.—Petitioner is defendant 2 in O. S. No. 160 of 1927, District Munsiff's Court, Mayavaram. The plaintiff died and respondents 1 to 3 applied to be brought on the record as his legal representatives. They pleaded to be entitled to be brought on because the plaintiff had been suing in the character of their benamidar and they are the persons really interested in the suit. The learned District Munsiff has accepted their plea without addressing his mind to its merits. He simply states that having found the plaintiff to be their benamidar they are in his opinion entitled to be recognized as legal representatives.

This recognition would be under O. 22, R. 3, Sch. 1 "shall cause the legal representative of the deceased plaintiff to be made a party." And S. 2, Cl. 11, Civil P. C., defines what a legal representative is. It is not suggested that respondents 1 to 3 in law represent the estate of the deceased, but it is argued that the deceased sued in a representative character and on his death the estate on behalf of which he was suing devolved upon the petitioners. The phrase "sue in a representative character" does not convey any ambiguity to my mind. Whatever role a person openly assumes in a suit is the character in which he sues. If a benamidar chooses

to sue as absolute owner, and is asked in what character he sues, he will naturally say as absolute owner; to say that he is suing in the character of benamidar when he assumes the role of absolute owner is sheer violation of plain language. It is hardly necessary to labour the point. To the question "in what character did you go to the fancy dress ball," the answer. 'I went as myself but I dressed up as Napolean," would be nonsense.

It is urged for petitioner that S. 2, Cl. 11, Civil P C., has nothing to do with trustees who do not sue in a representative character but in their character of trustee on behalf of the trust; and when a trustee dies the estate does not devolve upon the beneficiary, as may be seen from S. 73, Act 2 of 1882. I agree, S. 2, Cl. 11, Civil P. C., in my opinion refers to suits in which a person is allowed to represent others in a representative capacity, and not to trustees, but since the deceased plaintiff never appeared either as a trustee or in any representative character, but sued in his own right, the point does not arise.

The respondents rely on various rulings none of which are particularly relevant to the point in issue. *Gur Narayan* v. *Sheolal Singh* (1), lays down, what in these days is never disputed, that a benamidar legitimately represents the real owner, is a mere trustee for him, and if he likes, may sue in his own name in an action to which the beneficial owner is no party. But it does not lay down that in such a suit the trustee sues in a respresentative character. *Venkatanarayana Pillai* v. *Subbammal* (2), establishes that a suit to set aside an adoption is brought by the presumptive reversioner in a representative character:

"the suit was brought by the deceased plaintiff as representing in his reversionary right the estate of the last male owner."

That is to say, the element of representation is inherent in the suit. This affords no parallel to a suit brought by a man in his own right.

Supposing that the benamidar obtains a decree and then dies, the beneficiaries may claim to be his representatives under S. 47, Cl. 3, Civil P. C.: *Kistam Naidu* v. *Duravada Patrudu* (3). The fact that although he did not sue in a representative character still nevertheless they may claim to be his representatives, hardly advances the present argument, because it has no bearing upon legal representatives as defined in S. 2, Cl. 11.

On the other hand *Periannan Chettiar* v. *Rangachi Reddi* (4), which is relied upon by petitioner is very much in point. If a principal allows his agent to sue on his behalf but in his own name, he cannot come in upon the death of that agent as the person entitled to continue the suit.

In the same way if parties allow their benamidar to sue in his own name, and not in a representative character, they cannot come in on his death under O. 22, R. 3.

Respondents 1 to 3 are not entitled to be recognized as legal representatives of the deceased plaintiff nor to be brought upon the record in that capacity and to that extent the order of the lower Court is modified and the petition is allowed with costs to petitioner to be paid by respondents 1 to 3 both here and in lower Court.

P.R.S./V.B. *Petition allowed.*

(1) A. I. R. 1918 P. C. 140=16 Cal. 566=46 I. A. 1 (P.C.).
(2) A. I. R. 1915 P. C. 124=38 Mad. 406=42 I. A. 125 (P.C.).
(3) A. I. R. 1927 Mad. 903.
(4) [1907] 17 M. L. J. 116.

A. I. R. 1930 Madras 222

VENKATASUBBA RAO, J.

Krishna Padayachi—Petitioner.

v.

Vinayakaswamiar—Respondent.

Civil Revn. Petn. No 687 of 1928, Decided on 25th September 1929, from order of Revn. Divn. Officer, Kumbakonam. D/- 17th March 1928, in E. P. No. 117 of 1927.

(a) Limitation Act. Art. 164—In case of substituted service terminus a quo is date of decree.

In the case of substituted service, if the summons was duly served the terminus a quo under Art. 164 is the date of the decree and not the date when it first comes to the knowledge of the defendant: *A. I. R.* 1928 *Mad.* 815, *Rel. on.*; *A. I. R.* 1928 *Mad.* 655, *Diss. from.*

[P 223 C 2]

(b) Limitation Act, Art. 164—Order of substituted service rightly made and properly effected—Knowledge of defendant is immaterial—But otherwise time runs from date of knowledge.

In the case of substituted service the article lays down that when the order is rightly

made and the service directed by the order is properly effected, knowledge of the defendant is immaterial and time runs from the date of the decree: *A.I.R.* 1927 *Mad.* 487; *A. I. R.* 1928 *Mad.* 815 and *A.I.R.* 1924 *Lah.* 191, *Rel. on.* [P 223 C 2]

Where, however, an order for substituted service is improperly obtained, as being made on insufficient material contained in an application supported by affidavit, the summons cannot be said to have been duly served within the meaning of Art. 164, and the time accordingly runs not from the date of the decree but from the date when it first came to the knowledge of the defendant. [P 224 C 1]

M. S. Venkatarama Iyer—for Petitioner.

K. S. Sankara Iyer—for Respondent.

Judgment.—This case raises a point in regard to the applicability of Art. 164 Lim. Act. The defendant was served by substituted service and a decree was passed on 20th June 1927 against him ex parte. He applied on 6th March 1928 for the setting aside of that ex parte decree. The question is, does time run from the date of the decree, or from the date when it came to his knowledge?

Art. 164 runs thus:

"By a defendant, for an order to set aside a decree passed ex parte	Thirty days from the date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree.

Can it be said that in every case where the summons is served by substituted service, the starting point is not the date of the decree but the date when it first comes to his knowledge? To accept such a contention would be equivalent to holding that substituted service is in no circumstances due service. There seems to be no warrant for this position. The Civil Procedure Code prescribes several modes of serving the defendant and one such mode is what is known as substituted service. It is impossible to hold that a mode of service prescribed by the Code is not due or proper service. It is to be further noted that the words "duly served" which occur in Art. 164 are also to be found in O. 9, R. 13, Civil P. C. It enacts that where a decree is passed ex parte, the defendant may apply for an order to set it aside; and the section proceeds to say (I am quoting only the relevant portion):

"If he satisfies the Court that the summons was not duly served, the Court shall make an order setting aside the decree."

If, when the defendant is served by substituted service, it is to be held that that he is in no case "duly served," what follows? Under this provision, the defendant has merely to show that service was effected by substituted service and he is entitled as a matter of course to have the ex parte decree set aside. This, apart from every other consideration, shows that the construction which I have referred to, of the words "duly served," must be rejected. With all respect, I therefore disagree with the decision of Srinivasa Aiyangar, J. in *Venkatachalam* v. *Subbayya*, *A. I. R.* 1928 *Mad.* 655. My view receives support from a decision of a Bench of this Court in *Shariba Beebi* v. *Abdul Salam*, *A. I. R.* 1928 *Mad.* 815. I accordingly hold that even in the case of substituted service, if the summons was duly served, the terminus a quo under Art. 164 is the date of the above decree, and not the date when it first comes to the knowledge of the defendant.

Then comes the question, in the case of substituted service, when is the defendant "duly served" and when not? It is contended for the respondent that the Court cannot examine the propriety of the order directing substituted service, for, it is said that under the article, the only point which the Court can consider is, whether the summons was duly served, that is, whether the order directing substituted service was duly carried out. The order may be right or wrong; it may be or may not have been made on sufficient material; the Judge when ordering substituted service may have acted with grave irregularity; still it is contended that the Court under Art. 164 is not concerned with the regularity of the propriety or the order and that its duty is confined to enquiring whether this wrong order was rightly carried out. I cannot accept this construction. What in the case of substituted service the article intends to lay down is, when the order is rightly made and the service directed by the order is properly effected, knowledge of the defendant is immaterial and time runs from the date of the decree. This is the natural and reasonable meaning of the section. This view is implied in the decision in

Narasimha Chettiar v. *Balakrishna Chetty* (1), which is cited with approval in the case already referred to A. I. R. 1928 *Mad.* 815. The Lahore High Court has taken the same view in *Ramkrishna* v. *Mula* (2).

Let me now examine whether the order made directing substituted service can be sustained. The first summons gave the name of the defendant's village correctly but the name of the taluk where the village is situate was wrongly given. The result was that the summons was sent to a wrong officer who returned it. In the second summons again, the same mistake was repeated and it shared the same fate. The third summons omitted to contain the name of the defendant's father and the Nazir returned it saying that it was impossible to serve it, as there were four men having the defendant's name. A fourth summons was then taken out. This time, there was no mistake made but it was found by the process server that the defendant's house was closed. Learning from neighbours that the defendant had left the place, he returned again the summons unserved. On this the plaintiff filed an application for substituted service supporting it by an affidavit. In that affidavit, these facts were not properly mentioned. The statements made were misleading and the Judge thereupon made an order for substituted service. In my opinion the order was improperly obtained, it was made on insufficient material and cannot be sustained. I therefore hold that the summons was not duly served within the meaning of Art. 164, and the time accordingly runs not from the date of the decree but from the date when it first came to the knowledge of the defendant. The lower Court has given no finding on this matter. I direct it to try the question:

"when did the defendant first have knowledge of the decree?"

after allowing the parties to adduce evidence and I further direct the Court to return a finding in three weeks from the receipt by it of this order. Time for objections one week thereafter. (After stating the finding of the lower Court that the petitioner was aware of the decree as soon as it was passed and that his contention that he came to know of it nearly nine months after the decree is false, the judgment proceeded.) The finding is against the petitioner and no objections have been filed by him. I accept the finding. The Civil Revision Petition is dismissed with costs.

P.R.S./V.S. *Petition dismissed.*

(1) A. I. R. 1927 Mad. 487.
(2) A. I. R. 1924 Lah. 191.

A. I. R. 1930 Madras 224

JACKSON, J.

Kristamneni Kristnayya—Defendant 1—Petitioner.

v.

Karnedhan Kothari — Plaintiff—Respondent.

Civil Revn. Petn. No. 1370 of 1929, Decided on 6th November 1929, against order of Sub-Judge, Guntur, D/- 12th September 1929.

Civil P. C., O. 39, R. 6 — Court cannot under R. 6 send commissioner to sell crop.

Order 39, R. 6 merely gives power to a Court to sell a perishable article and certainly does not authorize it to send a commissioner to sell any crop. [P 224 C 2]

K. Kameswara Rao—for Petitioner.
V. Govindarajachari—for Respondent.

Judgment.—The order of the lower Court cannot be supported. The Court certainly has no jurisdiction under O. 26, R. 9, Sch. 1, Civil P. C. There is nothing in the affidavit to attract O. 39, R. 1, and O. 39, R. 6 merely gives power to a Court to sell a perishable article and certainly does not authorize it to send a commissioner to sell any crop. Nor is this a matter in which S. 151 should be invoked. The proper course for the respondent would be to apply for a receiver, if he has right to apply and if he has no right to apply for a receiver, he has no right to apply for a commissioner.

The respondent complains that the suit is being wantonly delayed by the petitioner in this Court—that is a matter for the lower Court.

The petition is allowed with costs and the order cancelled.

P.R.S./V.B. *Petition allowed.*

A. I. R. 1930 Madras 225 (1)

JACKSON, J.

Swarnammal—Petitioner.

v.

K. Muniswami Chetty — Respondent.

Criminal Revn. Case No. 117 of 1929, and Criminal Revn. Petn. No. 99 of 1929, Decided on 11th October 1929, against order of 2nd Presidency Magistrate George Town, Madras D/- 30th October 1928.

Criminal P. C., S. 441—Under S. 441 reasons can be supplied where no reasons are given under S. 370—Reasons already given under S. 370 cannot be contradicted by those given under S. 441.

Section 441 is not enacted to enable Presidency Magistrates to give fresh reasons for their decisions contradictory to those already given ; but to enable them to supply reasons where in exercise of their privilege under S. 370, they have given no reasons at all.

[P 225 C 2]

V. L. Ethiraj and *N. Somasundaram* —for Petitioner.

T. S. Anantaraman – for the Crown.

M. A. T. Coelho and *C. M. J. Ernest*— for Respondent.

Order.—The procedure of the learned 2nd Presidency Magistrate cannot be supported. He dismissed a complaint and discharged the accused which he is empowered to do under S. 370, Criminal P. C., without giving any reasons. But he elected to give as his reason that there was no legal evidence. This was taken up on revision and on the face of the record the learned Presidency Magistrate is wrong and there is legal evidence, the sworn statement of P. W. 3. But the Magistrate submits a report under S. 441, Criminal P. C., reiterating his statement that there is no legal evidence, and recording for the first time that he disbelieves P. W. 3. This argues great confusion of mind because if the evidence of P. W. 3 requires judicial consideration there evidently is legal evidence.

It seems obvious that at the time he discharged the accused the Magistrate never directed his mind to the credibility of P. W. 3, because he held that there was no legal evidence.

His subsequent argument is not of much use ; in fact S. 441, Criminal P.C., is not enacted to enable Presidency Magistrates to give fresh reasons for their decisions contradictory to those already given ; but to enable them to supply reasons where in exercise of their privilege under S. 370, Criminal P. C., they have given no reasons at all. This petition must be allowed and further inquiry ordered. The discharge is cancelled.

P.R.S./V.S. *Petition allowed.*

A. I. R. 1930 Madras 225 (2)

CURGENVEN, J.

Appu Pillai—Petitioner.

v.

Nataraja Pillai and *others*—Respondents.

Civil Revn. Petn. No. 169 of 1929, Decided on 18th September 1929, from order of Sub-Judge, Tanjore, in Original Petn. No. 482 of 1928.

Civil P.C., S. 115—Suit with regard to election dispute—Only appreciation of evidence involved—High Court cannot interfere in revision to decide questions of facts as to validity of votes.

In a suit in an election dispute High Court cannot interfere in revision with the lower Court's order on grounds which involve nothing more nor less than appreciation of evidence, and decide for itself on the question of fact whether the votes were valid or not valid. The High Court has to confine itself to the question of jurisdiction only : (1927) *M. W. N.* 842; *A.I.R.* 1926 *Mad.* 319; *A. I. R.* 1925 *Mad.* 1207; *A. I. R.* 1928 *Mad.* 199 and *A. I. R.* 1925 *Mad.* 1207, *Rel. on.* [P 226 C 1]

P. Venkataramana Rao—for Petitioner.

S. Parthasarthi and *V. K. Thiruvenkatachariar*—for Respondents.

Judgment.—The petitioner was an unsuccessful candidate in an election to fill a vacancy in the Municipal Council of Tanjore. He got 99 votes against 100 votes obtained by respondent 1, who was declared elected. The petitioner filed a petition challenging the result of the election before the Subordinate Judge of Tanjore and being unsuccessful there has now filed this petition for revision of the lower Court's order.

The question depends entirely upon whether certain votes should or should not have have been rejected. The learned Subordinate Judge has on this point come to certain conclusions. I cannot say that having scrutinized the ballot papers I should have come to the same conclusions, because it appears to me that in each case where there was a second mark, which the learned Subordinate Judge considers in itself sufficient to invalidate the vote as creating

a doubt as to voter's intentions, it was produced by folding the paper transversely before the ink was dry. Nevertheless the current of authority in this Court is clearly against my interfering with the order upon any such grounds as this, which involves nothing more nor less than an appreciation of the evidence. In the Full Bench case in *M. Appayya Gounder* v. *Dawood Saheb* (1), the view was clearly expressed that where there is no question of jurisdiction or of acting illegally this Court cannot interfere under S. 115, Civil P.C. And there is a series of subsequent decisions: *Doraiswami Nadar* v. *Joseph* (2); *Mamundi Konar* v. *Shamsuddin Saheb* (3) and *K. Subbiah* v. *Manikyam* (4), which have proceeded upon the same principle. In *Mamundi Konar* v. *Shamsuddin Saheb* (3). which also related to the validity of ballot papers, Wallace, J., after commenting upon the lower Court's decision and finding that it had ample jurisdiction to decide the questions before it, added:

"There is in that decision neither lack of jurisdiction nor irregular exercise of jurisdiction which would give this Court authority to interfere under S. 115, Civil P. C. It cannot be reasonably contended here that this Court has to decide for itself on the question of fact as to whether the votes were or were not invalid. This Court in a civil revision petition has only to see that the lower Court exercised its jurisdiction properly."

Adopting this view, and notwithstanding that were I to give a decision on the facts it would run counter to the lower Court's decision, I must dismiss the petition with costs.

P.R.S./V.B. *Petition dismissed.*

(1) [1927] M. W. N. 842 (F.B.).
(2) A. I. R. 1926 Mad. 319.
(3) A. I. R. 1925 Mad. 1207.
(4) A. I. R. 1928 Mad. 199.

A. I. R. 1930 Madras 226

WALLACE AND MADHAVAN NAIR, JJ.

Ambalavana Thambiran—Appellant.

v.

Vageesam Pillai and *others*—Respondents.

Appeal No. 289 of 1928 and Civil Revn. Petn. No. 1014 of 1928, Decided on 1st May 1929, against order of Dist. Judge, Ramnad, D/- 17th July 1928.

(a) Civil P. C., S. 92 (1) — Cls. (a) and (b) are distinct.

Clauses (a) and (b) are distinct clauses : *A. I. R.* 1928 *Cal.* 368, *Diss. from.* [P 228 C 1]

(b) Civil P. C., S. 92—Liberty to apply reserved in scheme to certain persons—No others can apply.

When liberty to apply is confined by a rule under the scheme decree to particular persons, no others have locus standi to apply and to permit others to apply is in effect to modify the scheme which is not permissible in law except by suit under S. 92. [P 227 C 2]

(c) Civil P. C., S. 92—Scheme going beyond what was decided in scheme suit is ultra vires.

A scheme which goes beyond what was decided in the scheme suit, and decides matters which come within the purview of S. 92 is so far ultra vires : *A. I. R.* 1927 *Mad.* 1073 (*F.B.*), *Foll.* [P 227 C 2]

A judgment in a scheme suit with regard to management of a trustee Devasthanam declared that when vacancy occurred in the trusteeship "the Pandara Sannadhi for the time being of Thiruvannamalai Mutt shall be appointed trustee unless the District Court of Ramnad for any valid reasons decides him to be unfit."

Held : that the scheme gave the District Court power to proceed to function and either to appoint "the Pandara Sannadhi or to refuse to appoint him on the ground that he was unfit." If he is appointed he can only be removed under S. 92 ; if he is not appointed no one else can be appointed except by a similar suit and a motion to appoint some one else can only be made by way of suit. [P 228 C 1]

(d) Mahomedan Law—Wakf—Trustee can be appointed directly without suit under Civil P. C , S. 92.

Under Mahomedan Law, Court has power of appointing a trustee directly without his having recourse to S. 92 : *A. I. R.* 1924 *Cal.* 441 and *A. I. R.* 1916 *P. C.* 132, *Rel. on.* [P 228 C 1]

(e) Civil P. C., S. 92—Legal Propriety of clause in scheme—Test laid down.

The true test as to the legal propriety of a clause in a scheme is whether the relief granted by that Court is such a relief that if it was being sought before the scheme was sanctioned, it would have to be sought by suit under S. 92. *A.I.R.* 1926 *Mad.* 559, *Foll.* [P 228 C 2; P 230 C 1]

K.S. Krishnaswami Iyengar, N. Srinivasa Iyengar and *A. Srinivasachariar*—for Appellant.

K. Rajah Iyer, V. Ramaswami Iyer, A. Swaminatha Iyer and *Ramachandra Iyer*—for Respondents.

Wallace, J.—This C. M. A. and C. R. P. are against the order of the lower Court dismissing an application presented under a scheme decree in A. A. O. 218 of 1925 on the file of the High Court. Under R. 2 in that scheme, which was for the management of the Anjukoil Devasthanam, it is declared that when a vacancy occurs in the trusteeship: "the Pandara Sannadhi for the time being of Thiruvannamalai mutt shall be appointed trustee unless the District Court of Ramnad for any valid reason decides him to be unfit."

The late Pandara Sannadhi who was the trustee died on 10th June 1928. The

petitioners applied under this rule on 25th June 1928 to the lower Court to declare respondent 1, who claimed to have succeeded as Pandara Sannadhi, to be unfit for appointment as trustee and to appoint either one of the petitioners or some other proper person to be trustee and for other reliefs. The District Judge dismissed the application, holding that R. 2 of the scheme is ultra vires and the petitioners came up by way of appeal and revision. It is conceded that no appeal lies and the case has been argued as one in revision.

In the lower Court it was alleged by the petitioners, inter alia, that respondent 1 has not been lawfully appointed as Pandara Sannadhi and therefore was unfit to be a trustee. But the argument before us has proceeded on the footing that he is the Pandara Sannadhi de facto, entitled, if R. 2 is not ultra vires, to be appointed as trustee unless otherwise found unfit, and it is urged that the petition should be reopened for enquiry as to his fitness. The respondents maintain that (1) the rule itself is ultra vires, (2) that even if it is intra vires the petitioners under the scheme have no locus standi to apply. A third point viz., that the High Court had no jurisdiction to frame a scheme at all was not pressed here.

To take the second objection first, the only persons to whom the scheme gives liberty to apply for directions are the trustee, the Board and the Advocate General : see R. 13. It is not open to any person to come up under the scheme and ask for directions. If it is held that any person can come up under R. 2 and ask for directions there is no reason why such a liberty should be restricted to that rule and not apply to any rule under the scheme, and S. 13 would become not only meaningless but misleading. I do not subscribe to the contention that the petitioners' petition is not one asking for directions. If, as is assumed by the petitioners, R. 2 vests the power of appointment of the Pandara Sannadhi in the District Court, then clearly the petitioners are asking for directions that the Pandara Sannadhi is unfit to be the trustee and for further directions that one of them or some one else, be appointed. This point will be more fully discussed later.

In C. M. P. No. 5606 of 1928 a Bench of this Court consisting of the Chief Justice and myself held, in interpreting a similar scheme, that when liberty to apply is confined by a rule under the scheme to particular persons, no others have locus standi to apply, and that to permit others to apply is in effect to modify the scheme, which is not permissible in law except by suit under S. 92. I may say, however, that if R. 2 is intra vires I see no objection to the petitioners putting in a memo of information to the District Court merely reporting the death of the Pandara Sannadhi and asking the District Court to function under R. 2 and applying for permission to be heard when the Court is holding its enquiry as to the fitness of the succeeding Pandara Sannadhi to be trustee. But that would be a petition outside the scheme and whether it would lie in law depends on the answer to the second point whether R. 2 is not ultra vires.

On this point the respondents' main argument is that the petitioners in applying for the appointment of a trustee other than the Pandara Sannadhi are asking for a relief which can only be granted by way of suit under S. 92, since the relief comes under Cl. (1) (b) "appointing a new trustee." Petitioners contend that S. 92 will not apply to the present case since the matter is neither in relation to any breach of trust nor one in which the direction of the Court is deemed necessary for the administration of the trust. Here of course there is no matter of breach of trust. Petitioners contend that it is also not a matter of direction, since the scheme itself has provided all the directions necessary, and that they are asking only to carry out the directions of the scheme. Now the Full Bench decision in *Veeraraghava Chariar* v. *Advocate-General, Madras* (1) has laid down emphatically that a scheme which goes beyond what was decided in the scheme suit, and decides matters which come within the purview of S. 92, is so far ultra vires. R. 2, is therefore intra vires only so far as it embodies a decision in the suit and is not providing for a relief which is only obtainable by suit under S. 92. It does not in my view go beyond what was decided in the suit itself and is therefore intra vires provided it is limited to what it says and is not stretched to cover a

(1) A.I.R. 1927 Mad. 1073=51 Mad. 31.

general plenary power of appointment of trustee. Appointment under it is intra vires, if confined to appointment of the Pandara Sannadhi. It is ultra vires, if called in aid to appoint anyone else.

To apply the Full Bench principles to the present case the judgment in the scheme suit gave the District Court power only to appoint the Pandara Sannadhi if not found unfit ; that is, it gave the District Court power to proceed to function and either to appoint him or to refuse to appoint him on the ground that he was unfit. If he is appointed, he can only be removed by a suit under S. 92 ; if he is not appointed no one else can be appointed except by a similar suit. A motion to appoint some one other than the Pandara Sannadhi can therefore be made only by way of suit, and that is the motion which the petitioners moved in the lower Court.

The petitioners argued further that Cl. 1 (b) is inseparable from Cl. 1(a), and that it is only in the case of the appointment of a new trustee consequent on the removal of an old one that 1 (b) applies. But I can see no ground for thus restricting the scope of the language used. We might as well hold that each different clause is thus inter-connected from (a) to (h), i. e., you cannot apply one of the clauses at all in isolation but you must apply all together or not at all. I am with great respect not prepared to accept the broad view of the Calcutta High Court in *Abdul Alim* v. *M. T. Abir Jan*, *A.I.R.* 1928 *Cal.* 368 that the juxtaposition of Cls. (a) and (b) implies that the appointment of a new trustee must be limited to cases where it is necessary because of the removal of an old one ; nor was such a proposition necessary for the decision of that case, since the general Mahomedan Law vested in the Court the Kazi's power of appointing a trustee directly, and if the Kazi could make the appointment without his having recourse to S. 92 as the law allowed him to do, so also could the Court. This is made clear in a similar case of the same Court in *Mohiuddin Chowdhury* v. *Aminuddin Chowdhury*, *A. I. R.* 1924 *Cal.* 441. The Privy Council case in *Mahomed Ismail* v. *Ahmad Mooli Dawood* (2), is on the same lines. Nothing which was intra vires of the power of the Kazi could be ultra vires of the power of the civil Court which now exercises his functions.

Mr. Varadachari for the respondents contends that here there is no case of appointment or removal at all, because really there is no vacancy. He argues that the Pandara Sannadhi for the time being is to all intents and purposes ex officio trustee of this Devasthanam. He must base that claim not on R. 2 of the scheme, since in his view it is ultra vires, but on the judgment under which the scheme was sanctioned, but the most that judgment says is that the Pandara Sannadhi :

'has a prima facie right to be the trustee of the Devasthanam."

" His right is inchoate which gets perfected by appointment of the Court and before his right can be negatived some special circumstances must be shown."

This to my mind does not constitute the Pandara Sannadhi ex officio trustee. There is to be an appointment by the Court. Before the Pandara Sannadhi becomes the trustee he must move the Court for his appointment, and the Court must enquire if there are any special circumstances which would render him unfit to be appointed. Obviously as the judgment has already decided that the Pandara Sannadhi shall be appointed unless unfit it is not necessary for him to sue for a declaration that he shall be appointed. The test in such a case would be, would the refusal of leave to sue under S. 92 deprive the applicant of the right already declared by a judgment of a competent Court to be his. If the answer is 'yes,' then clearly S. 92 cannot apply. Here the refusal of leave to sue for appointment under S. 92 would deprive the Pandara Sannadhi of his declared right to be appointed, if not unfit. Therefore no suit by him is necessary ; contrariwise the refusal to the petitioners to sue would not deprive them of any declared right. Therefore their only way of moving the Court to appoint some one else would be by suit under S. 92. If the Pandara Sannadhi does not within a reasonable time apply for appointment, then any one interested in the trust can move for the appointment of a trustee to fill the vacancy but that motion if it is a motion to appoint any one else than the Pandara Sannadhi, must be by way of suit under S. 92, Cl. 1 (b).

(2) A.I.R. 1916 P.C. 132=43 Cal. 1085=43 I. A. 127 (P.C.).

I hold that there is no error of law in the lower Court's order and dismiss the C. R. P. and the C. M. A. with costs of the Pandara Sannadhi in each but only one advocate's fee.

Madhavan Nair, J.—The petitioners before us are two persons who claim to be the senior-most Tambirans of the Thiruvannamalai Adhinam at Kunnakudi. Purporting to act under the scheme framed by the High Court in respect of the Anjukoil Devasthanam in A. A. O. Nos. 218 and 219 of 1919 and A. A. O. No. 216 of 1925 they filed a petition before the District Court of Ramnad at Madura praying (1) that respondent 1 be declared legally unfit to be trustee of the Devasthanam on the ground of his not being a lawful Pandara Sannadhi and even otherwise be held unfit to hold office, (2) that either of the petitioners or such other proper person may be appointed as the trustee and (3) that a receiver should be appointed pending the disposal of the petition. The judgment of the High Court which incorporated the scheme agreed to by the parties to the then proceedings states that :

"The head of the Mutt (i. e., Thiruvannamalai) has a prima facie right to be a trustee of the Devasthanams. His right is inchoate which gets perfected by appointment by the Court and before his right can be negatived, some special circumstauces must be shown."

The case for the petitioners in the lower Court was that the late Pandara-Sannadhi who was the trustee of the Anjkoil Devasthanam died on 10th June 1928, that respondent 1 has been pretending that he had been appointed as "chinna-pattam" on 6th January 1928 and had become the head of the Tiruvannamalai Adhinam on the death of his predecessor, that there was no such appointment as contended for by respondent 1 and that he is immoral and unfit to hold the office of Pandara Sannadhi and therefore to be the trustee of the Devasthanam. For the purpose of the proceedings in this Court, the petitioners stated that they are willing to treat respondent 1 as the Pandara Sannadhi of the Adhinam but they say that he is unfit to be appointed trustee of the Devasthanam for the reasons mentioned in the petition. The application to the District Court was made by the petitioners under Cl. 2 of the scheme which runs as follows :

"When a vacancy occurs at any time hereafter in the trusteeship of the Devasthanam the Pandara Sannadhi for the time being of the Tiruvannamalai Mutt shall be appointed trustee unless the District Court of Ramnad for any valid reason decides him to be unfit. The District Judge shall, if so requested by any party concerned, within one month from his decision, refer the matter to the High Court and the decision of the High Court shall be final."

Having regard to S. 92, Civil P. C., and the decision of the Full Bench in *Veeraraghavachariar* v. *Advocate General of Madras* (1) the learned District Judge held that :

"the provision of Cl. 2 of the scheme is ultra vires and that the relief sought by the petitioners can be sought only under S. 92 of the Code."

He, therefore, dismissed the application. It is admitted that no appeal lies against this order and so A. A. O. No. 289 of 1928 has to be dismissed. In C. R. P. No. 12 of 1928, we are asked to say that the Court below acted without jurisdiction in summararily dismissing the petition without conducting an enquiry. In the Full Bench decision in *Veeraraghavachariar* v. *Advocate General of Madras* (1), it was decided that:

"if in a decree for a scheme framed under S.92, Civil P. C., liberty is given to persons to apply to the Court for directions merely to carry out the scheme already settled such reservation of liberty in the decree will be intra vires if the assistance of the Court can be without offending S. 92, but where liberty is given to apply to the Court for alteration or modification of the scheme, such reservation is ultra vires as offending S. 92."

Section 92, Civil P. C., provides that in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the person mentioned in it may institute a suit and obtain a decree for any of the reliefs mentioned in Cls. (a) to (h), sub-S. (1) of which the two clauses with which we are concerned are Cls. (a) and (b) which refer to "removing a trustee" or "appointing a new trustee." The substantial question for consideration is whether Cl. (2) of the scheme relating to the appointment of a trustee is ultra vires as offending this section. The argument of the petitioners that the clause is not ultra vires, and that effect can be given to it without offending S. 92, has ranged over a very wide field but for purposes of discussion it may be stated somewhat in this form. S. 92

Civil P. C., applies only in two cases: either there must be an alleged breach of any express or constructive trust created for public purposes or a charitable or religious nature: or the direction of the Court must be deemed necessary for the administration of any such trust. In this case, it is conceded that there is no question of any breach of any express or constructive trust. So assuming that the reliefs prayed for fall within Cl. (a) or (b) of the section, unless the direction of the Court is to be deemed necessary for the administration of the trust the section has no application. In this case the direction of the Court is obviously not for that purpose and, therefore, there is no need to resort to the procedure of a suit referred to in S. 92 for granting the reliefs prayed for by the petitioners. It would, therefore, follow that S. 92 has no application to the present petition. The petitioners' learned counsel has also argued that the relief prayed for is for the appointment of a trustee and that S. 92 does not come into play unless the petitioners ask for the relief of removal as well as the appointment of a trustee.

Having regard to the various considerations urged and the decisions of the other High Courts brought to our notice, the question raised is not an easy one to decide. The argument that direction of the Court for the administration of the trust is not asked for in this case as scheme is already in existence for that purpose does not give as much help in solving the difficulty as it assumes that the scheme has been passed validly which as contended for by the respondent is the very question that we are called upon to decide. As observed by Wallace, J., in *Abdul Hakim Baig* v. *Burramuddin* (3), at p. 590 (of 49 *Mad.*):

"The true test as to the legal propriety of a clause in a scheme is whether the relief granted by that clause is such a relief that, if it was being sought before the scheme is sanctioned, it would have to be sought by a suit under S. 92. If it was, it cannot be granted by any sort of application under the scheme notwithstanding that the scheme itself purports to provide such means of obtaining that relief."

That I think, on principle, is the proper standpoint from which the question should be viewed. Otherwise, it will lead to this result. When once a scheme for the administration of a trust has been framed, S. 92 will no longer have any application and under the guise of applications under the scheme any number of applications for removing or appointing trustees without the gurantees provided for in S. 92 can be made. This will really defeat the object of S. 92. Applying the test referred to above what we have really to consider is whether the relief granted by Cl. 2 of the scheme in this case is or is not a relief which would have to be sought by a suit under S. 92, Civil P. C. On this point I do not think there can be much doubt. The clause refers to the appointment of the Pandara Sannadhi for the time being of the Tiruvannamalai Mutt as the trustee of the Devasthanam when a vacancy occurs and indicates that he should be so appointed unless he is for some valid reason found unfit. The petitioners in their application, as now explained by them, say that the present Pandara Sannadhi of Tiruvannamalai Mutt is an unfit person to be appointed as the trustee and, therefore, he should not be appointed as the trustee. Both Cl. 2 of the scheme and the application of the petitioners made under it refer to the appointment of the Pandara Sannadhi as the trustee of the Devasthanam, a relief which if Cl.2 of the scheme did not exist could be obtained in my opinion only by filing a suit under S. 92, Civil P. C.

But it is argued for the petitioners that considering the history of S. 92, Cls. (a) and (b) of that section must be read together and that the section would have application only when the object of the application is the "removal of a trustee and the appointment of another trustee." In other words, it is argued that the section cannot come into play unless the appointment of a new trustee is dependent on removal of the old one. This view finds support in a decision of the Calcutta High Court in *Abdul Alim Abed* v. *Abirjan Bibi* (4). The petitioners argue that this interpretation of S. 92 should be accepted and that since they did not ask for the removal of any trustee before appointing a new one the relief prayed for by them in their application under Cl. 2 of the scheme does not fall within the scope of S. 92. The answer to this contention is twofold: Firstly, the view that Cls.

(3) A. I. R. 1926 Mad. 559=49 Mad. 580.

(4) A. I. R. 1928 Cal. 368=55 Cal. 1284.

(a) and (b) should be read together is not supported by the decisions of this Court. On the other hand, in *Neti Rama Jogiah* v. *Venkatacharlu* (5), this Court held that a suit for the appointment of a new trustee for a temple on the ground that the defendants are not the lawful trustees and that the trusteeships are, therefore, vacant, is a suit under S. 539 (a), Civil P. C. Secondly, the petitioners' application in substance asks for the removal of the present Pandara Sannadhi from the trusteeship of the Devasthanam and the appointment of a proper man in his place. In view of the admission made in this Court that respondent 1 may be treated as the present Pandara Sannadhi of the Mutt and having regard to the fact that he is prima facie entitled to the trusteeship of the Devasthanam according to the judgment of this Court, the petitioners' application is not to be read as meaning that there is a vacancy in the trusteeship of the Anjukoil Devasthanam which should be filled up by the appointment of a trustee but that it means that the present Pandara Sannadhi who is prima facie the trustee should be removed from the trusteeship of the Devasthanam and that a new one who is a proper man should be appointed in his place. A perusal of the application will bear out this interpretation of its contents. In this view, the relief prayed for by the petitioners would fall within the scope of S. 92, Civil P. C. I must, therefore, hold that Cl. 2 of the scheme in question is ultra vires and hold that the relief sought by the petitioners can be sought only in a suit under S. 92 of the Code.

Apart from the objection that Cl. 2 of the scheme is ultra vires, respondent 1 has urged another objection to the maintainability of the petitioners' application. He argues that assuming that Cl. 2 is intra vires, under Cl. 13 of the scheme the petitioners have no locus standi to file the application. Cl. 13 is as follows:

"The trustee, the Board or the Advocate General shall have liberty to apply to the District Court of Ramnad for directions generally including directions for the utilisation of surplus moneys, if any. They shall also have liberty to apply for any modification of the scheme."

If the petitioners purport to act under the scheme as they do then it is clear that effect should be given to Cl. 13 under which right of making applications to the Court is given only to the trustee, the Board or the Advocate General. Obviously the right of making the applications has been purposely confined to the persons mentioned in this clause; for, otherwise there will be no guarantee for the bona fide nature of the applications. The petitioners not having been mentioned as persons entitled to apply under Cl. 13 have in my opinion no locus standi to make the present application. It must, therefore, be dismissed on this ground also.

The appeal against the order and the Civil Revision Petition are dismissed with costs of respondent 1.

P.R.S./V.B. *Appeal dismissed.*

(5) [1903] 26 Mad. 450.

A. I. R. 1930 Madras 231

RAMESAM AND CORNISH, JJ.

(*Lodd*) *Govindoss Krishnadoss*—Plaintiff—Appellant.

v.

Gopeswar Lalji Maharaj and *another*—Defendants—Respondents.

Original Suit Appeal No. 78 of 1926, Decided on 16th October 1929. from judgment of Kumaraswami Sastri, D/- 2nd March 1926 in C. S. No. 192 of 1924.

(a) Specific Relief Act, S. 21 (b)—Promise that power-of-attorney will not be revoked except on certain grounds is not specifically enforceable.

A promise, contained in an ordinary power-of-attorney that it will not be revoked except on certain grounds is the same as a contract to keep a servant on hire and is not specifically enforceable : (1906) *A. C.* 254, *Ref.* [P 233 C 1]

(b) Contract Act, S. 202—Spiritual benefit conferred by religious endowment upon agent does not amount to interest within meaning of S. 202.

Agency created by an ordinary power-of-attorney for the management of an endowment can be revoked even though the endowment is made for the spiritual benefit of the person creating the endowment and the members of the family including the agent, for such spiritual benefit cannot amount to an interest within the meaning of S. 202. [P 233 C 1, 2]

T. Rangachariar and *B. C. Seshachala Iyer*—for Appellant.

V. C. Gopalaratnam—for Respondents.

Ramesam, J.—This is an appeal by the plaintiff against the decree of our brother, Kumaraswami Sastri, J., in C. S. No. 192 of 24 which was a suit brought by the plaintiff for a declaration of his hereditary right to the man-

agement of the temple of Sri Vittalnathjee in Ekambareswar Agraharam, Madras, and that the defendant has no right to cancel the power-of-attorney executed by him in favour of the plaintiff and for an injunction. The learned Judge dismissed the suit and the plaintiff appeals.

The facts of the case may be thus stated: In the year 1896 one Ganga Bai, widow of the plaintiff's paternal grandfather's brother, built a temple for Sri Vittalnathjee in Ekambareswar Agraharam and in 1900 she executed a Bhot Patra (Ex. A) in which she mentions the fact of her having built the temple in 1896 and got the idols of Sri Vittalnathjee and Sri Swaminijee installed therein and of having set apart a sum of Rs. 40,000 for the seva, puja, utsavams and other festivals of the deities and for the salaries of the temple servants. The sum was left with the plaintiff's father, Krishnadoss Balamukundoss of Giridoss Govindoss Company of Madras and he was to pay monthly a sum of Rs. 200 for the expenses. She then adds another Rs. 5,000 to the original fund of Rs. 40,000. She says that the above properties, namely, the house in which the temple was built, the above funds and also cloths, jewels and vessels costing about 4,500 were settled upon the deities and were delivered possession of to the Guru of the family, namely, Sri Krishnavati Vahujee of the Udaipur Samasthanam. She also provides that the successors of the Guru should conduct the seva, puja, offerings, festivals etc. of the temple and that the funds should not be used by anybody for any other purposes. In 1904 the said Sri Krishnavati Vahujee, who was made the trustee of the institution under Ex. A, executed a power-of-attorney to Krishnadoss Balamukundoss giving him certain powers for managing the institution, the principal being a person who had to be constantly absent from Madras, namely, in Udaipur Samasthanam. This is Ex. 3. In 1906 Krishnadoss Balamukundoss died and the agency created by Ex. 3 must be taken to have terminated. The plaintiff stepped into his father's shoes and continued to look after the management of the institution, and in 1909 another power-of-attorney was executed by the same lady, namely, Sri Krishnavati Vahujee, to enable the plaintiff to look after the management of the temple (Ex. 4). In 1911 the principal, namely Sri Krishnavati Vahujee died. Again the contract of agency must be taken to have terminated. But the plaintiff continued to look after the management of the temple. In 1914 the successor of Sri Krishnavati Vahujee namely, her adopted son, Sri Gopeswara Laljee, gave a fresh power-of-attorney to the plaintiff (Ex. 5). To this power-of-attorney a schedule of the properties entrusted to him is attached. Items 1, 2, 3, 4, 8 and 9 therein show that the original funds of Rs. 45,000 were reduced to Rs. 39,000 and odd and both parties have recognized that that was the sum then available for the purposes of the trust. The houses are described in items 5 and 6, and jewels and other moveables in items 7 and 10. In 1916 the same Sri Gopeswara Laljee executed another power-of-attorney to the plaintiff (Ex. 2) under which the power-of-attorney of 1914 was cancelled and larger powers were conferred upon the plaintiff. Some time before the suit which was filed in 1924 misunderstandings arose between the plaintiff and the Udipur Guru who is the defendant and the defendant purported to cancel the power-of-attorney, Ex. 2 on 28th February 1924. The present suit was therefore filed by the plaintiff for the reliefs already mentioned in March 1924. The learned trial Judge thought it was unnecessary to take oral evidence. He held that the defendant was entitled to cancel the power-of-attorney, Ex. 2, and that, if the plaintiff could at all complain of it, it was only by way of a claim for damages; he therefore dismissed the suit with costs.

On appeal it is contended before us that Ex. 2 was irrevocable because it was coupled with some interest of the plaintiff. The document itself purports to be an irrevocable power of attorney; but towards the end it is also provided therein :

> "that a power-of-attorney though irrevocably granted shall be revocable on strong proof of gross mismanagement on the part of the said attorney."

It is therefore clear that the document is not strictly, on the face of it, an irrevocable power-of-attorney, but it was a power-of-attorney irrevocable on certain grounds only but not on

other grounds. This again means merely that it is an ordinarypower-of-attorney coupled with a promise that it will not be revoked except on certain grounds. How far such a promise is enforceable by way of damages is another matter. It is obvious that such a promise which is the same as a contract to keep a servant on hire is not specifically enforceable see (1906) *App. Cases* 254. But it is contended by the learned advocate for the appellant that, apart from this promise not to revoke, the document is irrevocable because the contract of agency was coupled with some interest of the agent, that the fact that the temple was erected for the benefit of the plaintiff's family was alleged in the plaint and was the subject of the first issue and that the learned Judge ought to have taken evidence on this issue before deciding on the question of the revocability of the power-of-attorney. It is true that the question whether the plaintiff has any interest is not one covered by the terms of the power-of-attorney and therefore S. 92, Evidence Act, may not stand in the way of the plaintiff.

This brings us to the question whether the plaintiff has any interest, such an interest as is contemplated in S. 202, Contract Act. The plaintiff does not repudiate the Bhot Patra, Ex. A; on the other hand, he recites its contents without any disapproval in para. 14 of his plaint. It is not pretended that Ganga Bai and the plaintiff were members of an undivided family in respect of the sum of Rs. 45,000 or in respect of the sum spent for the purchase of the house in which the temple is located. On the other hand, the recital in the plaint is made on the footing that they were sums over which she had absolute control. We must take it on the admission in the plaint that the house and the property endowed were the absolute property of Ganga Bai and the plaintiff had no interest in those properties. No doubt there is a further allegation in the plaint that the endowment was made for the spiritual benefit of herself and the members of her family. Assuming that it was so, such spiritual benefit cannot amount to an interest within the meaning of S. 202, Contract Act. We do not think therefore that the agency created by Ex. 3 is in favour of an agent who has got any interest in the property which forms the subject matter of the agency. Even if it were such an agency, it is doubtful whether Ex. 2 fulfills the requirements of S. 202 because the object of the agency was not to enable the agent to realise his interest. It is suggested by the learned advocate for the appellant that in this matter there is some difference between the English Law and Indian Law. The illustrations to S. 202 and the Indian decisions seem to proceed on the footing that there is no such difference. However, on the other view we have taken it is unnecessary to pursue this matter any further. We therefore think that the learned Judge was right in refusing to take any oral evidence as to the existence of any interest of the plaintiff. It follows that the defendant was entitled to revoke the agency under Ex. 2. As the plaintiff claimed no damages for the revocation against the covenant in the document, the question whether the plaintiff is entitled to any damages does not arise. The result is the appeal must be dismissed with (taxed) costs.

Mr. Rangachariar complained that the direction to the Official Referee to consider the amount of damages claimed by the defendant is misleading and may lead to an inquiry not intended by the learned Judge. As we understand this direction which is embodied in Cls. 4 and 5 of the decree it is intended to cover any actual loss caused to the property, funds and moneys by the defendant's management. Therefore, no further direction or modification is necessary. The defendant has filed a memorandum of objections complaining of the direction of the learned Judge limiting the taking of accounts to the period from 1916. The prior power-of-attorney was cancelled in 1916 and strictly any claim for taking an account of the period before 1916 would perhaps be barred. But it is necessary to make further observation on this matter because Ex. 2 refers to all the property mentioned in the schedule to Ex. 5 and describes the agency as one relating to those properties. Certainly the agent has got to account for those properties as from 1916, unless he accounts for any change in the properties in a manner

which is satisfactory to the Court. Respondent 2 has substantially failed and sho must pay the (taxed) costs of the memorandum of objections to the appellant.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 234

ANANTAKRISHNA AYYAR, J.

Mandy Mathar Sahib — Defendant—Appellant.

v.

Bijan Bi and *another* — Plaintiffs—Respondents.

Second Appeal No. 46 of 1926, Decided on 17th October 1929, from decree of Dist. Judge, Coimbatore, in Appeal Suit No. 342 of 1923.

(a) Mahomedan Law—Wife—Maintenance—Under Hanafi Law maintenance to wife is not allowed.

The husband is not under Hanafi law liable for the maintenance of his wife where there is no decree or agreement for maintenance before suit : 6 *Cal.* 631 and 41 *Mad.* 211, *Rel. on.* [P 235 C 1]

(b) Mahomedan Law — Law applicable in trial of suits shall be law of defendant.

The law to be observed in the trial of suits shall, in the absence of any enactment or usage having the force of law, be the law of the defendant : *A. I. R.* 1925 *All.* 720, *Foll.* ; 4 *All.* 205, *Rel. on.* [P 235 C 1,2]

(c) Mahomedan Law—Maintenance—Wife—No arrears of maintenance can be claimed under Hanafi law.

Under the Hanafi system of law, the wife is not entitled to arrears of maintenance against the husband in the absence of a specific agreement or decree. [P 235 C 2]

(d) Mahomedan Law—Maintenance—Wife—Hanafi husband deserting his wife—Wife cannot pledge credit of her husband—Contract Act, S. 68.

There is no provision of Mahomedan Law allowing the wife unconditionally to pledge her Hanafi husband's credit to secure money for maintenance where the husband deserts his wife. [P 236 C 1]

T. M. Krishnaswami Iyer—for Appellant.

S. S. Ramchandra Iyer — for Respondents.

Judgment.—Plaintiff 1 was married by the defendant in 1904. He had two children by her, who lived until 1921 ; differences having arisen between plaintiff 1 and the defendant, the defendant divorced plaintiff 1 in February 1920. Between 1913 and 1920 plaintiff 1 and her two children were living separately from the defendant.

On the allegation that plaintiff 1 maintained herself and her two children out of the money borrowed from her brother-in-law plaintiff 2, she filed the original suit, making her brother-in-law plaintiff 2, to recover Rs. 1,244 from the defendant, being money borrowed for the maintenance of herself and the two children aforesaid ; the amount is alleged to have been borrowed between May 1917 and February 1920, and the suit was filed on 8th April 1922. The defendant denied his liability. He also denied plaintiff 1's right to pledge the credit of the defendant and alleged that there was no lawful necessity to do so. He also pleaded that the suit was not maintainable at law and that the plaintiffs had no cause of action against him.

This is an unfortunate case ; plaintiff 1 a Mahomedan lady had not proper legal advice in connexion with her suit. This is clear from the proceedings in the case. The first Court gave the plaintiffs a decree as sued for, finding that the defendant was a rich man with an annual income of about Rs. 3,000 and that plaintiff 1's claim of Rs. 1,244 for maintenance of herself and her two children for nearly 34 months was proper in the circumstances. On appeal before the lower appellate Court the learned District Judge stated that it was admitted that

"under the Mahomadan Law a wife is not entitled to past maintenance unless the claim is based on a specific agreement and as no such specific agreement is set up in the present suit, the plaintiff 1 had no right to sue and this is conceded by the learned advocate for the plaintiffs."

The lower appellate Court treated the case as

"practically a suit by plaintiff to recover money advanced to plaintiff 1 for the maintenance of herself and her two children and the learned vakil for the appellant does not dispute that under Mahomedan Law, a wife if neglected by her husband may contract debt for the support of herself and her children, and that if such debts are legitimate and contracted bona fide for their support, the creditors have a right of recovery against the husband. (Amir Ali, Mahomedan Law, Vol. 22, p. 362, and Mulla's Mahomedan Law, S. 214). There can be no doubt therefore, that the suit is maintainable in law by plaintiff."

On the merits the lower appellate Court reduced the amount decreed, being of opinion that Rs. 30 a month for the maintenance of plaintiff 1 and her two children may be considered a reasonable rate. It held that Art. 120 applied to the suit and that the suit was not barred by limitation.

In modification of the decree passed by the 1st Court, the appellate Court gave a decree for Rs. 993 in favour of plaintiff 2 only. The exact passages from Amir Ali's book referred to in the lower appellate Court's judgment could not be traced by the learned advocates who appeared before me in the second appeal.

The defendant is a Hanafi. It is stated that plaintiff 1 became a Shafi after marriage. It is clear that the defendant, the husband, is not under Hanafi law liable for the maintenance of his wife where there was no decree or agreement for maintenance before suit see : *Abdul Futteh* v. *Zabunnessa Khattun* (1). No doubt it is not specifically stated in the report, that the law applicable to that case was Hanafi law ; but having regard to the fact that that the authorities quoted by the learned Judges of the Calcutta High Court are authorities governing the Hanafi school of law, we may take it that that case was a decision under the Hanafi law. Further light is thrown on that point by the observations of Abdur Rahim, J., and Srinivasa Iyengar, J., in the case reported in *Mahomed Haji* v. *Kalimbai* (2). At p. 213, the learned Judges observed as follows :

"The decision in *Abdul Fatteh* v. *Zabunnessa Khathun* (1) is according to the Hanafi school of law, which is followed by Mahomedans of Bengal generally."

Further it is also stated at p. 212 as follows:

"In the Shafi law that the wife is entitled to recover arrears of maintenance, though not due under a decree of Court or a mutual agreement, contrary to the Hanafi Law admits of no doubt.

It is also clear that in such cases, it is the personal law of the defendant that has to be applied, when he is sought to be made liable: see *Aziz Bano* v. *Muhammad Ibrahim Hussain* (3). Sulaiman, J., observed at p. 824 (*of* 47 *All.*) that:

"in his opinion the personal law which ought to be considered would be the personal law of the defendant.

At p. 825 (*of* 47 *All.*) the learned Judge observed:

"it would be grossly unjust to decree the claim on the strength of the personal law governing the plaintiff. It is a well settled rule that the law to be observed in the trial of suits shall, in the absence of any enactment or usage having the force of law, be the law of the defendant.

The case before the Allahabad High Court arose out of a suit by a Sunni husband against his Shiah wife for restitution of conjugal rights, and it is in that connexion that the learned Judge remarked that the law which ought to be applied was the law of the defendant: see *Nazarat Hussain* v. *Hamidan* (4). This is the principle recognized in S. 112, Government of India Act, though the section in terms applied to cases on the original side of the High Court of Madras, Calcutta and Bombay. The section enacts:

"when the parties are subject to different personal laws or custom having the force of law. the High Court shall decide according to the law or custom to which the defendant is subject."

A similar law has been declared to be the law that should be followed in the mufassil by the Supreme Courts of Madras and Bombay (37 George 3, Chap. 142 S. 13) Similarly with reference to the mufassil in the Bengal Presidency a similar statute was passed : see 21 George 3, Chap. 70, S. 17.

Text writers on Hanafi Law have unanimously laid down that under that system of law, the wife is not entitled to arrears of maintenance against the husband in the absence of a specific agreement or decree: see Baillie's Digest of Mahomedan Law, Hanafi Jurisprudence, Edn. 2, p. 447; Abdur Rahiman's Institutes of Mussalman Law p. 110; Baillie's Digest of Mahomedan Law (Imami Code of Jurisprudence) p. 100 foot-note 6, where the Hanafi Law is also referred to. Tyabji's Mahomedan Law S. 307; Mulla's Mahomedan Law S. 214. In these circumstances, it would seem that the first plaintiff is not entitled to arrears of maintenance against her Hanafi husband—the defendant—as no specific agreement or decree has been set up in the present case.

The learned District Judge, however, treated the plaint as one filed by plaintiff 2 and gave a decree in his favour for the amount of maintenance at the rate of Rs. 30 a month for plaintiff 1 and her two children, on the footing that plaintiff 1 must be taken to have pledged the credit of the defendant since the defendant deserted and neglected to arrange for their maintenance. When the defen-

(1) [1881] 6 Cal. 631=8 C. L. R. 242.
(2) [1918] 41 Mad. 211 = 42 I. C. 517 = 6 M. L. W. 288.
(3) A. I. R. 1925 All. 720=47 All. 823.
(4) [1882] 4 All. 205=(1882) A. W. N. 15.

dant is not liable for any arrears of maintenance under the Hanafi Law in the absence of specific agreement or decree the question arises whether the wife has got an absolute right to pledge the husband's credit to procure necessities for maintenance or borrow money for such purpose. The learned advocate for the respondent drew my attention to certain text books on Mahomedan Law; but the same mention certain conditions also and it is not the plaintiff's case that such conditions have been satisfied in the present case. Amir Ali's Mahomadan Law Vol. 2, p. 468; Abdur Rahiman's Institutes of Musalman Law p. 112, Art. 202; Hedaya, Vol. 1, p. 397, Baillie's Digest of Mahomedan Law, pp. 447-448. My attention has not been drawn to any provision of Mahomedan Law allowing the plaintiff—the wife—unconditionally to pledge her Hanafi husband's credit to secure money for maintenance where the husband desertsed the plaintiff his wife. In these circumstances and having regard to the pleadings and proof in this case, I regret, I am unable to uphold the decree in favour of plaintiff 2.

There is, however, the fact that the defendant deserted and neglected his two children by plaintiff 1 who were maintained by plaintiff 1 till their death in 1921. The amount of Rs. 30 a month fixed by the lower appellate Court was in respect of both plaintiff 1 and her two children, and plaintiff 1 was entitled to recover the amount spent by her for the maintenance of the children from the defendant. I therefore allow the second appeal in part and remand the appeal to the lower appellate Court for fresh disposal in so far as the claim relates to the expenses incurred by plaintiff 1 in connexion with the maintenance, etc., of her two children acting under O. 41. R. 33, Civil P. C. It would be open to the lower appellate Court to allow fresh evidence in case it should think fit to do so. In the peculiar circumstances of the case the parties to this litigation should bear their own costs incurred up.to date. It would, however, be open to the lower appellate Court to pass such orders as to costs, as it should think fit, with reference to the amount which it may ultimately decree including court-fee thereon in the first Court.

P.R.S./V.S. *Case remanded.*

A. I. R. 1930 Madras 236

ANANTAKRISHNA AYYAR, J.

(*Annapragada*) *Visvanadham*—Plaintiff—Appellant.

v.

(*Annapragada*) *Mangamma* and *others* Defendants—Respondents.

Second Appeal No. 394 of 1926, Decided on 11th September 1929, from decree of Sub-Judge, Guntur, in Appeal Suit No. 1 of 1925.

(a) Injunction—Tenant-in-common— Principles governing grant of injunction claimed by tenant-in-common are different.

Where the parties are not divided but are only tenants-in-common in a house and for the sake of convenience each is in possession of some particular portion, the principles governing the Court in respect of grant of injunction at the instance of one tenant-in-common as against other are essentially different from those governing the Courts in respect of a grant of injunction between neighbouring owners of land or houses. Where there are no materials on record from which the Court can come to the conclusion whether a proper case has been made out for the grant of an injunction as between tenants-in-common, no injunction can be granted. Justice would not be meted out if an injunction is granted between tenants-in-common when there are no proper grounds justifying the same.

[P 237 C 2, P 238 C 1]

(b) Civil P. C., O. 26, R. 10—No second commissioner should be appointed without considering whether first commissioner's report should be superseded or not.

The practice of appointing a second commissioner without formally recording objections to the first commissioner's report and without considering whether the first commissioner' report should be superseded or not is a practice which cannot be too strongly condemned. Reasons for superseding the first commissioner's report must te recorded in writing by the Court : *A. I. R.* 1922 *Mad.* 219, *Rel. on.*

[P 238 C 2]

Ch. Raghava Rao—for Appellant.

A. Viswanatha Iyar and *A. Ramaswami Iyer*—for Respondents.

Judgment.—The plaintiff is the appellant in this second appeal. He sued for a declaration of his title to the house and site "*A*" marked in the plaint plan and for an injunction restraining the defendants from trespassing upon his portion and from pulling down the wall between the portions *A* and *B*. Defendant 1 is the widow of the plaintiff's deceased brother. Her case was that the suit house was not divided between the parties but that for convenience of enjoyment, the plaintiff was in possession of one portion and that she was in possession of another portion of

the same, and that the allegation in the plaint that the plaintiff was the owner of one portion of the house was not correct. It would seem that, after the death of defendant 1's husband, there was an arrangement evidenced by Ex. 1 dated 18th November 1901 by which certain properties were given to defendant 1 by the plaintiff. It would also seem that, subsequently, with reference to the lands covered by Ex. 1 there was an actual division by metes and bounds, but with regard to the suit house there was no division between the plaintiff and defendant 1 and that each occupied a particular portion of the house only for convenience of enjoyment of the same. Defendant 1 on 30th November 1922 executed a sale deed in favour of defendants 2 to 4 in respect of her rights to a moiety of the suit house.

The plaintiff stated that defendants 2 to 4 were trespassing upon his portion of the house and were trying to pull down the wall and accordingly he sued for a declaration of his title and for an injunction. The first Court found that there was an actual division by metes and bounds between the plaintiff and defendant 1 as regards the house and that the plaintiff was entitled to the house and site marked "*A*" in the plaint; and he accordingly decreed the suit in favour of the plaintiff. On appeal by defendants 2 to 4, the lower appellate Court came to the conclusion that there was no actual division by metes and bounds in regard to the suit house, that the plaintiff and defendant 1 were enjoying particular portions of the suit house for the sake of convenience only. On that finding that there was no final division of the house as alleged by the plaintiff, the suit was dismissed. The learned Subordinate Judge in para. 13 of his judgment remarked that the proper course would have been for the parties to agree to have a partition of the house effected as between themselves, so that all future disputes might be avoided; but he regretted that none of the parties asked for such a prayer and consequently he could not proceed further with that suggestion. In this second appeal preferred by the plaintiff it was argued by his learned advocate that the finding of the lower appellate Court on the question of non-division was not sustainable because the lower appellate Court had not considered the evidence of the witnesses examined on the side of the defendants. When once it was admitted that there was a partition, the presumption would be that the partition was complete, and the learned advocate submitted that the way in which the lower appellate Court proceeded to dispose of the question, throwing the onus of proof on the plaintiff, was not justified in law. If the lower appellate Court had really proceeded in the way suggested by the learned advocate, I agree that his criticism will be well-founded; but as I read the judgment of the lower appellate Court, at p. 4, line 36, I find the lower appellate Court has considered the evidence of the defence witnesses:

> "It is not necessary to comment on the evidence of the defendant's witnesses. The reason given by defendant 1 (D. W. 1) for a tentative division is very convincing."

So that, according to my reading of the judgment, the lower appellate Court did consider the defence evidence and was satisfied with the evidence of the first witness on the side of the defendants. I think it is a finding which is binding on me in second appeal and accordingly this contention of the learned advocate fails.

The second point urged by the learned advocate for the appellant was that even on the finding that there was no final division between the parties, the lower appellate Court ought to have considered whether the plaintiff would be entitled to the injunction prayed for in the plaint. The answer to this contention seems to be this: the plaintiff came into Court with a specific allegation that the properties had been actually divided by metes and bounds and that the plaintiff was the absolute owner of his portion of the properties and the defendant 1 of hers. As between the parties if the partition has been proved, the plaintiff's prayer for an injunction would have to be adjudicated upon that footing. If, however, the parties were not divided but were only tenants-in-common and for the sake of convenience each had been in possession of some particular portion, then the principles governing the Courts in respect of a grant of injunction at the instance of

one tenant-in-common as against others would be essentially different from those governing the Courts in respect of a grant of injunction between neighbouring owners of lands or houses. But having regard to the allegations in the plaint and the issues framed in the case, there are no materials on record from which the Court could come to the conclusion whether a proper case had been made out for the grant of an injunction as between tenants-in-common. In fact, the plaintiff came into Court with certain definite allegations, which, however, were not proved. Justice would not be meted out if an injunction be granted between tenants-in-common when there had been no proper allegations not grounds justifying the grant of the same. It therefore seems to me that the second ground also fails.

I should have been glad if the learned advocates in this case could have found their way to agree to have this suit remanded to the first Court so that an actual partition between the parties in regard to the suit house could be worked out without further litigation; but I am in no better position now then the lower appellate Court was when it wrote para. 13 of its judgment. That being so, I regret that nothing could be done except to leave the parties to take steps to have a partition of the suit house, so that future quarrels could be avoided.

Finally before leaving this case, I think I should make a few observations with reference to the remarks made by the lower appellate Court in para. 12 of its judgment. It says:

"The first commissioner was sent while the suit was pending disposal in the Court of the District Munsiff, Narasaraopet. As is the practice in the Court of the Additional District Munsiff, Guntur, to send a second commissioner in all such cases, a second commissioner was sent."

If the practice in the Additional District Munsiff's Court of Guntur is, as is remarked by the lower appellate Court in para. 12 of its judgment, I think the sooner that practice is put an end to the better will it be in the interests of the parties as well as the convenience of the Court. The jurisdiction of a Court to issue commissions is governed by the provisions of O. 26, Civil P. C. As provided in O. 26, R. 10, sub-Cl. 3 it is only:

"where the Court is for any reason dissatisfied with the proceedings of the commissioner, it may direct such further enquiry to be made as it shall think fit."

and if necessary supersede the report of the first commissioner and either appoint a second commissioner or give further directions in the matter. The practice of appointing a second commissioner without formally receiving objections to the first commissioner's report and without considering whether the first commissioner's report should be superseded or not is a practice which cannot be too strongly condemned. In fact, in the case reported in *Thottamma* v. *Subramaniayyan* (1) at p. 82 (*of* 45 *Mad.*) the High Court had occasion to express its disapproval of such practice in the following terms:

"It certainly encourages a haphazard and careless selection of commissioners. It subjects parties to unnecessary and avoidable expense and encumbers the records with useless papers. In our opinion this practice should be put an end to at once. We want it to be distinctly understood that the filing of objections to a report is no ground for appointing another commissioner and that in all cases where a second commissioner is appointed to do the work, the reasons for adopting such a course must be recorded in writing to enable the appellate Court to see whether judicial discretion has been properly exercised."

In this case, the Court should first have considered whether the first commissioner's report should be superseded and must have recorded its reasons in writing when it came to the conclusion that it should be superseded. Then and then alone, it had jurisdiction to appoint a second commissioner to do the same work allotted to the first. I thought it necessary to draw the attention of the lower Courts to the observations in *Thottamma* v. *Subramaniayyan* (1) so that the practice mentioned by the lower appellate Court to prevail in the Additional District Munsiff's Court might be put an end to.

The second appeal fails for the reasons mentioned by me and is dismissed with costs.

P.R.S./R.M. *Appeal dismissed.*

(1) A. I. R. 1922 Mad. 219=15 Mad. 79.

* A. I. R. 1930 Madras 239

SUNDARAM CHETTY, J.

Ganapathy Chetty—Defendant—Appellant.

v.

Sundararaja Pillay — Plaintiff — Respondent.

Second Appeal No. 33 of 1926, Decided on 29th August 1929, from decree of First Addl. Sub-Judge, Madura, in Appeal Suit No. 5 of 1925.

*** Contract Act, S. 23—Past co-habitation with dancing girl as consideration for promissory note — Consideration is immoral within meaning of S. 23.**

Where the consideration for a promissory note is past cohabitation of the executant with a dancing girl, the claim under the note is unenforceable, as the consideration therefor is immoral within the meaning of S. 23 : 44 *Bom.* 542 and *A.I.R.* 1924 *Bom.* 135, *Foll.*; 13 *M.L.J. Expl.* and *not Appr.* [P 239 C 2 ; P 240 C 2]

K. V. Srinivasan—for Appellant.

C. Brook Elliot—for Respondent.

Judgment. — This second appeal arises out of a suit, brought by the plaintiff (respondent) for the recovery of a sum of money alleged to be due to him from the defendant under the pro-note Ex. A. The case set up in the plaint was, that this pro-note was executed in consideration of a sum of Rs. 400 paid to the defendant in cash. That case he failed to make out, and it is clear from the judgment of both the lower Courts that they disbelieved the plaint version as to the form of the consideration, and they have held that the suit pro-note was given in consideration of past cohabitation which the defendant had with a dancing girl named Chinnathayi. In the view that such a consideration for the pro-note is not illegal, a decree has been given in favour of the plaintiff.

It is now argued for the appellant, that once the Court below found that the plaintiff failed to prove that the pro-note was supported by consideration as alleged in the plaint, the suit should have been dismissed, without going into the question whether the consideration alleged by the defendant for the execution of the suit pro-note is true and valid. If a strict view of the pleadings is taken, any variance between the pleading and the proof would be a good ground for rejecting the case. However, this case may be decided even upon the finding of the Courts below that the real consideration for the suit pro-note was not a cash loan, but, on the other hand, it was executed in consideration of the defendant's past cohabitation with a dancing girl. The question now to be decided in view of this finding, is, whether the consideration for the suit pronote is immoral within the meaning of S. 23, Contract Act, and if so, whether it is enforceable against the defendant.

Section 23 declares that the consideration or object of an agreement is lawful unless the Court regards it as immoral or opposed to public policy. Section 2, Cl. (d) of the Act states that if at the desire of the promisor, a promisee has done or promised to do something, such act or promise is consideration for the agreement. According to this definition, the services rendered by the dancing girl to the defendant which would come under past cohabitation would be as much a consideration for the pro-note as a promise on her part to have future cohabitation with him. There is no doubt that, where the object of an agreement is future cohabitation, it is tainted with immorality. The question is, whether the consideration would not also be immoral within the meaning of the section, if it should be past cohabitation. In the treatise on the Indian Contract Act by Pollock and Mulla, 5th Edn., the learned authors observe in connexion with S. 23 at p. 162, that a consideration which is immoral at the time, and therefore, would not support an immediate promise to pay for it, does not become innocent by being past. It seems to me that the test to be applied for deciding, whether a particular thing is immoral or not, is not whether it is a past action or one in future contemplation. It would not be quite logical to draw a distinction between the two, for the taint of immorality exists in either case. The decisions of the Bombay High Court reported in *Hussainali* v. *Di bai* (1), and *Kisendas* v. *Dhondu* (2), clearly lay down that even if the consideration be past cohabitation, it would not be valid under S. 23, Contract Act, and therefore the contract would be unenforceable. Reference was made to these rulings in the judgment of the lower appellate Court, but it tried to distinguish them on the ground that the connexion was found to

(1) A.I.R. 1924 Bom. 135.
(2) [1920] 44 Bom. 542=57 I.C. 472=22 Bom. L.R. 762.

be adulterous in those cases. In my opinion, the fact that it was an adulterous connexion would make it illegal besides being immoral. In the present case, there is no doubt that the connexion was immoral, though it would not come within the purview of any section in the criminal law. If the Court regard this as immoral, then the consideration must be taken to be obnoxious to S. 23, Contract Act. The only decision which was relied on by the lower appellate Court for holding that the suit pro-note is valid and enforceable is the decision reported in *Lakshminarayana Reddiar* v. *Subhadri Ammal* (3). In the first place, I should observe that in that case the plea was that the pro-note was executed for the purpose of future cohabitation. It was found that the defendant failed to prove that plea. At p. 12 Bhashyam Ayyangar, J., observes that

"the pro-note will be illegal as tainted with immorality, only if the consideration therefor be future cohabitation or both past and future cohabitation."

Then the learned Judge proceeds to deal with the view under the English law and states that

"a promise made in consideration of past illicit cohabitation is void for want of consideration under the English law."

After stating this principle of English law, there is the further observation, namely:

"There is, however, no illegality in such promise but merely absence of consideration and, therefore, according to English law if made in the form of a bond or covenant under seal, there is prima facie a valid contract."

An immoral consideration under S. 23 of the Act would, in my opinion, be different from the absence of consideration. In the view that it would only amount to absence of consideration, it was held that the case could come under S. 25 (2), Contract Act, as a promise to compensate a person who has already voluntarily done something for the promisor. In this case, what we have to see is, whether the pro-note in question is one executed without any consideration at all, or, whether, the consideration for the case is tainted with immorality. In the former alternative, it may come under S. 25, Cl. 2, but in the latter alternative, the case would be governed by S. 23, Contract Act. In the aforesaid decision, it does not appear that the question was considered with special reference to S. 23, nor is there an express observation to the effect that, if the consideration be past cohabitation, it would not be immoral or illegal.

For these reasons, I should hold, with great respect, that the decision in *Lakshminarayan* v. *Subhadri Ammal* (3) cannot be applied to the present case, and the view expressed in the Bombay decision is clear on the point and I am in full agreement with it. I therefore hold that the consideration for the suit promissory note being immoral within the meaning of S. 23, Contract Act, the claim under it is unenforceable. In the result, the decree of the lower appellate Court is reversed, and the plaintiff's suit is dismissed with costs in all the Courts.

P.R.S./V.S. *Appeal allowed.*

(3) [1903] 13 M.L.J. 7.

A. I. R. 1930 Madras 240

RAMESAM AND JACKSON, JJ.

Sabapathi Press and *Co. Ltd.*—Appellant.

v.

R. Sabapathi Rao and *others* — Respondents.

O. S. A. No. 10 of 1928, Decided on 18th April 1929, from judgment of Beasley, J., D/- 16th November 1927, in Original Petn. No. 94 of 1922.

(a) Companies Act (5 of 1913), Ss. 158, 156 (4) and 166—Petition under S. 166 by persons who have fully paid up their share capital is maintainable as they are contributaries—Companies Act, S. 156 (4).

The qualification in Cl. 4, S. 156, that a member shall not be liable to pay more than the unpaid amount of his share does not make him the less a contributory in the particular case where the capital is fully paid up and a petition for winding up by members who have paid up their share capital fully is maintainable under S. 166: *In re, National Savings Bank Association*, 1 *Ch.* 547 and *In Re, Anglesea Colliery Company*, 1 *Ch.* 555, *Foll.* [P 241 C 1,2]

(b) Companies Act (7 of 1913), S. 162, Cl. 6—Press a limited concern— Lessee thereof subleasing at great profit — For recovery of dividends suit found necessary — Chairman not authorized to give receipt on behalf of persons named in the dividend warrant—Winding up was held just and equitable.

A press which was a limited concern was leased to a certain person who subsequently subleased it to another at large profits. Numerous shareholders had also to file suits against the company for recovering the dividends to them. The Chairman of the press was found not authorized by the persons whose names appear on the dividend warrants to give an acquittance or receipt on their behalf.

Held ; that under S. 162, Cl. (6) it was just and equitable that the company should be wound up: *A. I. R.* 1925 *Mad.* 489 *Ref.*

[P 241 C 2, P 242 C 1]

B. Somayya and *T. R. Arunachalam*—for Respondents.

Judgment.—The first point argued in this appeal is a question of law. It has been contended before us by the Chairman of the Sabapathi Press Co. Ltd., who argued the case personally, that this petition for winding up filed by some shareholders who have paid up their share capital fully is not maintainable. Under S. 166, Companies Act, an application to the Court for the winding up of a company shall be by petition presented either by the company or by any creditor or creditors, contributory or contributories etc., S. 156 of the Act runs thus:

"In the event of a company being wound up every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and the costs charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following. * * * *"

Clause (4) lays down the following qualification:

"In the case of a company limited by shares no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member."

It is therefore contended before us that a member who has fully paid up his share is not liable to contribute anything under this clause and therefore he is not a contributory within the meaning of S. 166. S. 158 defines the term "contributory." It means:

"every person liable to contribute to the assets of a company in the event of its being wound up, and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory."

The corresponding sections of the then English Act were the subject of consideration in English Courts in *In re, National Savings Bank Association* (1). The question was considered by Knight Bruce and Turner, JJ. in a case which came up on appeal before them from an order of the Master of the Rolls. S. 74, English Act, then under consideration is the same as S. 158. S. 38 corresponds to our S. 155. It was held by Lord Justices that all past members of the company were liable to contribute and the qualification that a member shall not be liable to pay more than the unpaid amount of his share does not make him the less a contributory in the particular case where his share capital is fully paid up. The case follows another decision in *In re, Anglesea Colliery Co* (2). Following these decisions, we hold that this petition is maintainable. In some cases it has been laid down as a matter of practice that the petition by a single shareholder ought not to be allowed unless it is supported by other shareholders or creditors. In the present case, the petition is supported by no less than 84 shareholders. The petition also alleges that in the event of winding up, the petitioners have a tangible interest in the surplus assets. We therefore do not see any kind of objection to the maintainability of this petition.

The next point relates to the grounds on which the company is sought to be wound up. S. 162, Cl. (6) says that a company may be wound up by the Court if the Court is of opinion that it is just and equitable that the company should be wound up. Cl. (1) to (v) of the section do not apply. A similar clause was the subject of construction by the Privy Council in *Loch* v. *John Blackwood Ltd*,. (3). Following that case, our brothers Spencer and Srinivasa Ayyangar, JJ. reversed in *Sabapaty Rao* v. *Sabapathy Press Co. Ltd* (4), the original order of Kumaraswami Sastri, J., dismissing the petition and remanded the case back for consideration on the ground that the reasons alleged in the petition will, if made out, be enough to sustain an order of winding up as just and equitable. The learned Judge, our brother Beasley, J. has now found that on one occasion, the press was auctioned and leased out to K. V. S. R. & Co. and that on next day it was subleased to Pola Sankariah for Rs. 10,523. Again in another year the same press was leased out to Mr. Ramchander, son of the Chairman, Mr. Venkata Rao. It was then subleased to Pola Sankariah for Rs. 14,300. The learned Judge observes that the very large profits made by intermediaries make the transactions not

(1) [1866] 1 Ch. 547=35 L. J. Ch. 809=14 W. R. 1005=12 Jur. (n.s.) 697=15 L. T. 127.

(2) 1866] 1 Ch. 555=35 L. J. Ch. 809=14 W. R. 1004=15 L. T. 127.

(3) [1924] A. C. 783.

(4) A. I. R. 1925 Mad. 489=48 Mad. 448.

altogether proper. The next point the learned Judge relied on is that suits had to be filed against the company for the recovery of dividends. Mr. Venkata Rao sought to explain this fact by saying that sometimes the shareholders would not draw their dividends so that they might make this complaint, and various other explanations are given in connexion with the other shareholders. But whatever the explanations may be there is no doubt that there are numerous cases of shareholders having had to sue the company for recovery of their dividends. The learned Judge also referred the matter to the Official Referee on two points, that is, to look into the accounts and also examine certain dividend warrants for the purpose of satisfying himself on the question as to whether dividends had been paid and whether Mr. Venkata Rao was authorized by the persons whose names appear on the dividend warrants to give an acquittance or receipt on their behalf. On both these questions the report of the Official Referee was against Mr. Venkata Rao. It is said that Mr. Venkata Rao had no opportunity of explaining these matters. On the other side, it is stated that his counsel, Mr. Sydney Smith, did not question the correctness of the report. The learned Judge also observes that there are other matters which he need not go into. Having regard to all these circumstances, we think it is not a matter in which we should differ from the discretion of the learned Judge.

We dismiss the appeal with taxed costs on the higher scale of the petitioners. The taxed cost of the Official Liquidator will be recovered out of the estate. The costs of the respondents may be paid out of the sum of Rs. 800 which has been deposited by the appellants as security for costs.

P.R.S./V.S. *Appeal dismissed.*

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* A. I. R. 1930 Madras 242

BEASLEY, C. J., AND CORNISH, J.

Muthuswami Servaigaran and *another* —Petitioners.

v.

Thangammal Ayiyar—Respondent.

Criminal Revn. No. 273 of 1929 and Criminal Revn. Petn. No. 243 of 1929, Decided on 11th October 1929.

*** Criminal P. C., S. 144—High Court can revise order under S. 144 provided revisional jurisdiction is exercised within 2 months of order.**

The effect of the omission of Cl. (3), S. 435 is that now under the present Code High Court has power to revise orders under S. 144, and in order that the High Court may revise the order the revisional jurisdiction must be exercised within 2 months of the passing of the order. (*Case law discussed*). [P 246 C 2]

K. S. Jayarama Ayyar and *S. Rangachari*—for Petitioners.

K. S. Sankara Ayyar—for Respondents.

Public Prosecutor—for the Crown.

Order.—This Criminal Revision Petition has been posted before us for a decision upon two preliminary points.

The facts are that the Sub-Divisional Magistrate of Pattukottai in exercise of his powers under S. 144, Criminal P. C., directed the petitioners to vacate the Nagaram palace building forthwith on the ground that the occupation caused annoyance and obstruction to the zamindarni and was likely to cause an immediate disturbance of the public tranquillity and a riot. In accordance with this order that palace was vacated and an application was subsequently made under sub-S. 4, S. 144, Criminal P. C., to the Additional District Magistrate of Tanjore to rescind the order of the Sub-Divisional Magistrate of Pattukottai. This application he rejected. The original order was dated 23rd January 1929, and the order rejecting the petition was on 23rd February. The petitioners then presented this revision petition. When it came on for hearing before Reilly, J. in view of the question raised, namely, whether the High Court has power to interfere in revision with orders under S. 144, Criminal P. C., and the importance of that question he directed that the petition should be heard by a Bench of two Judges. Another question raised before him was whether the petition is out of time because orders under S. 144, Criminal P. C., are in force only for two months. This question also has been left for this Bench to decide.

Dealing with the latter question first, on the assumption that the Sub-Divisional Magistrate acted within his jurisdiction in passing the order, it cannot be questioned that, as the two months have now elapsed since the order was passed, the High Court has nothing to revise. The question as to whether or

not the Sub-Divisional Magistrate had jurisdiction to make the order is one of the matters raised in the petition but we are not disposing of that question here as that is not one of the preliminary questions we have to decide. In view of the fact that the High Court has now no order to revise the determination of the larger and more important question as to whether such orders are revisable would be unnecessary but for the fact that two petitions which came on recently for hearing before Ananta-krishna Ayyar, J., were ordered to stand over pending the decision by us of this point and we accordingly allowed the matter to be argued.

It is necessary, first of all, to trace the history of Ss. 144 and 435, Criminal P. C. In the Code of 1864 S. 62 corresponds to the present S. 144 and S. 404 corresponds to S. 435. S. 404 reads as follows:

"The Sudder Court may, on the report of a Court of Session or of a Magistrate, or whenever it thinks fit, call for the record of any criminal trial or the record of any judicial proceeding of a criminal Court, other than a criminal trial, in any Court within its jurisdiction, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by the Sudder Court and may determine any point of law arising out of the case, and thereupon pass such orders as the Sudder Court shall deem right."

The earliest decision upon the point we had to decide was under the Code of 1861 and that was *Abbas Ali Choudhury* v. *Illim Meach* (1). That was a decision of a Full Bench, of the Calcutta High Court which decided, Phear, J., dissenting, that an order paseed by a Magistrate under S. 62, Criminal P. C. is not of the nature of a judicial proceeding and therefore cannot be interfered with by the High Court under S. 404 of that Code. Couch, C. J., in his judgment on p. 51 in referring to S. 62 says:

"The language of it seems to point out that it was intended to give the Magistrate a power to be exercised with the utmost promptitude; and, if he should make an order which he had no authority to make, and the party on whom that order is made should not obey it, and be convicted, its legality may then be tried. That is the ground upon which I have always been of the opinion that this is not a judicial proceeding."

In the Code of 1872 S. 518 corresponds to S. 144 of the present Code and S. 520 states that orders made under S. 518 are not judicial proceedings. This latter section was obviously the result of the decision of the Full Bench of the Calcutta High Court already referred to. Under the Code of 1872 we have two decisions upon this point, namely, *H. V. Ramanuja Jeeyarswami* v. *Ramanuja Jeeyar* (2), a decision of Innes and Muthuswami Iyer, JJ., in which it was held that proceedings under S. 518 of that Code are not revisable by the Courts as such orders were expressly declared in that Code to be not judicial proceedings and *Sundaram* v. *Queen* (3), where at p. 222 Sir Charles Turner stated:

"It should always be borne in mind that orders under S. 518, Criminal P. C., of 1872 are not judicial proceedings, and if the High Court has power to correct them otherwise than indirectly which is doubtful, that power can rarely be exercised in time to prevent hardship. The law in sanctioning this imperfectly controlled power is careful to provide it shall be committed only to Magistrates whose discretion is presumably guaranteed by their responsible position or by selection."

The next decision is one under the Code of 1882 and it is a decision strongly relied upon by Mr. Jayarama Ayyar in support of his argument that proceedings under S. 144 of the Code are judicial proceedings. That is *Queen Empress* v. *Tirunarasimhachari* (4) in which it was held by Sir Arthur Collins, C. J., and Parker, J., that a Magistrate making an enquiry before issue of an order under S. 144 of the Code is acting in a stage of a judicial proceeding and has, therefore, jurisdiction to direct the prosecution of witness for giving false evidence before him at such enquiry. Under the Code of 1882, differing from the Code of 1872, proceedings under S. 144 were stated to be not proceedings. In that case Sir Arthur Collins stated:

"The difficulty arises from the variation in language between S. 237 of the old Code and S. 435 of the present Code. Under the old Code powers of revision were granted to the High Court in judicial proceedings only, and the enacting of S. 520 would seem to imply that, but for that section orders under S. 518 would be "judicial proceedings."

Section 435 of the present Code enables the High Court to call for the record of "any proceeding before any inferior criminal Court" and, therefore, orders under S. 144 would certainly be subject to revision, were it not for the

(1) 14 W. R. Cr. 46.

(2) [1881] 3 Mad. 354.
(3) [1883] 6 Mad. 203 (F.B.).
(4) [1896] 19 Mad. 18.

proviso in Cl. 3 of the section. Under S. 1 of the present Code "judicial proceedings" is defined to be

"any proceeding in the course of which evidence is or may be legally taken."

It seems to us impossible to deny that a Magistrate acting under S. 144 may legally take evidence before issuing an order . . . . . From this it would appear that both under the old Code and under the present Code these urgent orders were regarded as in their nature "judicial proceedings." the only difference being that, whereas under the old Code, S. 520 somewhat inaccurately declared them not to be judicial proceedings for the purpose of ousting the High Court's powers of revision under S. 297, of the present Code equally bars the High Court's jurisdiction without making an illogical declaration.

Sir Arthur Collins therefore took the view that when in the Code of 1872 proceedings under S. 518 were declared not to be judicial proceedings it was not because they were not judicial proceedings but because it was intended to prevent these orders made upon sudden emergencies from being the subject of revision and the Code of 1882 by stating that they were not proceedings more accurately described them. The next Code to be considered is that of 1898 and it is similar to the Code of 1882 in that by sub-S. (3), S. 435, orders made under S. 144 are not proceedings within the meaning of S. 435. On the 1898 Code there is a decision in *Arunachalam Pillai* v. *Ponnusami Pillai* (5) of Sadasiva Iyer and Napier, JJ. which is strongly relied upon by Mr. Jayarama Ayyar in support of his argument. In that case it was held that the High Court has no appellate or revisional power to interfere with the orders of a public servant except in so far as they are orders passed by the public servant in his capacity of a Court subordinate to the High Court and that an order passed by a Sub-Magistrate under S. 144, Criminal P. C., is an order made by him in his capacity as a Court and he is also acting as a Court when he grants or refuses sanction for a prosecution for the disobedience of such order. In that case the order passed under S. 144 of the Code had been disobeyed but the Stationary Sub-Magistrate passed an order refusing sanction to prosecute the person who had disobeyed the order and Napier, J., on p. 424, says:

"We are clear that the Stationary Sub-Magistrate in passing this order refusing sanction was acting judicially, for the original order which it was alleged was disobeyed was an order passed under S. 144, Criminal P. C. These orders have always been treated as judicial orders and we cannot separate the authority issuing the order from the authority granting sanction for disobedience of it."

When Napier, J., stated that these orders have always been treated as judicial orders he was referring to the numerous cases to which our attention has been drawn where the High Court has interfered with orders passed under S. 144 of the Code on the ground that the Magistrate had no jurisdiction to pass such orders. The High Court obviously could not in the face of the Code revise those orders but interfered on the question of want of jurisdiction alone under S. 15, Charter Act and S. 107, Government of India Act. As he points out in his judgment the High Court could have no appellate or revisional power if the Magistrate acts administratively and it is only where he acts judicially that the High Court can possibly interfere under the Charter Act or the Government of India Act. We have therefore this position that the High Court has always been acting under its inherent powers and interfering with Magistrates who have acted under S. 144 without jurisdiction but has been expressly prevented from revising the orders of these Magistrates under S. 435. It is argued from this by Mr. Jayarama Ayyar that it was not because such orders were not in the nature of judicial proceedings that the power of the High Court to revise them was ousted but because it was undesirable that the discretion of Magistrates acting very often on a sudden emergency should be revised by the High Court and that whereas in 1872 such "proceedings were said not to be judicial proceedings" in 1882 they were said not to be proceedings within the provisions of S. 435 and the same under the Code of 1898, that bar to the High Court has now been removed by the Code of 1923 where sub-S. (3), S. 435 has been omitted.

We now come to the Code of 1923. But before doing so there is another

(5) [1918] 42 Mad. 64=35 M. L. J. 454=8 M. L. W. 422=48 I. C. 878=(1918) M. W. N. 824.

case to which reference has been made which, although it was decided in 1923, was before the Code of that year came into force. That is *Nataraja Pillai* v. *Rangasami Pillai* (6), a decision of Ayling and Ramesam, JJ. The facts in that case were that a Sub-Divisional Magistrate passed an order under S. 144, Criminal P. C., prohibiting certain persons from interfering with a religious ceromony. On disobedience of that order he sanctioned their prosecution for an offence under S. 188, I. P. C., and it was held that the Magistrate was not, when passing the order under S. 144, Criminal P. C., acting as a Court within the meaning of Cl. (7), S. 195, Criminal P. C., but was only acting as a public servant and hence the proper appellate authority to revoke the sanction was not the Sessions Court, but the District Magistrate as provided by Cl. (6), S. 195.

The decision of Sadasiva Iyer and Napier, JJ. in *Aruna chalam Pillai* v. *Ponnusami Pillai* (5) was not followed. The Court followed the Calcutta Full Bench case and also relied on *Sundaram* v. *Queen* (3). But that was a decision under the Code of 1872 which expressly stated that proceedings under the corresponding section to S. 144 were not judicial proceedings and the Full Bench in that case could not possibly therefore have held the proceedings were judicial proceedings. Moreover the judgment in *Nataraja Pillai* v. *Rangaswami Pillai* (6) does not deal with the other aspect of the case presented by Napier, J., namely that such orders must be judicial orders and not administrative for otherwise the High Court could not interfere in those cases when the Magistrate has acted without jurisdiction whereas the High Court has invariably done so under the Charter Act and the Government of India Act. No doubt most of the orders passed by a Magistrate do not in the least seem to be judicial proceedings, and Ayling, J., gives such an instance on p. 59. Then came the Code of 1923 and there sub-S. (3) to S. 435 is omitted and one question to be considered by us is what is the effect of that omission? There have been two decisions with regard to this question under that Code : *Vedappan Serrai* v. *Periannan Serrai* (7) and *S. Alaga Therar* v. *G. A. Baker* (8). The former decision is one of Ramesam, J., and the latter is one of Reilly, J., following *Nataraja Pillai* v. *Rangaswami Pillai* (6) already referred to. In *Vedappan Serrai* v. *Periannam Serrai* (7), Ramesam, J., held that no revision lies to the High Court against an order passed under S. 144, Criminal P. C., as the Magistrate acting under that section is not a Court and the amendment of S. 435, Criminal P. C., by the omission of Cl. (3) from that section has not the effect of permitting a revision to the High Court from such an order, though it has the effect of permitting a revision from an order under S. 145. On p. 623, Ramesam, J., states :

" it seems to me that as to S. 144, Cl. (3), S. 436 was somewhat redundant and only made matters clear. Even without it, it is doubtful whether S. 435 applies. There is nothing in S. 144 to indicate that the Magistrate acting under that section is a Court as in the case of S. 145. "

He was referred to a decision of the Privy Council in *Clarke* v. *Brojendra Kishore Roy* (9) but in his opinion that case did not help the petitioner because it only showed that in some parts of the Code the words " Courts " and " Magistrates " are used interchangeably and that under S. 96 a Magistrate issuing search warrants was acting as a Court but this did not conclude the matter as to S. 144. The Privy Council case is reported in *Clarke* v. *Brojendra Kishore* (9), and, in our view, it is a decision strongly in support of Mr. Jayaram Ayyar's contention. There the District Magistrate issued a search warrant in connexion with the investigation of some offence. A suit for trespass against him was instituted but it was held by the Privy Council that by S. 36, Sch. 3 and S. 96, Criminal P. C., the power of issuing a search warrant was among the " ordinary powers " of the District Magistrate and therefore under S. 105 he had power to direct a search to be made in his presence if he thought it advisable to do so. Lord Macnaughten in delivering the judgment of the Judicial Committee referred to S. 36, Cr. P. C., which is as follows :

(6) A. I. R. 1923 Mad. 473=47 Mad. 56.

(7) A. I. R. 1928 Mad. 1108=52 Mad. 69.

(8) [1928] 55 M. L. J. N.

(9) [1912] 39 Cal. 953=16 I. C. 501=39 I. A. 163 (P. C.).

"All District Magistrates, Sub-Divisional Magistrates and Magistrates of the First, Second and Third classes have the powers hereinafter respectively conferred upon them and specified in Sch. 3. Such powers are called heir "ordinary powers."

Section 36 is in Chap. 3 which is headed "Powers of Courts." When Sch. 3 is referred to it will be seen that under part 4 of that schedule which is headed "ordinary powers of a Sub-Divisional Magistrate" Cl. (6) is power to make orders under S. 144. On p. 966, Lord Macnaughten states:

"For the sake of brevity the Code uses the terms "Court" and "Magistrate" generally if not always, as convertible terms."

It is impossible to avoid the conclusion that this case decides that every act done by a Magistrate in pursuance of the powers given to him by S. 36 and Sch. 3 is done by him as a Court particularly when it is remembered that the chapter is headed "Powers of Courts." The present Code like the Code of 1898 and that of 1882 merely speaks of "proceedings" and not "judicial proceedings" so that it is not necessary really to consider anything more than the power of the High Court to revise a "proceeding before an inferior criminal Court." Although judicial proceedings are defined in the Code as including "any proceeding in the course of which evidence is or may be legally taken on oath" it was admitted in argument before us that it may sometimes be necessary for the Magistrate before issuing an order under S. 144 to take evidence on oath so that even if that test is applied, it would appear that these proceedings may be judicial proceedings. It is quite true that in the Calcutta Full Bench case such proceedings were held not to be judicial proceedings but that decision was not unanimous and it was undoubtedly in consequence of it that the Code of 1872 described such proceedings as not judicial. The decision of the Full Bench of this Court in *Sundaram* v. *Queen* (3), could not have been otherwise than it was as we have already stated, because the Code of 1872 stated that such proceedings were not judicial proceedings. There is also the other description to be applied namely "proceedings of an inferior Criminal Court." The Privy Council case, in our view, makes such proceedings, proceedings of a Court, so that that description is also applicable. If this is so, then we are bound to take a different view to that of Ramesam, J., in the case in *Vedappan Servai* v. *Periannan Servai* (7), where he says that Cl. (3), S. 435 was redundant. What is the effect of the omission of that clause in the present Code? We cannot say that that omission was unintentional. We have to take the Code as it is. Up to the present Code, from 1872 until 1923, a ban was placed upon the High Court's power of revision with regard to proceedings under S. 144. Now that ban has been removed. It may have been unintentionally removed but we are not concerned with that. We must hold that the effect of that omission is that the ban is removed and that the High Court has now power to revise such orders. We are aware that, if this decision is right, it may lead to most unfortunate consequences. It is obvious that the Magistrate has most frequently to act in an emergency and that it will be a disaster, if, when he does make an order, a criminal revision petition is at once presented to the High Court and a stay order applied for. We come to the decision we have with great regret and only say that, if Cl. (3), S. 435, was omitted by mistake we hope that legislature will as soon as possible restore it at any rate as far as S. 144, Criminal P. C., is concerned. Petition is dismissed as the order expired before the petition was presented.

P.R.S./V.B. *Petition dismissed.*

A. I. R. 1930 Madras 246

BEASLEY, C. J. AND PANDALAI, J.

(*Pantam*) *Venkayya*—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 375 of 1929 and Criminal Revn. Petn. No. 339 of 1929

Decided on 30th October 1929.

Penal Code, S. 171 (f)—Mens rea is necessary ingredient in offence under S. 171 (f).

Mens rea is an ingredient in the offence under S. 171 (f) and where the corrupt intention is absent, the offence of personation cannot be committed: *The Stepney* Case, 4 *O. M. & H.* 34, *Foll.* [P 248 C 1]

Nugent Grant, *V. Satyanarayana*—for Petitioner.

K. N. Ganapathi—for the Crown.

Beasley, C. J.—The petitioner was convicted by the Sub-Divisional Magistrate of Rajahmundry and sentenced

under S. 171 (f), I. P. C., to a fine of Rs. 50 and in default to suffer simple imprisonment for a month.

The offence of which he was convicted was that of personation at an election. Briefly, the facts of the case are that on 16th April 1928 there was an election to fill vacancies of the Peddapur Taluq Board. There were two vacant seats for Peddapur firka and eight candidates and eight polling stations. The petitioner's name was by mistake on the roll of two different villages, namely Geddanapalli and Bhupalapatam. The petitioner voted once in the morning in the polling station for Geddanapalli and in the afternoon for a second time in the polling station for Bhupalapatam.

The offence of personation at elections is defined in S. 171-D., I. P. C., as follows :

"Whoever at an election applies for a voting paper or votes in the name of any other person whether living or dead, or in a fictitious name or who having voted once at such election applies at the same election for a voting paper in his own name ; and whoever abets, procures or attempts to procure the voting by any person in any such way commits the offence of personation at an election."

In the Sub-Divisional Magistrate's Court evidence was given in support of the complaint against the petitioner by certain witnesses proving that the accused voted twice which is not disputed by the petitioner and that he did so although this conduct was objected to by P. Ws. 1 and 2. The petitioner filed a written statement denying the offence. He, however, admitted that he voted a second time but stated that he had done so in the bona fide belief that he could do so as his name was included in two lists. He also disputed the evidence of the prosecution witnesses as to the objection raised by them at the time of his second voting. Two witnesses were called by the petitioner who were the Polling Officers and they deposed that no objection, oral or in writing, was raised at any time to the petitioner voting on the second occasion. On behalf of the petitioner three contentions were raised, namely: (1) that the accused did not specifically apply for the ballot paper and that the second voting was not an offence in the strict letter of the section;(2) that the accused had a right to vote a second time as his name appeared twice in two polling areas in the voters' list and (3) that mens rea is an ingredient in this offence and no mens rea was proved. The Sub-Divisional Magistrate decided all the three points against the petitioner and, since no argument was addressed to us by Mr. Grant on behalf of the petitioner that his findings on the first two points are wrong we have only to consider his finding on the third point, namely, whether mens rea is an essential ingredient in this offience. The Sub-Divisional Magistrate thought that all that it was necessary to prove was the fact that the petitioner had voted twice and that his motive for doing so, whether corrupt or otherwise, was immaterial. He, therefore, did not come to any finding as to the petitioner's motive or guilty knowledge. He thinks that however genuine the belief of a person may be that he is entitled to vote twice if his name appears twice upon the electoral roll, he none the less commits an offence under S. 171-D, I. P. C. We have been referred by Mr. Grant to the corresponding S. 171-D, I. P. C. in the English Act, namely the Ballot Act (35 and 36 Vic. Ch. 33). S. 24, of that Act is S. 171-D, I. P. C. We have compared the two sections and they are clearly the same. That being so, we were referred to an English decision on that section reported in the *Stepney* case (1). There, in discussing the offence of personation, Deman, J., stated on p. 46 as follows :

"It is thoroughly understood election law that, unless there be corruption, and a bad mind and intention in personating, it is not an offence. If it is done under an honest belief that the man is properly there for the purpose of voting, it is held in these cases and in other cases analogous that no offence has been committed. . . . . They are enactments which can be really only applicable to an intentionally bad act, because if a man is guilty at all he is guilty of felony, and may be imprisoned as a felon for a considerable time. To suppose that the legislature ever intended to enact that a man, who with perfect honesty but from a mere blunder as to his rights gives a vote, and then (believing that he has a right to do so), gives a second vote, he being on the register, on the same day, is to be deemed guilty of felony, is to impute an intention to the legislature which is absurd though if it had said so in absolutely plain words, we must have carried it out. I do not think that that is the intention of the Act ; I think there is still to be added to the offence of personation a corrupt intention. and where the corrupt intention is absent, the offence of personation cannot have been committed."

(1) 4 O'M. & H. 34.

The facts in that case were that a man's name had been wrongly included in the register of two divisions. He voted twice and it was admitted that he was ignorant of the law and had acted conscientiously by mistake, that he had no corrupt intention and that he had not been corruptly influenced.

It was argued by the Public Prosecutor that there is no such thing as mens rea in India, that, unless an accused person can bring himself within any of the exceptions in the Indian Penal Code, the offence is committed as soon as the acts set out in the section in the code which defines the offence have been committed, that it is not stated in S. 171-D that the personation must be with a corrupt or any other intention and that therefore intention is immaterial. It was contended that the petitioner's plea amounts to nothing more than the plea that he was ignorant of the law which plea could be of no avail to him. But we find ourselves quite unable to agree with that argument. It does not follow that the petitioner's plea was merely one that he was ignorant of the law. His plea apparently is that as his name was twice upon the electoral roll, he believed by a mistake of fact, that he was on that account entitled to vote twice. His plea is not that he thought that a voter could vote more than once at an election. We have no doubt whatever that the Sub-Divisional Magistrate was wrong in not applying his mind to that aspect of the case. He should have seen, whether, upon the evidence, the petitioner was able to bring himself within any of the exceptions in the Indian Penal Code. This he has not done. Quite apart from this, we are unable to say that the intention of an offender in the commission of this crime is any different in India to what it is in England.

There can be no question whatever that the legislature in introducing the new chapter, Ch. 9 (a), into the code exactly copied the English statute law with regard to offences relating to elections and we see no reason for saying that, whereas in England the corrupt intention of the voter is to be considered here it is immaterial. We, therefore, set aside the conviction of the petitioner, order the fine inflicted upon him to be refunded and direct that this complaint be reheard by the District Magistrate, Rajahmundry or some other Magistrate whom he may direct other than this Sub-Divisional Magistrate. We ourselves are not prepared to decide this matter on the evidence and we think it is essential that the case should be decided by tho Court before which the evidence is presented.

P.R. S./V.S. *Conviction set aside.*

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* A. I. R. 1930 Madras 248

SUNDARAM CHETTY, J.

Secy. of State — Defendant—Appellant.

v.

T. S. Murugesan Pillai and *others* — Plaintiffs—Respondents.

Second Appeal No. 54 of 1926, Decided on 26th August 1929, from decree of the Sub-Judge, Kumbakonam, in Appeal Suit No. 152 of 1924.

*** (a) Land Acquisition Act, S. 6 (1)—Notification by Government issued after institution of suit—Court ought to take notice of notification.**

In a suit for an injunction against the Government restraining them from proceeding with the acquisition of certain lands, the Court ought to take into consideration a notification issued by the Government under S. 6 (1) after the institution of the suit : 44 *Cal.* 47, *Rel. on.* [P 249 C 2]

(b) Land Acquisition Act, S. 6 (1), Proviso—Eighty per cent of cost of acquisition paid first by Government to be recouped subsequently by private parties—Provisions of S. 6 (1). Proviso, are substantially complied with.

Where 20 per cent. of the cost of acquisition of certain lands for building sites is to be levied in the first instance from the private parties and 80 per cent should be first paid by the Government to be subsequently recouped from the private parties to whom the lands are to be assigned, the provisions of S. (1), proviso, are substantially complied with in that, part of the acquisition costs had to come out of the public revenues at the time of acquisition : *A. I. R.* 1926 *Mad.* 1033, *Expl. A. I. R.* 1927 *Mad.* 245, *Ref.* [P 250 C 2]

Govt. Pleader—for Appellant.

B. Sitaram Rao and *B. Venkataraman*—for Respondents.

Judgment.—This second appeal arises out of a suit filed by the plaintiffs (respondents 1 to 3) for an injunction restraining defendant 1, the Secretary of State for India in Council, from acquiring the plaint-mentioned lands under the provisions of the Land Acquisition Act. The suit was instituted before the issue of any notification by the

Government under S. 6 (1), Land Acquisition Act. But, as a matter of fact, such a notification was issued by the Government in respect of the plaint-lands soon after the filing of the suit. That is clear from Ex. 1 which is dated 15th May 1923. The trial Court took into consideration the fact of the issue of the notification, Ex. 1, during the pendency of this suit and held that there was no valid ground for the issue of an injunction restraining the Government from proceeding with the acquisition under the Act. But the lower appellate Court was of opinion, that the suit should be decided on the state of circumstances which existed at the date of the institution, without taking into consideration what transpired subsequent to the filing of the plaint. Considering the scope of this suit within this narrow compass, it held that the civil Court could go into the question, whether the acquisition was really for a public purpose or not, conceding at the same time that, if a notification under S. 6 (1), Land Acquisition Act, be issued and proceedings are taken on that basis, it may be conclusive evidence of the purpose being a public one. Regardless of the declaration contained in the notification, the learned Subordinate Judge came to the conclusion upon the materials furnished in the suit, that the purpose could not be deemed to be a public purpose. In this view, an injunction was issued against defendant 1 as prayed for in the plaint.

In this second appeal, it has been fairly conceded by the learned advocate for the respondents. that, if a declaration under S. 6, Land Acquisition Act, be made by a notification in the gazette it would be conclusive evidence of the fact that the land sought to be acquired was needed for a public purpose. It has also been held in *Ponnaiya* v. *Secy. of State* (1) that after such a declartion, it is not open to the owner to contend in any civil Court that the land was not needed for public purpose: vide also decision in *Veeraraghavachariar* v. *Secy. of State* (2). as to the conclusiveness of the declaration as to the purpose being a public one. That being so, the next question is, whether in deciding this suit, the Court can take into consideration the fact of the issue of such a notification by the Government soon after the filing of the suit as evidenced by Ex. 1. There is no doubt that the Government would take further steps in the matter of the acquisition on the strength of that notification. The relief claimed by the plaintiffs in this case, is an injunction to restrain the Government from proceeding with the acquisition. If an injunction should be granted ignoring the fact of the issue of this notification, it would only lead to an anomaly and also to multiplicity of suits.

The decision in *Nuri Miah* v. *Ambica Singh* (3) relied on by the learned Government Pleader, lays down the principles which should be applied to a case of this kind. It is therein laid down that, though ordinarily the decree in a suit should accord with the rights of the parties as they stood at the date of the institution of the suit, that rule need not be followed where it is shown that the original relief claimed, has, by reason of the subsequent change of circumstances, become inappropriate, or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. Adopting the principles enunciated in this ruling, it would be proper in this case for the Court to take notice of the fact of the issue of the notification, Ex. 1, though it was after the filing of the suit, in order to mould the decree in the proper form according to the circumstances which have arisen since the institution of the suit. The relief in this case being an injunction which is in the discretion of the Court to grant or refuse, I think that, for a satisfactory disposal of the case, due weight should be given to the issue of the notification, Ex. 1, in order to see whether, in spite of such a notification there are still reasonable grounds for the issue of any injunction. In the view I have taken, it must be held that the notification is conclusive evidence of the fact that the acquisition in question was for a public purpose. It is unnecessary therefore to canvass the evidence in order to come to an in-

(1) A. I. R. 1926 Mad. 1039.
(2) A. I. R. 1925 Mad. 837=49 Mad. 237.
(3) [1917] 44 Cal. 47=24 C. L. J. 140=34 I. C. 869=20 C. W. N. 1009.

dependent conclusion whether it is for a public purpose or not.

I have to consider the contention of the learned advocate for the respondents that there was no substantial compliance with the proviso to S. 6 (1), Land Acquisition Act, and therefore the declaration would be ultra vires. The proviso is to this effect :

"No such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority."

In the present case, what has been done is that 20 per cent of the cost of the acquisition should be levied in the first instance from the applicants for the sites and the remaining cost, namely, 80 per cent should first be paid out of the public revenues by the Government, but it should subsequently be recouped from the persons to whom the sites are assigned, in instalments which are spread over a period of 20 years. As I have already said the avowed purpose of the acquisition is to provide sites for the Panchamas and other labourers. It is argued that in view of the avowed intention of the Government to recoup the 80 per cent of the cost from the grantees of the sites in the manner stated above, it should be deemed that no portion of the cost really comes out of public revenues. Without now going into case law as to the interpretation of this proviso, it seems to me at first sight, that all that the proviso requires is, that some portion of the initial cost of the acquisition should come out of the public revenues. It is silent as to what the effect of any future action by the Government in the matter of recouping the amounts advanced by it would be upon the validity or propriety of the notification. There is no doubt that there must be a substantial bona fide compliance with the terms of this proviso. By reason of the stipulation that the 80 per cent of the cost now paid by the Government should later on be recovered from the grantees, it cannot be concluded that the entire amount would surely be recouped by the Government. We cannot forget the other contingency of the Government failing to recoup portion of this amount, in which case, it must itself bear the outlay to that extent. Such contingencies as would arise in future are now problematic and in the face of the clear fact that 80 per cent of the cost is now paid out of the public revenue, we need not speculate as to what would happen in future. I am therefore of opinion that, in spite of the aforesaid stipulation, there is substantial compliance with the condition in the proviso that at least a part of the cost should come out of public revenues at the time of the acquisition. In the case reported in *Ponnaiya* v. *Secy. of State* (1) referred to above, there was a payment by Government of only one anna out of a sum of Rs. 3,352 and odd, the cost of the acquisition. It was therein held that this was merely an evasion of the terms of the proviso to S. 6 (1) of the Act. But, on a perusal of the judgments of both the learned Judges in that case, it seems to me that the facts proved in that case led to an inference that the acquisition in question was only a device for private ends under the guise of the Land Acquisition Act, and in all probability, the payment of one anna only out of a very big sum coupled with those special circumstances, was viewed as a mere evasion and not a compliance at all with the requisites of the proviso. Whereas, a divergent view was taken by another Division Bench of this Court in the case reported in *Senja Naicken* v. *Secy. of State* (4). It was held, that even a contribution of one anna by the Government, though the cost of the acquisition amounted to a pretty large amount, would be a sufficient compliance with the proviso and that there was no valid reason to question the legality of the notification. This objection is in my opinion unsustainable, and I hold that the declaration under S. 6 (1) of the Act evidenced by Ex. 1 is legal and valid.

Any further steps taken by the Government in pursuance of this notification cannot be arrested by the issue of an injunction in this suit. I therefore disagree with the opinion of the lower appellate Court, and find that it is needless to issue any injunction. In this view, the plaintiffs' suit should be dismissed and this appeal allowed. As for costs, the important fact to be borne in mind is, that the present suit was instituted by the plaintiffs before the issue of the notification, Ex. 1, and therefore it was open to them to question the

(4) A. I. R. 1927 Mad. 245=50 Mad. 308.

alleged public purpose for the acquisition and to ask for an injunction. However, the plaintiffs have been throughout contending that the notification itself is ultra vires, and that contention has been found against. Taking all these circumstances into consideration, I think fit to direct the plaintiffs to pay one half of defendant 1's costs throughout and bear their own costs. Leave refused.

P.R.S./V.S. *Appeal allowed.*

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* A. I. R. 1930 Madras 251

RAMESAM AND JACKSON, JJ.

S. K. Raghavendra Rao—Defendant—Appellant.

v.

Venkatasami Naickan and *others*—Plaintiffs—Respondents.

Appeal No. 95 of 1925, Decided on 16th August 1929, from decree of Addl. Sub-Judge, Coimbatore, in Orignal Suit No. 24 of 1923.

*** (a) Mortgage—Consideration—If execution is proved, recital is prima facie proof of passing of consideration against heir or purchaser from executant.**

If a suit is between the mortgagee and the mortgagor only and the mortgagor admits the document, the onus of proving want of consideration is on him; but if he does not admit the execution of the document and denies it and therefore denies the whole transaction, the burden of proving execution and the passing of consideration are both on the plaintiff-mortgagee. Generally he discharges his burden by proving execution only and exhibiting the document containing admission by the mortgagor of having received consideration. The moment such a document is proved and exhibited, it is for the mortgagor to rebut the presumption arising out of the recital in it. If further instead of the mortgagor himself the mortgagee has to sue his legal heir who is an infant, there is no greater burden as regards proof of consideration on the mortgagee. In the case of the purchaser from the mortgagee who cannot be expected to admit the execution of the document, if he puts the mortgagee to strict proof of execution and passing of consideration unless in the course of proving the document, certain circumstances have been elicited which throw a cloud of suspicion on any part of the case, the recitals would be prima facie proof of the passing of consideration and it is for the purchaser to meet the presumption arising out of the recital: 6 *Cal.* 268 and 35 *I. C.* 455 (*Spencer, J.*), *Diss. from*; 6 *C. L. J.* 659 and 10 *A. L. J.* 108, *Doubted*; *A. I. R.* 1921 *Cal.* 435, *Dist.*; 36 *All.* 478, *Rel. on*; *A. I. R.* 1924 *Cal.* 415, *Ref.* [P 253 C 2, P 254 C 1]

*** (b) Evidence Act, S. 106—Presumption applies only in absence of clear or sufficient evidence.**

In a case where all the facts are proved by ample evidence and the Court is in a position exactly to say what happened, no importance need be attached to the rule as regards burden of proof. It is only in cases where evidence is meagre and the Court is not in a position definitely to know what happened that the technical rule as to burden of proof is to be observed. [P 256 C 1]

*** (c) Evidence Act, S. 106—Representatives of parties to transaction cannot take advantage of S. 106.**

Section 106 cannot be utilized to help persons who are representatives of parties to a transaction and who step into their shoes: 35 *I. C.* 455, *Diss. from.* [P 257 C 1]

Watrap S. Subramania Iyer—for Appellant.

K. Bhashyam Iyengar—for Respondents.

Ramesam, J.—This appeal arises out of a suit on a mortgage bond dated 17th October 1908, executed by one Venkatasami Naidu. Defendant 2 is the father of the executant. Defendants 3 and 4 are the assignees of a mortgage decree obtained against the suit lands. Defendants 5 and 6 are subsequent mortgagees. Defendants 7 and 10 are purchasers of portions of the mortgage property. Defendants 8 and 9 are purchasers in Court auction of portions of mortgage property in execution of a decree on a prior mortgage. The mortgagor became an insolvent and his property became vested in the Official Receiver who is defendant 1. Defendant 1 pleaded that the mortgagor was not the managing member of the family at the time of the alleged execution of the suit bond. He put the plaintiff to proof of the execution of the mortgage bond and of its consideration. He also alleged that there were misunderstandings between the mortgagor and his father and that they were executing fictitious documents in favour of relations with a view to precipitate a partition in the family. He relied on some other circumstances for showing that the suit document was a nominal one. Defendant 2 contended that the suit document was not binding on him. Defendant 7 raised certain contentions which it is unnecessary to state. The Subordinate Judge granted a decree against defendant 1's share only. The Official Receiver files this appeal and he repeats his contention in the Court below that the suit document was nominal.

Defendant 1 became an insolvent some time in August 1914. He had pre-

viously executed two mortgages in favour of his wife's brothers. The were dated 15th February 1913 and 27th February 1913. Soon after the mortgagor was declared insolvent, the Official Receiver took steps to have these mortgages declared void against the creditors under S. 36, Insolvency Act, and they were declared void. The present plaintiff 1 is the brother of the father-in-law of the mortgagor. He died before the case came on for trial and his nephews were brought on the record as his legal representatives. These happen to be the two mortgagees whose mortgages were declared void in the insolvency proceedings. It is contended for the appellant that as his mortgages in favour of the brothers-in-law were found to be collusive documents it is likely that the suit document also was a collusive and nominal document. But it seems to me that the suit mortgage was executed in circumstances quite different from those of the other two mortgages. They were executed in 1913 when the mortgagor was getting heavily involved and as a matter of fact he was declared insolvent soon after.

The suit mortgage bond was executed six years before the insolvency. It does not follow from the fact that the man was getting involved in 1913 and was executing nominal documents, that the document of 1908 should also be regarded as nominal. The suit mortgage is in favour of the uncle-in-law of the mortgagor, a rather remote relation. The other two mortgages were in favour of his brothers-in-law, very close relations. It is next urged that when in the insolvency proceedings the present mortgage bond was summoned for it was produced by defendant 2 before the Official Receiver. Assuming that it was produced by defendant 2, it does not follow that the document was always in the custody of defendant 2 and it had never been with the mortgagee. It is true that, if the mortgagee had never had possession of the suit document, it suggests that it is a nominal transaction. But of this suggestion there is really no evidence. The document was actually produced before the Official Receiver by D. W. 4, son of defendant 7, and he says that defendant 2 gave it to him. I doubt if this oral evidence ought to be believed, D. W. 3 says that there was a partition between the mortgagor and his father in 1909 and that at the time of the partition the suit mortgage bond was with defendant 2 and that it was taken from him. Ex. 4 is the partition deed. There is a clause in it providing that besides the debts referred to in the schedule all other debts should be discharged by the persons who contracted the debts. Now, this is sought to be construed as a statement that all debts other than those mentioned in the schedule are nominal and nominal endorsements of payments should be obtained on the bonds and the bonds handed ever to the other party. I do not see any justification for this construction of Ex. 4. This contention therefore that the suit document was regarded as a nominal document at the time of the partition fails.

The next circumstance relied on by the appellant may be thus stated. Defendant 7 obtained a decree in O. S. No. 28 of 1908 and proceeded to execute his decree by sale of the mortgage properties. In the proclamation the suit mortgage was given in the list of prior encumbrances and a remark was added that it was a nominal document. This is a statement made behind the back of the creditor in proceedings to which he was not a party and it was purely a self-serving statement. A statement of that kind is not even evidence against the plaintiff. Thus, so far as the specific circumstances relied on by the appellant are concerned, I think that they do not go to show in the slightest degree that there is any suspicion attached to the document.

It is next contended that, even ignoring all the circumstances relied on by the defendant, the plaintiff ought to fail because it is said that the burden of proof is on the plaintiff to prove that there was consideration for the suit mortgage and the supplemental plaintiffs have not discharged that burden resting upon them. The document Ex. A mentions five items of consideration. The first item is a sum of Rs. 1,000 due to the Coimbatore Town Bank. That there was such a debt and that it was paid off by January 1909 is proved by P. W. 1. It is not even suggested that the defendants have paid off this debt. There is some evidence that plaintiff 1 paid off the debt vide the evidence of

P. W. 2. Item 2 is a debt of Rs. 1,605 due to one Subramanian Chettiar, and item 3 is a debt of Rs. 567 due to Kumarappa Chettiar. Plaintiff 2 as P. W. 2 swears that these two promissory notes were paid off and that he saw the promissory notes brought back. Unfortunately, the promissory notes are not now produced. But plaintiffs 2 and 3 are not responsible for such non-production. They are only the legal representatives of plaintiff 1 brought on record just two months before trial. The original mortgagee is dead. It may be that if he had been living he would have given a better account of these promissory notes. It cannot be said that the inability of plaintiffs 2 and 3 to explain as to what became of the promissory notes is a suspicious circumstance against them. The payment of the other items is also spoken to by plaintiff 2.

It is argued for the appellant that he is a stranger to the document and therefore the burden lies on the plaintiffs to prove the passing of consideration as against him. The appellant is a stranger to the document only in the sense that he was not an original party to the document. In the sense that he derives his interests from the mortgagor and therefore stands in his shoes, he is not a stranger but it is said that as he knows nothing of the original transaction the burden ought to lie on the person who knows more about it. In this particular case, if the burden of proof is to turn upon a consideration of this kind, the plaintiffs also can be said to be in the same position. The original mortgagee, viz., plaintiff 1 died and his nephews are the legal representatives. They know no more of suit transaction than the appellant and so far as this aspect is concerned both the parties who are now contesting are persons who have no means of knowledge and if the rule as to burden of proof is to turn upon this circumstance it is clear that as both the parties are strangers and as the proof of the execution of the document is prima facie proof of the passing of consideration, the further burden of rebutting this presumption arising from such proof must rest on the defendants and the defendants must fail. But I do not wish to dispose of the case on this narrow ground. An elaborate argument has been addressed to us that wherever there is a mortgage and the mortgagee's interest afterwards passes to a stranger and a suit is brought on the document the burden of proof against the stranger is on the mortgagee and if he fails to show the passing of consideration positively, he must fail even if there is no evidence on the side of the defendants. I agree with a part of this propesition but not with the full extent of the implication in it and, as there are cases either apparently or really supporting the contention of the appellant, I wish to deal with this matter fully.

If the suit is between the mortgagee and the mortgagor only and the mortgagor admits the document, the onus of proving want of consideration is on him but if he does not admit the execution of the document and denies it and therefore denies the whole transaction the burden of proving execution and the passing of consideration are both on the plaintiff mortgagee. Generally he discharges his burden by proving execution only and exhibiting the document containing the admission by the defendant of having received consideration. The moment such a document is proved and exhibited, it is for the defendant to rebut the presumption arising out of the recitals in it. Those last statements of mine are elementary propositions and there can be no conflict of opinion about them. I state them merely to lead to the next step. But suppose that the original mortgagor died leaving, let us say an infant heir who knows nothing about the original transaction and a suit is brought against the infant heir. Naturally he denies knowledge of the transaction and puts the plaintiff to the proof of the execution and the passing of consideration. The burden is of course on the plaintiff to prove both. But suppose the plaintiff proves execution and exhibits the document containing the recitals as to receipts of the consideration by the mortgagor whose heir the defendant is, has he not made out a prima facie case as to the passing of consideration also? I think he has done so and unless in the course of proving execution very suspicious circumstances are elicited in the cross-examination of the plaintiff's witnesses the mom.

ent the execution is proved, it is for the defendant to meet the plaintiff's case made out by the putting in of the document in evidence containing the recitals. I do not think there is any case, at any rate none has been cited before us, showing that an infant heir is in a better position than the original mortgagor and that there is a greater burden on the plaintiff because the infant heir knows nothing about the original transaction. No Court has yet said that:

Now I take up the next question. Instead of the property passing to the infant heir, suppose the original mortgagor has sold it by private sale or the mortgaged property has passed from him by an auction-purchase to the purchaser. Does this purchaser stand in a better position than the original mortgagor or the infant heir? On principle I do not see why he should. As to one proposition laid down by all the cases I entirely agree, namely, that, where a purchaser who cannot be expected to admit the execution of the document denies such execution and puts the plaintiff to proof of the whole transaction the burden is on the plaintiff to prove execution and the passing of consideration. All the cases lay down this and I agree with this proposition. But this is nothing more than what happens in the case of the mortgagor himself denying execution; and to say this is not to put the purchaser in a better position than the original mortgagor. Now, suppose in such a case the plaintiff mortgagee has proved the execution of the document and has put in evidence the recital therein as to the passing of consideration, i. e., an admission by the mortgagor whose representative the defendant is. In such a case it seems to me that, unless in the course of proving the document circumstances have been elicited by cross-examination of witnesses which throw a great cloud or suspicion on any part of the case, the recitals would be prima facie proof of the passing of the consideration and it is for the defendant who claims under the person who made the admission to meet the presumption arising from the recitals. I do not think it can lie in his mouth to say that he was a stranger to the original transaction; and, if he cannot undertake to meet the plaintiff's prima facie case arising from the recitals, he cannot, it seems to me, insist on the plaintiff proving something more than the recitals so as to make out the passing of the consideration specifically and not by mere admissions. It may be in a particular case, if the plaintiff is in a position to produce better evidence than mere recitals and deliberately abstains from doing so, such as in the case of a merchant not filing his accounts or where it appears that there must have been other vouchers and they are not produced, or some other suspicious circumstances appear, that it is open to the Court to say that it is not satisfied with the presumption arising from the recitals and to require more from the plaintiff before it calls upon the defendant to meet the plaintiff's case. But to say this is not to lay down any rule as to burden of proof. It is merely a question of weighing the evidence. It seems to me that in general, by which I mean where no other suspicious circumstances appear, the plaintiff by merely proving the execution of the document containing recitals must be taken to have made out a prima facie case and it is for the defendant to meet that case by adducing his evidence. The fact that the defendant is a stranger to the original transaction cannot make his position better or the plaintiff's position worse than where he sues the original mortgagor. So far, I have discussed the matter on general principles and without reference to any cases. I will now discuss the cases that have been cited before us.

The first decision cited before us is *Brajeswaree* v. *Bhudamuddi* (1). The matter came up on second appeal before Jackson and Macdonell, JJ. The lower appellate Court held that the passing of the consideration was not proved though the execution of the document had been proved. The point raised in second appeal was that, unless there was some evidence for the defendant to rebut the case made out for the plaintiff, the plaintiff ought to get a decree. Jackson, J. agreed with this contention but Macdonell, J. said that it was a second appeal and he could not interfere. The matter came up before a third Judge Garth, C. J., who made certain observations to the effect that the weight of the recitals as against a stranger to the

(1) [1881] 6 Cal. 268=7 C.L.R. 6.

document must be taken to be less than the weight of the same recitals against the original executant. I regret I have to dissent from this proposition. No doubt, the result of that case can be justified if the lower appellate Court had said that, apart from the recitals in the document, there were other circumstances appearing in the plaintiff's case itself or other surrounding circumstances which threw so much suspicion that without further evidence on the part of the plaintiff it was not prepared to accept his case, or in other words, it would not have called upon the defendant to meet the plaintiff's case. If anything in that case rests upon some such consideration, I would agree with Macdonell, J., that it is a matter for non-interference in second appeal; but Jackson, J's judgment shows that there were no such circumstances and I would agree with Jackson, J., that in that case the second appeal ought to have been allowed. In any event, I am unable to agree with the Chief Justice's observation that because the defendant is a stranger to the document the weight to be attached to the plaintiff's evidence varies. The weight of certain evidence cannot vary because of the nature of the defendant but can only vary with reference to the surrounding circumstances.

The recitals in a document may lose their weight on account of other suspicious circumstances surrounding the execution of the document coming out in the evidence; but where there are no such suspicious circumstances I am unable to see how the weight can diminish because the defendant is a person other than the original executant, though claiming under him. The next decision relied on is *Bisheswar Dayal* v. *Harban Sahay* (2). So far as the head-note in this case is concerned, I do not see any reason to dispute it. The defendant was a stranger and he denied all knowledge of the bond. The burden therefore was primarily on the plaintiff. It was for him to make out a prima facie case. Whether more was intended by the case does not appear from the judgment. If it was meant to lay down in that case that positive proof of the passing of consideration must be given and that the proof of execution is not enough to discharge the plaintiff's burden and to call upon the defendant to meet the case, I cannot agree with it. It is not clear that the case was intended to lay down any such rule. The words "the transaction was perfectly genuine and free from taint of fraud" suggest not that the plaintiff should prove a huge negative, that he has to imagine some fraud and show that there was no fraud, but that there was some circumstance in the case suggesting fraud or suspicion of fraud and the plaintiff has to clear it up. But it is unnecessary for me to say more about that case. There again the matter came up on second appeal and the appeal was dismissed. Perhaps, there was something in the lower appellate Court's judgment about fraud surrounding the execution of the document. The next case referred to is *Saluk Singh* v. *Ajudhya Pershad* (3). Here again, I have no quarrel with the head-note. The burden certainly lay on the plaintiff, but it seems to have been held that even if the plaintiff proved the execution of the document he had not proved the passing of consideration. The last sentence in the judgment seems to suggest that there was so much more which the plaintiff could have proved but he did not and that his not adducing such further evidence as was in his power must be taken to destroy any presumption arising from the recitals of the document. It may be that the decision is right on the facts. All that the Judges say is that the Court of first instance was quite right in primarily placing the onus of proof on the plaintiff and in holding that the onus was not shifted. The latter proposition I do not take as a general rule of law that in every case of a stranger-defendant the burden does not shift merely by proof of execution. If it is merely a statement on the facts of the case, the case lays down nothing in favour of the appellant.

The next case is *Krishna Kisore* v. *Nagendrabala Chowdhurani* (4). This case certainly does not help the appellant. Both sides adduced such complete evidence as was in their power and the Court was in a position to adjudicate upon the truth and not upon a technical rule of onus. In such cases it is said that the onus of proof becomes immaterial and

(2) [1907] 6 C. L. J. 659.

(3) [1912] 10 A L. J. 103=15 I. C. 121.

(4) A. I. R. 1921 Cal. 435.

no importance should be attached to the question of onus. I entirely agree with these remarks. In a case where all the facts are proved by ample evidence and the Court is in a position exactly to say what happened, no importance need be attached to the rule as regards burden of proof. Other cases occur where evidence is very meagre and the Court is not in a position to know definitely what happened. In such a case the case has to be decided with reference only to the technical rule as to burden of proof. Let us imagine a very elementary case. Suppose that beyond exhibiting the document both sides have adduced no further evidence. In such a case, if the burden is on the defendant, he ought to fail; but if it is on the plaintiff if he has not discharged the burden by exhibiting the document he ought to fail. In such a case the rule as to burden of proof becomes of great importance and it is with reference to such a case that my remarks apply. It is in such a case that I say in general that after exhibiting the document containing the recitals as to the passing of consideration, the burden shifts to the defendant. It is only in certain special cases of suspicious circumstances that it may not so shift.

Certainly the decision in *Krishna Kiser De* v. *Sreemati Nagendrabala Chowdhurani* (4), does not help the appellant. There is only one case from our Court cited for the appellant and this is *Kumarappa Chettiar* v. *Narayanan Chettiar* (5), I regret to say that I am unable to agree with the observations of Spencer, J., at p. 456. He seems to dissent from the decision in *Babbu* v. *Sita Ram* (6), on the ground that the peculiar position of the stranger has not been carefully examined. Now a stranger who purchased a mortgagor's title, whether by private purchase or in Court auction, ought to know exactly the nature of the title he has purchased, and to say that such purchase was without notice seems to be incorrect. Want of notice in such a case can only be the result of sheer carelessness on the part of the purchaser which must amount at least to constructive notice. It is very difficult to imagine a case of a transferee who does not stand in the shoes of the transferrer and against whom an admission of the transferrer cannot be regarded as evidence. Far from dissenting from *Babbu* v. *Sita Ram* (6), I am inclined fully to agree with the observations in that case. The observations of Kumaraswami Sastriar, J., at p. 458 are more carefully worded and it is not necessary for me to dissent from them as from Spencer, J's., observations. There he says that, where a person claiming title to the property succeeds in showing that there is no debt, then the property cannot be sold. This of course is perfectly right. In fact, the whole judgment of Kumaraswami Sastriar, J., proceeds on the footing that the fictitious nature of the consideration was actually shown in that particular case and in such a case, unless it is intended to benefit the mortgagee, which is a special case, the mortgagee cannot have a decree for sale. I agree with all this. At p. 457 he agrees with *Bisheshwar Dayal* v. *Harbans Sahay* (2). But on reading the rest of the paragraph it seems to me he is not laying down any rule as to burden of proof. He only says that want of consideration may be proved as part of other circumstances going to show that the instrument is a colourable transaction and not intended to convey any interest to the ostensible purchaser or to confer any title on him. In fact, there seems to be in that case very strong evidence to show that the document was colourable. Whether it came out as part of the plaintiff's case or whether the defendant adduced such evidence I am not able to say. The matter came up in second appeal and the crux of the appellant's contention seems to have been that, even if there is no consideration proved he is entitled to a decree for sale. In my opinion this case does not help the appellant. Certainly I am inclined to dissent from Spencer, J.'s disapproval of *Babbu* v. *Sita Ram* (6).

In my opinion the observations in *Babbu* v. *Sita Ram* (6), are unexceptionable, and I agree with them. In *Benoy Bhusan Roy* v. *Dhirendra Nath De* (7), at p. 181 (*of* 74 *I. C.*), we have got the following observation:

"The document was executed by his father, and contains a recital that the consideration

(5) [1916] 35 I.C. 455.
(6) [1914] 36 All. 478=25 I.C. 426=12 A.L.J. 806.
(7) A.I.R. 1924 Cal. 415.

had been received by the executant. The burden lies upon the executant or his representative to prove that the recital was untrue and to satisfy the Court how he became a party to a document which contained an untrue recital of this description . . . . . This burden has not been discharged. On the other hand, there is affirmative evidence on the part of the plaintiff to show that consideration was in fact paid."

I entirely agree with these observations and seeing that Mukerjee, J., is a party to this case it seems to me that what is sought to be implied in *Bisheswar Dayal* v. *Harbans Sahay* (2), was not really meant by it. It is true that this last case is a case of an heir; but I do not see how the case of an heir differs from that of a transferee. If any relaxation of the rule of law is to be made for the case of a purchaser on the ground that he is a stranger and he knew nothing of the initial facts, surely the same thing ought to be done for an infant heir or even a major heir who knew nothing about the transaction. The truth is that S. 106, Evidence Act, cannot be utilized to help persons who are representatives of other parties and who step into their shoes, as Spencer, J., seems to suggest in *Kumarappa Chettiar* v. *Narayanan Chettiar* (5). In my opinion, in the present case after Ex. A has been proved there are no suspicious circumstances compelling the Court not to shift the onus to the defendants. The defendants have proved nothing to rebut the presumption arising from the recitals in the bond.

The appeal fails and ought to be dismissed with costs.

Jackson, J.—I agree.

P.R.S./V.B. *Appeal dismissed.*

A. I. R. 1930 Madras 257

RAMESAM AND JACKSON, JJ.

Subramania Pillai—Defendant 2—Appellant.

v.

Venkatarama Reddi and *another*—Plaintiff and Defendants 1—Respondents.

Appeal No. 237 of 1926, Decided on 12th August 1929, from a decree of Dist. Judge, South Arcot, in Original Suit No. 45 of 1924.

(a) Hindu Law—Debts—Father—Money decree obtained against father and properties attached—In execution whole of interest may be proceeded against irrespective of ambiguity in description—Son is bound by such execution unless he shows that debt was immoral—Civil P. C., S. 53.

Where money decrees are obtained against a father and the properties attached, even when there is ambiguity in the description of the properties such as by the use of the words right title and interest of the judgment-debtor, still it must be taken prima facie that the intention in the execution proceedings is to proceed against the whole of the interest that may be proceeded against on account of the Hindu Law rule that a father's debts may be executed against the son. There may be some special circumstances in some cases to show that the execution proceedings were limited to a particular share of interest. Where no such limitation expressly appears, all that the sons can claim is to show that the debt was illegal or immoral or that the debt never existed, and the moment they fail to prove any of the specific circumstances, their claim must fail: 13 *Cal.* 21 (*P.C.*); 12 *Mad.* 142 (*P.C.*); 17 *Cal.* 584 (*P.C.*); 14 *Cal.* 572 (*P.C.*) and *A. I. R.* 1927 *Mad.* 311, *Foll.* [P 258 C 1]

(b) Hindu Law—Debts—Father—Matter in execution res judicata against father—Plea of res judicata is also effective against son—Civil P. C., S. 11, Expl. 6.

Execution against father is effective enough to bind the son also and if any matter in execution is res judicata against the father, the plea of res judicata is operative against the son too, for practically the father represents the son in execution proceedings even where the suit was not framed against him as manager of the family. [P 258 C 2]

C. Padmanabha Ayyangar and *T. D. Srinivasa Chariar*—for Appellant.

P. K. Janakiram—for Respondents.

Judgment.—In this case we have got a decree against a Hindu father. There were a number of execution petitions in 1916, 1918, 1920 and 1921. In the execution proceedings of 1921 the property was sold. The sale certificate is dated 31st March 1921. The present defendant 1 was the purchaser. He sold the property to the present defendant 2 under Ex. 5 dated 19th September 1921. The present plaintiff brought this suit for the recovery of his share in the property on the ground that the execution proceedings against his father, the judgment-debtor, did not include his own share in the property. Prior to that he had put in a petition for setting aside the sale so far as his interests were concerned: vide Ex. 3 (a). It was dismissed. There was an application for review, Ex 4. That was dismissed. It is clear that all parties thought that the execution proceedings were against the whole of the family property and not against the father's share only. In none of the schedules attached to the proclamation was there any remark made to the effect

that only the father's half share in the properties described was intended to be sold. According to a series of decisions of the Privy Council, where money decrees are obtained against a father and the properties attached, even when there is ambiguity in the description of the properties such as by the use of the words right, title and interest of the judgment-debtor, still it must be taken prima facie that the intention in the execution proceedings is to proceed against the whole of the interest that may be proceeded against on account of the Hindu Law rule that a father's debts may be executed against the son. There may be some special circumstances.

In some cases to show that the execution proceedings were limited to a particular share or interest. Where no such limitation expressly appears, all that the sons can claim is to show that the debt was illegal or immoral or that the debt never existed, and the moment they fail to prove any of the specific circumstances, their claim must fail. This is the result of the decisions in *Nanomi Babuasin* v. *Modhun Mohun* (1), *Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan* v. (2), *Mahabir Pershad* v. *Moheswar Nath Sahai* (3), and *Simbhunath Pande* v. *Golap Singh* (4). It is perhaps putting the matter too strongly to say that the sale certificate only is conclusive on the matter. It is safer to look at the whole of the execution proceedings. Though the Judges who decided the case in *Natesa Pathar* v. *Ganapathi Subba Pathar* (5) have rested their judgment on the sale certificate only, the conclusion in the judgment is one with which we agree and they have referred to all the Privy Council cases. In the present case the learned District Judge attempts to distinguish the case in *Subba Rao* v. *Swamia Pillai* (6) on the ground that in that case the son intervened in execution before sale and the Court disallowed his objection. It is true that no such thing happened in the present case ; but the son's objection after the sale in the present case is practically similar to what happened in that case. We, therefore, think that the District Judge is wrong in thinking that only the father's share was proceeded against in the execution proceedings.

It is then stated that the execution petition of 1920 was really barred by limitation and though the proceedings which terminated in a sale are binding against the father the son is not precluded from showing that that application was barred. We do not agree with this contention. The matter is res judicata against the father. If so, as the effect of the cases is that execution against father is effective enough to bind the son also, the res judicata is operative against the son also. Practically the father represents the son in the execution proceedings even where the suit was not framed against him as manager of the family. It is unnecessary to consider the question whether the applications of 1916 and 1918 may not be considered as steps in-aid of execution, to prevent the application of 1920 being barred by limitation. We do not think that there is any decision which compels us to hold that they cannot be such steps-in-aid, though the execution proceedings in the Panrutti Court might have been irregular and, if objected to immediately, would not have been allowed to proceed. We allow the appeal and dismiss the plaintiff's suit with costs throughout.

P.R.S./V.S. *Appeal allowed.*

(1) [1886] 13 Cal. 21=13 I. A. 1=4 Sar. 682 (P.C.).
(2) [1889] 12 Mad. 142=16 I. A. 1=5 Sar. 271 (P.C.).
(3) [1890] 17 Cal. 584=17 I.A. 11=5 Sar. 489.
(4) [1887] 14 Cal. 572=14 I. A. 77=5 Sar. 5 (P.C.).
(5) A. I. R. 1927 Mad. 311.
(6) [1918] 7 M. L. W. 407=47 I. C. 834.

A. I. R. 1930 Madras 258

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

(Chairman), Municipal Council, Srirangam—Defendant—Appellant.

v.

Anantha Subramania Ayyar—Plaintiff—Respondent.

Appeal No. 273 of 1929, Decided on 4th September 1929, from order of Sub-Judge, Trichinopoly, D/- 17th July 1929, in I. A. No. 824 of 1929.

(a) Madras District Municipalities Act—Rules for the preparation of electoral rolls, R. 6—Members in waiting are not included in revising authority — Waiting Board is intended to be reserve and can never become anything more than such reserve — Person nominated as member of Revising Board re-

fusing to serve—Collector's new nomination held to be correct.

The rule consists of two distinct parts, first, referring to the revising authority, the second to the Waiting Board. The members in waiting are not included in the revising authority which body shall consist of certain three persons, none of them being a member in waiting. The second part of the rule provides that certain persons may be appointed to the Waiting Board to take the place of any member of the revising authority. The fact that he takes the latter's place does not alter his status and convert him into a regular member. A Waiting Board is intended to be a reserve and can never become anything more than such reserve. Its members are outside the Board and they are to be called out in emergencies to act temporarily as substitutes.

The Collector originally nominated three persons as members of a Revising Board; he also appointed certain members in waiting. On one of the nominated members declining to serve, the Collector nominated another person in his place. It was contended that when a nominated member refused to serve, it was a member in waiting that should have stepped into his place.

Held: that under R. 6 there could not be a proper Revising Board of two members and in appointing the third, the Collector was perfectly right. [P 260 C 2]

(b) Madras District Municipalities Act—Rules for the preparation of electoral rolls, R. 6—Biased chairman is disqualified from adjudicating upon person's claim—Objection of interest can, however, be waived by conduct.

Where the chairman of a Revising Board has a personal interest and bias in the result of a person's name being included in the electoral roll, the chairman is disqualified from adjudicating upon the claim of that person; but that person, aware of the objection of interest, cannot take the chance of a decision in his favour and afterwards raise the objection. *Wakefield* v. *West Riding Ry. Co.*, 6 *B. & S.* 794, *Rel. on.*; *Frome United Breweries Co.* v. *Bath Justices*, (1926) *A. C.* 586 and *Rex* v. *Howard*, (1902) 2 *K. B.* 363, *Ref.* [P 262 C 1; P 263 C 1]

(c). Madras District Municipalities Act—Rules for the preparation of electoral rolls, R. 6—Members of Revising Board differing—All members should endeavour to arrive at unanimous judgment.

A final decision ought not to be pronounced in a case in which the members of the Revising Board differ until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment: 6 *All.* 468, *Rel. on.* [P 264 C 1]

T. Rangachariar and *A. Srirangachariar*—for Appellant.

T. R. Ramachandra Iyer and *S. Srinivasa Iyer*—for Respondent.

Venkatasubba Rao, J.—The learned Sub-Judge has been tempted to give way to moral indignation and to exhibit great heat. This is a draw-back that has seriously impaired his judgment.

The question we have to decide is, have the rules for the preparation of electoral rolls been contravened to such an extent, as to render the proceedings of the "revising authority" wholly null and void? We state the question in this form having regard to R. 6(b) which enacts inter alia:

"The orders passed by the revising authority shall be final and shall not be liable to be questioned by any legal proceeding."

The plaintiff has therefore sought to show that the Board which decided against his claim was not properly constituted and that in consequence there was no decision which could become final, within the meaning of that provision. In view of the wording of this rule, we shall refrain, as far as possible, from referring in our judgment, to the various irregularities that have occurred, but do not affect the constitution of the Board or its jurisdiction.

Acting under R. 2, the chairman decided to omit the name of the plaintiff from the preliminary roll on the ground that in regard to residence he did not possess the necessary qualification. R. 3 refers to claims and objections. When a person feels aggrieved by the omission of his name, he prefers what is called a claim; when, on the other hand, a person feels aggrieved by the improper inclusion of another person's name, he may prefer an objection. These are for the present the only parts of the rule with which we are concerned. We shall quote the very words, in so far as they are material, that relate to the preferring of an "objection."

"Any person whose name is on the roll and who objects to the inclusion of the name of any other person whose name is on the roll, may prefer an objection to the revising authority."

Under this rule, the plaintiff preferred a claim and that is quite normal. An objection was also preferred by one Srinivasa Iyengar, an agent or a clerk of the chairman. As the rule stands, how can one object to the inclusion of a name, when that name has not been included? However, what really happened was, that Srinivasa Iyengar filed an objection stating that the plaintiff was not possessed of necessary property qualification. Two questions were thus raised before the revising authority:

(1) Was the plaintiff disqualified by reason of the fact that he was not resi

ding within certain limits (the ground taken by the chairman) and

(2) Was the plaintiff disqualified not owning certain property in his own right? (the ground taken by the chairman's clerk).

Before proceeding with the narrative, we shall relate how the revising authority came into existence.

Rule 6 says :

"The revising authority for each electoral roll in a municipality shall consist of the chairman as president and two non-officials who are not members of the Municipal Council to be nominated by the Collector of the District. The Collector shall also appoint two non-officials and two or more officials (specifying the order in which they shall be entitled to act, the non-officials taking precedence over officials) as members in waiting to take the place of any member of the revising authority (including the president) who refuses to attend, or becomes incapable of attending, a sitting or who is personally or pecuniarily interested in, or gives evidence, in respect of, any claim or objection and is thereby rendered unfit to take part in the adjudication of such claim or objection."

The Collector nominated under this rule :

(1) The Chairman of the Municipality.
(2) Mr. Rajagopala Naidu and
(3) Mr. Balasubramania Aiyar,

as members of the Revising Board. He appointed also as required by the rule certain members in waiting of whom two were non-officials and two officials. Of these four, we are concerned with one, namely, Mr. Kandaswami Udayar, a non-official.

Mr. Rajagopala Naidu, on his being informed of the Collector's proceeding, declined to serve on the Board stating that he did not wish "to be drawn into Srirangam politics" a very wise decision indeed, having regard to the facts revealed by this case. The Collector, on being informed of this, nominated Mr. Rangaswami Pillai in the place of the gentleman who declined to serve. The Board that heard the plaintiff's claim consisted, as original members of

(1) The Chairman,
(2) Mr. Balasubramania Aiyar ; and
(3) Mr. Rangaswami Pillai.

The plaintiff objects that the appointment of Mr. Rangaswami Pillai was ultra vires. He puts his case thus. The very object of there being members in waiting is, that they may be called on to act when such a contingency occurs as has now actually arisen. When Rajagopala Naidu refused, it was a member of the Waiting Board that should have stepped into his place. The Collector, had, therefore, no power to make a fresh nomination and the appointment of Rangaswami Pillai was consequently invalid. This objection has been upheld by the lower Court, but is, in my opinion, untenable. The rule consists of two distinct parts, first, referring to the revising authority, the second, to the Waiting Board. The members in waiting, on a true construction are not included in the revising authority. The rule very clearly lays down that that body shall consist of certain three persons none of them being a member in waiting.

The second part of the rule provides that certain persons may be appointed to the Waiting Board "to take the place of any member of the revising authority." The fact that he takes the latter's place does not alter his status and convert him into a regular member. A Waiting Board is intended to be a reserve and can never become anything more than such reserve. Its members are outside the Board and they are to be called out in emergencies to act temporarily as substitutes. If it is borne in mind that a Revising Board is constituted to deal not with a single voter but with voters generally, the scheme of the section becomes quite apparent. For example, when the case of a particular voter is being considered, a member may refuse to attend that sitting. The voter may happen to be his relation, friend or enemy, or, he may have some interest in the property which the voter claims to be his. In such a case, he may very properly refuse to attend a sitting. But, does that fact ipso facto terminate his membership of the Board? He may nevertheless attend its other sittings and take part in them. The members of the Waiting Board are intended to step in at such times, and when the original member returns, they step out and go back into the reserve. Under this rule, there cannot be a proper Revising Board of two members and in appointing the third, the Collector was perfectly right. The plaintiff's objection, therefore, fails.

The plaintiff next objects that the chairman was disqualified by interest

from adjudicating upon his claim. He alleges that he has been vice-chairman for some years and that there has been bitter enmity between him and the chairman. The latter was intent on seeing that he was not re-elected and it was with that object that he caused his name to be omitted on the roll. Though the case has been argued very fully and elaborately, still we must not lose sight of the fact that what we are hearing is an appeal from an order granting a temporary injunction. But, on such materials as exist, we must make up our minds, whether the plaintiff has made out this charge. The lower Court in holding in favour of the plaintiff relies on several facts and circumstances, but we propose to confine ourselves to two or three facts which have, in our opinion, a decisive bearing on the question to be tried. The chairman's objection was, as we have already said, based on certain rules in regard to residence, in the soundness of that objection, however, he seemed to have had little faith. The plaintiff thereafter preferred his claim. It was too late for the chairman to change his ground of attack. It was at this juncture that his clerk comes on the scene with what is called an objection. That related to quite a different ground, one based on want of property qualification. We have already pointed out that preferring an "objection" in the circumstances was out of the common. The question of the locus standi of Srinivasa Iyengar was then raised. The Revising Board, by a majority, decided the point against him and held that he had no right to be heard.

The chairman dissented taking a different view. On the material before us, we cannot resist the conclusion that it was at his instance that his clerk preferred that objection. Mr. Rangachari in his eloquent address, while admitting that this is a suspicious circumstance, urges that it may be capable of explanation. True it may be; but the chairman has had an opportunity both in the lower and in this Court and what explanation has been forthcoming? The case has been fought with great bitterness and every point argued very fully and we cannot help concluding that the chairman has failed to remove the suspicion, because he has no satisfactory explanation to offer.

We now pass on to another circumstance which tells against the chairman with equal if not greater force. On 9th June, the ruling to which we have referred, regarding the locus standi of Srinivasa Iyengar was given. Though it was held that he could not be heard, the Board decided to go suo motu into the merits of the objection. Thereafter there were some adjourned sittings with which we are not concerned. On 14th, the chairman makes a reference to the Government on a certain point and seeks its advice. He formulates the question thus: Some persons without title to property seek inclusion in the electoral roll on the ground that the tax bills stand in their names with the consent of the real owner. The transfer of a bill is not a transfer of property in the eye of the law. Attempts are frequently made by persons in such position to get their names improperly included in the electoral roll. He concludes his letter by saying:

"It is necessary to put a stop to such malpractice. The Revising Board feels some difficulty in the matter and it is prayed that the Government may be pleased to favour us with their view early."

A perusal of this leads one to think that the reference has been made by, or at the instance of the Revising Board; but nothing of the sort; this was done as a matter of fact behind its back. Then again, was this reference made to the Government bona fide and in the ordinary course? The essence of the charge against the plaintiff was that the property belonged to his father but that the tax bills stood in his name. He answered it somewhat thus.:

"True, my father's name appears as that of the owner, but I am a member of a joint family. The bills were transferred to my name with the consent of every member of that family. This happened some years ago and since then I have been paying the taxes."

These facts are not mentioned in the reference. The chairman states a hypothetical case having no relation to existing or actual facts. And how does he word his reference?

He, in terms, suggests to the Government the answer which he wishes to get.

The reference is forwarded on 14th and the Government sends its answer promptly on 17th which is very laconic.

"The Government agree with the view expressed in the chairman's letter read above."

Having obtained this answer (which

is styled a Government order), the chairman reads it out at the next sitting on 20th. We may here state that ultimately the point was found against the plaintiff by the votes of the chairman and Mr. Rangaswami Pillai, the third member, Mr. Balasubramania Aiyar, dissenting. The plaintiff states that it was the reading of the Government Order at the sitting, that clinched the question, for Rangaswami Pillai would otherwise not have supported the chairman. This may or may not be so ; with that we are not concerned. The question is what does this conduct indicate? It is unnecessary to dwell further on the point. It is clear beyond doubt that from the very start the chairman had a personal interest in the result and his conduct on the Board shows that there was not even a semblance of fairness in his dealing with the plaintiff's claim. If the matter rested there, we would hold the decision as invalidated on the ground of bias.

But the plaintiff is precluded from raising this plea, as, by his conduct, he waived the objection on .the ground of interest. On his own showing, he was aware from the very beginning that he could not hope to get justice from the chairman. It was on 1st June that the chairman's clerk came forward with his "objection." After that date, there were several sittings of the Board and the plaintiff never suggested that the Chairman was unfit to take part. On 20th June the Government Order was openly read out at the sitting of the Board. Even then, the plaintiff failed to urge that the chairman was disqualified by interest. On that day, the case was argued and on a certain point judgment was reserved. It was on the 22nd for the first time that the plaintiff hinted that the chairman was actuated by bias. The truth is, that the plaintiff expected that the decision of the majority would be in his favour and not till he realized that that expectation was unfounded that he demurred to the chairman being a member of the Board.

On the question of interest, *Frome United Breweries Co.* v. *Bath Justices* (1), contains a very valuable exposition of the law by the House of Lords. In that case, certain licensing justices referred the question of renewal of a license to the compensation authority and resolved at a further meeting that a solicitor should be instructed to appear before that body and oppose the renewal on their behalf. The solicitor duly appeared and opposed. Three of the justices who sat and voted as members of the compensation authority had been parties to the resolution authorising the solicitor to appear on their behalf. It was held that those three justices were disqualified from sitting on the compensation tribunal on the ground of bias and its decision was set aside. Mr. Rangachari contends that the act of the Revising Board in the present case was not a judicial but an administrative act. This case shows that interest or bias invalidates a decision irrespective of the fact whether the tribunal is performing a judicial act or not. Lord Atkinson thinks that the subject matter of the proceeding was judicial as distinguished from administrative and Viscount Cave seems to agree with this view. Lord Summer, on the other hand, is of the opinion, that the act is an administrative act, whereas, Lord Carson thinks that:

"Magistrates under the Licensing Acts are frequently compelled to mix up what might be called administrative with what might be called judicial action."

Administrative or judicial, the act was equally liable to be set aside if bias was proved on the part of the tribunal. On this point, all the four learned Lords were agreed. Mr. Rangachariar contends that the duties imposed by the rule on the chairman are such that certain amount of bias is inevitable. A very similar argument was put forward in that case. Viscount Cave meets it thus:

"But, assuming this to be so, it by no means follows that a justice who was actively opposing the renewal of a license can adjudicate upon the question of renewal . . . . But the statute nowhere says that justices who elect to appear as opponents of the renewal and take activs steps (such as instructing a solicitor) to make their opposition effective, may nevertheless act as Judges in the dispute; and in the absence of a clear provision to that effect, I think that the ordinary rule, that no one can be both party and Judge in the same cause, holds good."

Lord Carson, expresses himself to the same effect:

"That, however, is not to my mind a reason for saying that the Magistrates are not to abstain from any action which might indicate

(1) [1926] A. C. 586.

a likelihood of bias, and the fact that there is no lis or what might be called any case existing between parties, affords no justification for not insisting upon the very elementary rule that a man cannot act as a Judge and as an advocate in carrying out the duties cast upon him."

Rex v. *Howard* (2), does not lay down a different rule. What the powers and duties of a licensing justice were under certain statutes, was there under consideration. It was held that having regard to those statutes, the standard to be applied in considering the question of bias must be one which admits the right of the justice to be at one and the same time objectors and Judges, in the sense in which they are Judges in such matters; the reason being they are empowered by law to fill the two capacities. This case does not decide that bias or interest on the part of the tribunal does not invalidate its decision. Now turning to the rule, with which we are concerned, it does no more than declare what would have been the law without it. We are not prepared to construe it as laying down that some special kind of interest must be shown, some interest directly connected with the subject matter of the claim or objection. *Wakefield* v. *West Riding Railway Co.* (3), is a useful case on the point. The word "justice" was there defined by a certain section and the definition included the words "who shall not be interested in the matter." Cockburn, C. J., observes, that the rule proceeded on the notion that railway officials did not know the law and, therefore, it was important to inform them what the law was. The addition of the words in question did not alter the law, for the legislature inserted them under the belief, that if they did not include what would be implied, they would be taken to exclude it.

Also on the question of waiver, this case is an authority. The judgment lays down:

"Nothing is better settled than this that a party aware of the objection of interest cannot take the chance of a decision in his favour and afterwards raise the objection."

The Chief Justice adds that this is the settled rule, although the law as an exception, may lay down by a positive enactment prohibiting an interested justice from acting in spite of assent. The present case clearly comes within the rule and not the exception.

The last objection of the plaintiff remains to be dealt with. We have already touched on what happened on 20th June. On that day, the question was argued before the Board in regard to the plaintiff's ownership of the property and the case was adjourned to 21st instant, judgment being reserved on the point. The chairman and Mr. Rangaswami Pillai prepared their judgment, holding that the plaintiff was disqualified and forwarded it to Mr. Balasubramania Iyer. He was unable to be present on the 21st and requested that the case might be postponed. The chairman then fixed the hearing to 3 p. m. on Saturday, the 22nd, Mr. Balasubramania Iyer wrote pointing out that he had to attend the Bench Court on each Saturday at that hour and that Monday would suit him. He added:

"I want to go through the notes of evidence in Mr. Ananthasubramania Iyer's case and also examine him on some more points before I come to a decision."

He suggested finally, that, if absolutely necessary, the Board might transact other businesses on that Saturday. What happened subsequently goes to the very root of the constitution of the Board. On 22nd, the Chairman and Mr. Rangaswami Pillai met and they were joined by Mr. Kandaswami Udayar, who, as we have said, was a member in waiting. To the Board so constituted the plaintiff objected. Then Mr. Kandaswami Udayar declined to act recording:

"I am of opinion, after perusing Mr. Balasubramania Iyer's letter, that this case should be heard by him,"

the only course open to an honest and sensible man; for, how could Mr. Kandaswami Udayar take part in pronouncing judgment on a matter not heard by him? But the other two chose, notwithstanding the absence of the third member, to deliver their judgment. In that judgment, which dealt only with what was known as property qualification, the plaintiff's right was negatived. Thereupon, Mr. Kandaswami Udayar again added a note saying:

"As I have not heard this case, I am unable to express any opinion."

This case was then adjourned to 24th. On that day, all the original three mem-

(2) [1902] 2 K. B. 363.
(3) [1865] 9 B. & S. 794=35 L. J. M. C. 69=14 W.R. 100=10 Cox. C.C. 162=13 L. T. 590=12 Jur. (n. s.) 160.

bers of the Board met. The plaintiff then objected that the chairman having interest, the Board was not properly constituted. The following ruling was then given by the chairman and Mr. Rangaswami Pillai:

"Further, when the hearing of the case is over and the majority judgment has been delivered, we cannot adjourn it now."

The fact is that after the 20th there was no kind of combined or joint action on the part of the members of the Board. The minds of the first two members had been made up, they had delivered their judgment and so far as they were concerned that judgment was final. What the opinion of their colleagues was mattered little to them. The latter, acting for himself, conducted some further enquiry, examined the plaintiff and wrote out a judgment in favour of the plaintiff. Are these irregularities mere defects of procedure, or do they affect the very constitution of the Board? The observations of Peacock, C. J., in *Khelut Chander Ghose* v. *Tarachand Koondoo* (4) quoted by the Court (consisting of three Judges) in *Rohilkhand Kumaon Bank Ltd.* v. *Row* (5) are in point. A final decision ought not to be pronounced in a case in which the Judges differ until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment. To the same effect are the observations of a Full Bench of nine Judges in another case which are also quoted in *Rohilkhand Kumaon Bank Ltd* v. *Row* (5). Applying this test, there was no proper judgment or decision in this case. The judgment pronounced was not that of the Board There was no conference and discussion of the points in difference. The other two did not wait to know what the third member's view was. They put it out of their power, to reconsider or alter their decision or to be influenced by the other member's view. This objection of the plaintiff must be upheld. The fact that the plaintiff's claim was formally rejected by a separate order on the 24th is not relevant to the point under consideration. That order is signed by the chairman and Mr. Rangaswami Pillai. Under that appears a note that Mr. Balasubramania Iyer delivered a separate judgment. It is immaterial whether the formal order rejecting the claim was made before or after the delivery of the judgment by the third member. As we have said, it is impossible to regard the decision as that of a properly constituted Board. This objection of the plaintiff therefore prevails.

We may observe before closing that the question of residence, the majority did not think it worth their while to go into at all, although the enquiry arose out of, and owed its origin to this very objection. This, to our mind, is very significant.

In the result, we concur in the conclusion of the learned Sub-Judge, though with many of his reasons we do not agree. The order granting the injunction is confirmed and the appeal is dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

(4) 6 W. R. 269.
(5) [1884] 6 All. 468.

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* A. I. R. 1930 Madras 264

WALLACE AND SUNDARAM CHETTY, JJ.

Somalinga L. Rengier and *others*—Defendants—Appellants.

v.

Ramia Santhu and *another*—Plaintiffs—Respondents.

Second Appeal No. 2343 of 1927, Decided on 19th September 1929, from decree of Sub-Judge, Madura, in Appeal Suit No. 22 of 1926.

*** Civil P. C., S. 11, Expl. 4—Suit to redeem invalid mortgage dismissed — Suit brought to redeem different mortgage on same property is not barred though principal amount of mortgage is same.**

Where the first suit is to redeem one mortgage, it does not bar a suit to redeem a mortgage of a different date though the property sought to be redeemed and the principal amount of the mortgage are identical. For instance if a mortgagor, who sought to redeem a specific mortgage fails in the suit, because the mortgage is not proved, he is not thereby precluded from seeking to redeem the same property from another specific mortgage. The dismissal, therefore, of a former suit brought to redeem an invalid mortgage, is really no bar to a subsequent suit in which a different mortgage, which subsequently sprang into existence by the operation of the statute of limitation, is sought to be redeemed. (*Case law discussed.*) [P 266 C 1. 2 P 267 C 1]

(b) Civil P. C., S. 11, Expl. 4—Expl. 4 cannot be given effect to unless all conditions mentioned in S. 11 are fulfilled.

Explanation 4, S. 11 cannot be given effect to bar a suit, unless all the requisite conditions laid down in the body of the section are also fulfilled. [P 267 C 1]

(c) Civil P. C., O. 2, R. 2—All causes of actions relating to subject matter need not be joined.

Order 2, Rule 2, does not oblige a plaintiff to combine in one suit all the causes of action which he may have in respect of the subject matter of the suit. [P 267 C 1]

T. L. Venkatarama Iyer—for Appellants.

A. Nagasami Iyer—for Respondents.

Sundaram Chetty, J.—This second appeal has arisen out of a suit brought by the plaintiff (respondent 1) for redemption of the plaint-mentioned othi on payment of a sum of Rs. 300 to defendant 1 and for recovery of possession of the plots marked *A* and *B* on redeeming the said mortgage. The facts of this case are set forth clearly in the judgment of the lower appellate Court. The usufructuary mortgage sought to be redeemed in this case has arisen in the following circumstances: In 1885 the plaintiff's deceased grandfather Lakshmana Ayyar received a sum of Rs. 300 from defendant 1 for the purpose of constructing a house on the site maked *A* and permitted him to occupy the said building and also the terraced room *B* in lieu of interest due on the sum of Rs. 300. There was thus an oral othi in favour of defendant 1 in November 1885. Defendant 1 and his wife have been in possession of the suit properties since 1885. On the strength of a subsequent hypothecation deed of 1894 executed by the plaintiff's grandfather in favour of defendant 5 (Ex.H) she filed O. S. No. 583 of 1899 and after some contest obtained a decree in her favour. It is admitted that that decree debt has been discharged. In his deposition given in that suit in 1900, the present defendant 1 admitted that he was in occupation of plots *A* and *B* on othi right for Rs. 300 (Ex. N). Having been in enjoyment of the property as a mortgagee in lieu of interest due on Rs. 300 for a period of over 12 years, defendant 1 has acquired a possessory mortgage right by prescription after the lapse of 12 years. On the basis of the creation of a prescriptive othi right in defendant 1 by adverse possession, the present suit is filed by the plaintiff for redeeming that mortgage and recovering possession of the suit properties. In O. S. No. 63 of 1915 on the file of the District Munsif's Court, Madura, the present plaintiff sued to edeem the oral othi of 1885 and recover possession of the properties: vide Ex. D. That suit was transferred to the file of the Additional District Munsif of Madura and was numbered as O. S. No. 177 of 1915. Though the first Court granted a decree for redemption holding the oral othi to be true, the first appellate Court reversed that decree and dismissed the suit on the ground that the oral mortgage for Rs. 300 was invalid and therefore incapable of proof (Ex. F.). A second appeal was preferred to the High Court and it was argued that, though the oral othi sued on would not entitle the plaintiff to a redemption decree, as it was invalid, a decree could at least be given for redemption on the footing of an othi right acquired by defendant 1 by prescription. The High Court, however, disallowed that contention, pointing out that the othi right created by prescription in favour of defendant 1 was not referred to in the plaint and was not the mortgage which the plaintiff actually sued to redeem. The second appeal was accordingly dismissed; but the High Court said that if any other othi relationship between the plaintiff and defendants had been created by prescription, he could sue again for redemption alleging it: vide Ex. G. The present suit has thus been brought for redeeming the aforesaid prescriptive othi, which defendant 1 has acquired under the statute of limitation.

The main contention put forward on the defendants' side is, that the present suit is barred as res judicata by reason of the decision in the former suit, namely, O. S. No. 63 of 1915. Reliance is placed on S. 11, Expln. 4, Civil P. C., and also O. 2, R. 2 in support of the plea that the present suit is barred. Both the lower Courts have held that there is no such bar to the present suit and gave a decree in plaintiff's favour for possession of the suit properties. The same contention is now pressed in this Court by the learned advocate for the appellant.

There is no doubt that the former suit was based solely on the oral othi of 1885 and it was dismissed on the ground that the oral mortgage was invalid and incapable of proof. Defendant 1, however, continued to be in possession under an invalid or void mortgage and the quality and extent of the right claimed by him by such possession depended upon the claim accompanying it and upon the

nature of animus possidendi. Having been in enjoyment of the properties adverse to full ownership, in the capacity of an othidar for over the statutory period, he should be held to have acquired a limited interest in the properties, to the extent which he prescribed for, namely, a possessory mortgagee's right for Rs. 300. This principle has been clearly laid down in *Gopala Dasu* v. *Rami* (1). To the extent of the limited right in immovable property acquired by another by prescription, there is an extinguishment in the title of the full owner and it may not be quite correct to say that there was any statutory transfer of that limited interest in favour of the person who prescribed for it. A mortgage is ordinarily created by a contract and as such it is an act of parties. But such a mortgage right, as for instance, the interest of a mortgagee in possession, may also be acquired by prescription, and when so acquired, after the completion of the enjoyment for the statutory period, he would just be in the position of a usufructuary mortgagee entitled to hold the properties until that mortgage is redeemed by the owner. In this view, we are of opinion that the prescriptive othi sought to be redeemed in the present suit is different from the oral othi of 1885 which was sued on in the former suit and held to be invalid and incapable of proof. The question therefore is whether the dismissal of the former suit brought to redeem an invalid mortgage of 1885 is really a bar to the present suit in which a different mortgage, which subsequently sprang into existence by the operation of the statute of limitation, is sought to be redeemed.

The facts of the present case seem to be on all fours with the facts of the case in *Ramaswami Ayyar* v. *Vythinatha Ayyar* (2). In that case, the first suit was brought for the redemption of a mortgage of 1856. The defendants denied the truth of that mortgage setting up another mortgage of 1853 for a portion of the suit properties. That suit was dismissed on the ground that the mortgage sued on was not proved and was in fact fictitious. In the second appeal preferred to the High Court, it was urged that a decree might be given for redemption at least on the footing of the mortgage of 1853 set up by the defendants ; but the High Court declined to grant such relief, one of the reasons for the refusal being, that the plaintiff not having sued in the alternative on that mortgage, no issue could be raised in respect of it in that suit. Thereupon, a second suit was brought for redeeming the mortgage of 1853, which was set up by the defendents in the previous suit. The plea of res judicata and the bar under S. 43 of the old Civil P. C.. were raised. There is an exhaustive discussion of the case law in that decision and the real test according to the opinion of the learned Judges is, whether the cause of action or transaction, on which the two suits are based is the same, and not whether the transaction is sought to be established in different modes or by different means. It is distinctly pointed out that a plaintiff is bound to bring before the Court all the grounds of attack available to him with reference to the title which is made the ground of action, but he is not bound to exhaust in one suit all the different causes of action which he may have at the date of that suit in respect of the property. If the plaintiff who sought to redeem a specific mortgage failed in that suit, because the mortgage was not proved, he was not thereby precluded from seeking to redeem the same property from another specific mortgage. That this is settled law, so far as this Presidency is concerned, is clear from the Full Bench decision in *Thirikaikat Madathil Raman* v. *T. Krishnan Nair* (3), which followed the rulings in *Ramaswami Iyer* v. *Vythinatha Ayyar* (2), *Veeranna Pillai* v. *Muthukumara Asari* (4) and overruled the decision in *Rangasami Pillai* v. *Krishna Pillai* (5).

In the face of these clear authorities in favour of the maintainability of the present suit, we fail to appreciate the strenuous contention of the learned advocate for the appellants, which, if we understand him aright, wipes off the distinction between the same right claimed as constituting the cause of action but sought to be enforced on different grounds of title or different modes of establishing it in more than

(1) A. I. R. 1921 Mad. 410=44 Mad. 946.
(2) [1903] 26 Mad. 760=13 M. L J. 448.
(3) [1906] 29 Mad. 153=16 M. L. J. 48 (F.B.)
(4) [1904] 27 Mad. 102.
(5) [1899] 22 Mad. 259.

one suit, and the case where the right claimed in one suit is different from that claimed in another suit, or in other words, where the causes of action are different and the plaintiff in both the suits does not litigate under the same title within the meaning of S. 11, Civil P. C. Unless it is shown that in both the suits the plaintiff is litigating under the same title (which is one of the conditions for the bar of res judicata as laid down in S. 11) it would be of no avail to the appellants to merely show that this is a matter which might and ought to have been the ground of attack in the former suit. O. 2. R. 2, Civil P. C., does not oblige a plaintiff to combine in one suit all the causes of action which he may have in respect of the subject matter of the suit, and Ex. 4 to S. 11, Civil P.C. cannot be given effect to to bar a suit, unless all the requisite conditions laid down in the body of the section are also fulfilled. In *Muhammad Rowther* v. *Abdul Rahaman Rowther* (6) at pp. 144 and 145 (of 46 *Mad.*) four propositions have been laid down by Ramesam, J., as deducible from an analysis of the decisions cited in that case. The second proposition is formulated thus :

"Where the first suit was to redeem one mortgage it does not bar a suit to redeem a mortgage of a different date, though the property sought to be redeemed and the principal amount of the mortgage are identical."

The decisions in *Ramasami Ayyar* v. *Vythinatha Ayyar* (2), *Veeranna Pillai* v. *Muthukumara Asari* (4) and *Thrikakiat Madathil Raman* v. *T. Krishnan Nair* (3), are cited as authorities for this proposition. The present case is in our opinion clearly governed by the aforesaid rulings.

The cases cited by the learned advocate for the appellants, namely, *Woomatara Debia* v. *Unnapoorna Dassee* (7), *Kameshwar Pershad* v. *Rajkumari Ruttan Koer* (8), *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff* (9), *Ramiah* v. *Lakshmi Narayanan* (10) and *Mahomed Ibrahim Hoosain Khan* v. *Ambika Pershad Singh* (11), have really no application to the present case. The scope of the decisions in *Woomatara Debia* v. *Unnapoorna Dassee* (7) and *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (8) has been clearly explained in *Ramasamy Ayyar* v. *Vythinatha Ayyar* (2). In *Rangaswamy Patrudu* v. *Appaswamy* (12), it has been held that where the plaintiff did not set up the title which he could have brought forward as an alternative basis of his claim on the last occasion, he could not be allowed to litigate it in a second suit. This principle cannot be extended to the present case, inasmuch as the right claimed in this suit is the right to free the property from a specific mortgage on redeeming it, whereas in the former suit it was a different right in respect of a different mortgage which was sought to be redeemed. We are therefore of opinion, that the present suit is barred neither under S. 11, nor under O. 2, R. 2, Civil P. C.

The plaintiff having established his right to redeem the plaint-mentioned mortgage, the lower Courts have, however, freed, him from the liability to pay Rs. 300 to defendant 1 for the redemption of the mortgage, on the ground that defendant 1 disclaimed the mortgage right and disowned any interest in the suit properties, with a view to bolster up the contention of his wife (defendant 5) that she acquired an absolute title to the suit properties by adverse possession. Inasmuch as the plaintiff's suit is for redemption of the mortgage which is found to be true and there is the admitted liability of the plaintiff to pay Rs. 300 to defendant 1, we do not think that the plaintiff should be freed from that obligation on account of the false denial of defendant 1. We think that the decree for possession given in favour of the plaintiff should be made subject to the payment of Rs. 300 by him to defendant 1 by way of redeeming the plaint mentioned mortgage.

In the result, the decree of the lower appellate Court is confirmed with this modification, namely, that if the plaintiff should pay Rs. 300 to defendant 1 or into Court to the credit of defendant 1 for redemption of the plaint mortgage within four months from this date, the plaintiff should be put in possession of the suit properties and if such payment

(6) A. I. R. 1923 Mad. 257=46 Mad. 135.
(7) 11 B. L. R 158=18 W. R. 163 (P.C.).
(8) [1893] 20 Cal. 79=19 I. A. 234=6 Sar. 241 (P.C.).
(9) [1913] 40 Cal. 1=16 I. C. 70=39 I. A. 287 (P.C.).
(10) A. I. R. 1926 Mad. 234.
(11) [1912] 39 Cal. 527=14 I. C. 496=39 I. A. 68 (P.C.).
(12) [1916] 1 M. W. N. 286=34 I. C. 456.

is not made within the time fixed the suit properties will be sold for the payment of the amount due to defendant 1. The appellants will pay one-half of the costs of respondent 1 in this second appeal. P.R.S./V.S. *Order accordingly.*

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RAMESAM AND VENKATASUBBA RAO, JJ.

(*Gadde*) *Venkatarayudu* and *others*—Defendants—Petitioners.

v.

(*Anumolu Chinna*) *Rama Krishnayya* and *others*—Plaintiffs—Respondents.

Civil Revn. Petns. Nos. 248, 1024 and 602 of 1928, Decided on 28th Oct. 1929.

(a) **Practice — Order intended to take effect in entirety—Order consisting of several parts—Party cannot adopt one part and repudiate another — But if party receives benefit under order under protest, he is not precluded from attacking it—Evidence Act S. 115.**

When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. For instance, if the Court directs that the suit shall be restored on the plaintiff paying the costs of the opposing party, there is no intention to benefit the latter, except on the terms mentioned in the order itself. If the party receives the costs, his act is tantamount to adopting the order. But if a party receives the benefit reserving his right to object to the order, he will not in that case be precluded from attacking it: *A. I. R.* 1927 *Mad.* 1009, *not Foll.* (*Case Law discussed*). [P 270 C 1]

(b) Practice — Rule of approbate and reprobate does not apply to order or judgment containing independent directions.

The rule that when an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another, does not apply to a case where the various directions in an order or judgment are intended to be distinct and independent of each other. Thus, if a suit is dismissed, but the plaintiff is awarded costs, he is not precluded from impeaching the judgment by receiving the costs: *A. I. R.* 1924 *Cal.* 380, *Rel. on.* [P 270 C 2]

(c) Civil P. C., S. 115—Scope.

Restoration of suit as a matter of grace after finding that there was no sufficient cause is wrong. High Court in revision found that there was sufficient cause and allowed restoration to prevent defeating of justice. [P 271 C 1]

D. A. Krishnachariar and *V. Suryanarayana*—for Petitioners.

K. P. Raman Menon, C. Rama Rao, S. Veeraraghava Iyer and *V. Pattabhirama Sastri*—for Respondents.

Venkatasubba Rao, J.—These three Civil Revision Petitions have been posted and argued together, as they raise a common point of law. When an order consists of two parts embodying directions, one against, and the other in favour of a party, can the latter, after taking advantage of that part which confers a benefit on him, object to the other part on the ground that he is not bound by it? This is the point of law which is common to the three cases, although in the application of the principle, each of these cases raises certain different questions. The order under consideration in Civil Revision Petition 248 of 1928 being typical, I shall set that out. A suit was dismissed for default and the plaintiff applied for its restoration. The Judge held that there were no sufficient grounds, but restored the suit as a matter of grace (as the Judge calls it) on the plaintiff paying the defendant's costs. The defendant, after receiving the costs, files the Civil Revision Petition objecting to the order. The question is, is he entitled to be heard? The point is, in my opinion, concluded by authority: but as it is said that our decision will govern several cases in this Court now pending, I shall deal with the question in some detail.

Pearce v. *Chaplain* (1), is a valuable case on the point. A summons was obtained calling upon the plaintiff to show cause why the judgment signed and execution sued out should not be set aside for irregularity without costs. The Lord Chief Baron directed that the judgment and execution should be set aside. Then followed an argument, whether, as a part of the order, the defendant should be restrained from bringing an action. The plaintiff requested the Court to direct that no action should be brought. The defendant urged, on the contrary that he suffered damage on account of the improper execution levied and that he should not be barred from bringing an action. On this, the Lord Chief Baron made the following order without embodying any decision as to the irregularity alleged:

"I do order that the judgment signed herein, and the execution issued thereon, be set aside without costs."

The defendant, acting upon the order, obtained back the goods taken in execution. The question arose, is he nevertheless entitled to complain against the

(1) [1846] 9 Q. B. 802=16 L. J. Eq. 49.

order? It may be useful to glance at the contentions raised by the counsel in that case, as they may be said to represent the arguments now urged before us. For the plaintiff it was urged :

"the defendant having obtained and acted upon this order, has made himself a party to it, and cannot now move to rescind it."

It was asserted on the other side :

"The defendant unavoidably acted on the order to the extent to which he accepted it, but did not thereby waive his expressed dissent from the residue."

Lord Denman, C. J., the three other members of the Bench concurring, delivered the following judgment :

"I think we must assume on the statements that there was an irregularity. But the Judge set aside the proceedings without costs and without deciding whether an irregularity had been committed or not. Then we find an order made that no action shall be brought, the defendant's attorney protesting against that restriction. But, notwithstanding his protest, he takes, and avails himself of, the order. We are then bound on principle to hold that he took it in its whole extent. There is no case which shows that when a party has acted upon such an order, and had the full benefit of it, he shall not be bound by all its terms."

This case I have set forth in some detail, as it serves to illustrate the principle upon which the rule is based. The English Courts have repeatedly given effect to this principle. The other cases on the point do not add to the reasoning contained in this judgment; but they show in what a variety of cases this rule was acted upon.

In *Tinkler* v. *Hilder* (2) the plaintiff having obtained judgment, the Judge made an order to stay the proceedings on payment of the costs of the day. These costs were subsequently taxed and paid. It was contended that the plaintiff could not object to the order, after having adopted it and acted under it, by receiving the costs. This contention was accepted by the Court. It is argued that the order in this case was made by consent; but the report shows clearly that this argument is not correct, although it receives some apparent support from the judgment of Platt, J. *Kennard* v. *Harris* (3) is still another instance where the same principle was recognized. *Wilcox* v. *Odden* (4) is also an authority for the same position. The facts closely resemble those in *Pearce* v. *Chaplain* (1). The defendant, in pursuance of the order, having received the goods from the Sheriff and thus far availed himself of the order, it was held that he could not apply to the Court to rescind that part of it which forbade the bringing of an action. *Sparrow* v. *Reed* (5) decides the same point. The case was first tried by the Judge and he ordered a second trial before a jury on the applicant paying the costs of the application to the party opposing it. Held, that whether the Judge had power to make such order or not, the opposing party had by accepting such costs precluded himself from afterwards objecting to the order. In the short judgment of Coleridge, J., the point is treated as settled beyond doubt.

In India also this rule has been almost uniformly acted upon. In *Hazari Lal* v. *Ganga Charan* (6) the suit was restored on payment of costs. The defendant having accepted the costs, was held precluded from objecting to the order in appeal. In this case, the learned Judges very aptly refer to the costs granted, as compensation awarded to the opposing party. *Rup Chand Prithi Chand* v. *Hardayal Mal* (7), is a similar case. There an ex parte decree was set aside on payment of costs. The revision petition was rejected on the ground that the plaintiff had accepted the costs. *Bankuchandra* v. *Marium Begum* (8) is a decision to the same effect of the Calcutta High Court by a Bench of three Judges. A suit dismissed for non-prosecution was restored on payment of the defendant's costs incidental to the application. The latter got his costs taxed and obtained an allocator. Held, that having taken this advantage under the order, he was precluded from appealing against it. In *Ramaswami* v. *Chidambaram* (9) Jackson, J., followed the same rule. The case related to an order allowing amendment of the written statement on payment of costs. With this ruling I concur in so far as it is in conformity with English cases on the point. In one respect, it is, in my opinion, wrong and to that I shall advert presently.

(2) [1849] 4 Ex. 187=18 L. J. Ex. 429=7 D. & L. 61=13 Jur. 684.
(3) [1824] 2 B. & C. 801=4 D. & R. 272.
(4) [1864] 15 C. B. (N.S.) 837.
(5) [1848] 17 L.J. (Q.B.) 183=5 D. & L. 633=2 B. C. Rep. 240.
(6) [1913] 18 I. C. 525.
(7) A. I. R. 1927 Lah. 55.
(8) [1917] 21 C. W. N. 232=37 I. C. 804.
(9) A. I. R. 1927 Mad. 1009.

What is the principle underlying these decisions? When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. For instance, if the Court directs that the suit shall be restored on the plaintiff paying the costs of the opposing party, there is no intention to benefit the latter, except on the terms mentioned in the order itself. If the party receives the costs, his act is tantamount to adopting the order. In other words, payment of costs is, as it were, consideration for the suit being restored; so that, the defendant cannot accept the cost and still object to the order. According to Halsbury, this rule is an application of the doctrine "that a person may not approbate and reprobate" (13 Halsbury. Para. 508.) In Broom's Legal Maxims, it is treated as an illustration of the maxim :

"that no man shall be permitted to blow hot and cold with reference to the same transaction. (Edn. 9, p. 118)."

In other words, to allow a party, who takes a benefit under such an order, to complain against it, would be to permit a breach of faith. From this statement, it is clear that if a party receives the benefit reserving his right to object to the order, he will not in that case be precluded from attacking it. It is in regard to this that I dissent with respect from the observation of Jackson, J., in *Ramaswami* v. *Chidambaram* (9) already referred to. That learned Judge thinks that it makes no difference that the party accepts the benefit under protest. In this connexion, of course, the significance of the expression "under protest" must be clearly borne in mind. As pointed out by Langdale, M. R. these words :

"have no distinct meaning by themselves and amount to nothing unless explained by the proceedings and circumstances. *Re. Massey* (10), cited in Stroud's Jud., Dic. Edn. 2, Vol. 3, p. 2118."

If, for example, the costs are paid into Court and the opposing party draws them out stating that he does so under protest, these words would then be meaningless. To such a case, the observation of Jackson, J, would properly apply. This would be analogous to what happened in *Croft* v. *Lumley* (11). The party receiving the rent there said that he did so under protest ; but, in the circumstances, the addition of the words was idle and meant nothing in fact. As Baron Channel said what the man did not what he said, was the all important matter.

To take another example, if the party liable under the order personally hands over the amount to his opponent, who, while insisting on keeping it, asserts that he receives it under protest, in such a case again, his so called protest cannot in the least avail him.

In each case it is a question of fact, whether the costs were paid by the one party, and received by the other, in such circumstances, as show that the latter's right to object is not waived. This I conceive to be the effect of the reservation referred to in the judgment in *Banku Chandra* v. *Marium Begum* (8) already cited.

It is next needless to add that the rule in question does not apply to a case where the various directions in an order or judgment are intended to be distinct and independent of each other. Thus, if a suit is dismissed, but the plaintiff is awarded costs, he is not precluded from impeaching the judgment by receiving the costs. Nor, if the suit is for the recovery of, say, Rs. 200 and a decree is passed for Rs. 50, is the plaintiff disentitled to object, by reason of his having received the amount for which judgment was given. *Jogendra* v. *Kodabaksah* (12), is a case of this description. The learned Judges, while affirming the principle laid down in decisions such as *Pearce* v. *Chaplain* (1) point out that the facts of the case before them do not bring it within those rulings.

Analogous to these are cases where conditional orders are coupled with orders that are executable. An order may run thus:

"I direct the suit shall be restored on defendant paying all costs of suit incurred up to date, fixed at Rs. 150; if this amount is not paid within a week, the petition shall stand dismissed with costs, Rs. 20."

In such a case, the fact that the defendant receives the last menticned sum, does not preclude him from impeaching the order.

(10) [1844] 8 Beav. 462.

(11) [1853] 6 H. L. C. 672=6 W. R. 523=4 Jur. (n.s.), 903=27 L. J. Q. B. 321.

(12) A. I. R. 1924 Cal. 380.

I think I have stated the principle with sufficient clearness and shall now proceed to consider separately each of the three revision petitions.

C. R. P. 248 *of* 1928.—The order in this case is that the suit shall be restored on the plaintiff paying the defendant's costs inclusive of vakil's fee Rs. 20. The costs were paid by the plaintiff and received by the defendant. It is now alleged, however, that while receiving the sum, the defendant reserved his right to object to the order. This seems very doubtful, but it is unnecessary to decide the point. Granting that the petitioner (defendant) has not precluded himself from filing this petition, I am clearly of the opinion that on the merits order of the lower Court must be supported. The learned Judge says that sufficient reasons are wanting, but he is prepared to restore the suit. The order is bad on the face of it, but we find on examining the record that there were sufficient reasons. It is discretionary with the High Court to interfere in revision and it will not use its powers for the purpose of defeating justice. On the assumption made by the learned Judge, his order is wrong, but we find his assumption itself is incorrect. The result is, his order must be supported and the Civil Revision Petition fails and is dismissed but, in the circumstances of the case, without costs.

C. R. P. No. 1024 *of* 1928.—A petition was filed in the lower Court under S. 47 for releasing certain property from attachment and it was dismissed. The following order was made :

"I shall set aside the order and restore the petition if the petitioners pay the respondent's costs before 2nd August 1928."

The amount was paid into Court and the opposing party drew it out. Applying the principle I have stated, the Civil Revision Petition is incompetent and is dismissed with costs.

C. R. P. No. 602 *of* 1928.—In this case, an order was made in appeal allowing the plaint to be amended on the plaintiff paying certain costs within a specified date. We find that payment of costs was made under R. 161, Civil Rules of Practice and that the defendant received the amount under protest. In effect, what happened was this. The plaintiff tenders the amount, the defendant offers to receive it without prejudice to his right to impeach the order. The plaintiff nevertheless pays the money and the defendant receives it. The latter has thus not precluded himself from filing this petition.

Now, coming to the merits the petitioner (defendant) does not seriously complain against the order allowing the amendment. If there was any ambiguity in the plaint, that was removed by the amendment made. But the mistake made by the Subordinate Judge really consists in this. In the suit, there was a distinct issue raised regarding the mortgage (issue 1). That issue was tried by the District Munsiff who recorded his finding upon it. The Subordinate Judge ignoring this has remitted the case to the first Court for a finding on that issue. He seems to think that the question has not been tried by the Munsiff, because the latter has not considered the second issue. This is clearly wrong as issue 2, as is now admitted, is merely, a repetition of the first in different words. In the circumstances the lower appellate Court is wrong in directing the Munsiff to retry an issue already tried. Though the Civil Revision Petition is in terms directed against the order granting amendment the petitioner's real grievance is, as I have stated that the Subordinate Judge's subsequent procedure was wrong. We agree with this contention and direct the Subordinate Judge to dispose of the appeal in the light of our observations. We are not to be understood as laying down in advance, that if while hearing the appeal it appears to him necessary to call for findings on any matters he is precluded from doing so. In the circumstances, we make no order as to costs.

Ramesam, J.—I have had the advantage of perusing the judgment of my learned brother with which I entirely agree. I wish to add a few words avoiding the repetition of what is stated by him as far as possible. The true basis of the rule is not estoppel by conduct but that a person cannot both approbate and reprobate. If the facts indicate that the person has adopted the order, he cannot object to it afterwards. The facts may show that receipt of the money is not inconsistent with reservation of the right to question the order

by way of appeal or otherwise. The protest, to have the effect of such reservation must give the opposite party an opportunity to withdraw the offer. If at of the time of paying the costs, the party to whom the amount is offered, states that he wishes to appeal and if, therefore, the offeror need not pay him the amount but may deposit it in Court and if still he offers the amount the receipt of it does not amount to approbation of the order. It is in this matter that I respectfully dissent from the opinion of Jackson, J. In *Croft* v. *Lumley* (11) the amount was offered as rent. A payer has the right to appropriate a a payment for a particular purpose. The payee has then no right to appropriate it to a different purpose. It is under such circumstances that it was observed that that what the man did and not what he said was the all important matter. In cases of the kind we are dealing with, there is no question of appropriating the amount for a different purpose and the observation in 6 *H. L. C.* 672, cannot apply.

In *Saratkumari Dasi* v. *Amullyadhan* (13) the deposit was made under a compromise decree. The appellant's knowledge and consent were afterwards denied. The appellants having obtained leave to appeal to the Privy Council, it is impossible to attribute to her an intention to adopt the compromise decree by offering the deposit as a security, for the offer as security shows her desire to prosecute the appeal and not to adopt the compromise decree. This case cannot help the petitioner.

In *Nalinakha Sinha* v. *Ram Taran Pal* (14), the costs are allowed unconditionally and the payment was not made on condition precedent to the operation of the rest of the order. Nor was there any option to pay the costs. That case illustrates the branch of the rule on the other side of the line. I agree to the orders proposed by my learned brother.

P.R.S./V.S. *Order accordingly.*

(13) A. I. R. 1923 P. C. 13.
(14) A. I. R. 1927 Cal. 733.

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KUMARASWAMI SASTRI AND WALSH, JJ.

Malabar Timber Co. Ltd.—Plaintiffs—Appellants.

v.

(*Ponnambilath Chathankandi*) *Prapravan Moidoo* and *others*—Defendants—Respondents.

Appeal No. 306 of 1924, Decided on 24th July 1929, from decree of Sub-Judge, Tellicherry, in Original Suit No. 33 of 1920.

(a) Transfer of Property Act, S. 111 (g)—Lessee failing to perform covenant—Lessor demising lease property afresh—Fresh lease clearly shows intention of lessor to terminate first lease.

One of the terms of a lease provided that "if the debts are not paid within one year all the stipulations shall become void and the lessee will have to lose the advance of Rs.8,000 which he had paid." The lessee did not perform the covenant. The lessors demised the lease property again on the footing that the first demise had been determined.

Held : that by giving a fresh lease the lessors clearly showed their intention to terminate the first lease : *Quesnel Forks Gold Mining Co. Ltd.* v. *Ward*, (1920) *A. C.* 222 and *Davenport* v. *The Queen* 3 *A. C.* 115, *Ref.*

[P 274 C 2]

(b) Transfer of roperty Act, S. 111 (g)—No formal notice is necessary where lessor unequivocally takes advantage of forfeiture.

Where the lessors have done an act which unequivocally shows that they took advantage of the forfeiture (leasing the property to somebody else) and that fact comes to the notice of the lessee, there is no reason to hold that because formal notice was not given, his rights under the first document continues and the lessee can go on assigning his lease to somebody else and claim a right which had been put an end to by the lessor. [P 275 C 2]

(c) Transfer of Property Act, S. 107—Lease once forfeited cannot be revived by mere oral agreement—It must be created by registered deed.

A forfeiture having been incurred and a fresh lease having been given, the old lease cannot be revived by simply saying that they agree to be bound by the terms of the old lease. It is difficult to see how a transaction which the law requires to be in writing registered could be created by a declaration of the parties that an extinct lease subsists: 24 *M.L.J.* 263, *Rel. on.*; *Jones* v. *Carter*, (1846) 15 *M. & W.* 718; *Dendy* v. *Nicholl* (1858) 27 *L. J. C.* 220; *Grimwood* v. *Moss*; (1872) 7 *C. P.* 360; *Evans* v. *Wyatt*; (1881) 43 *L. T.* 176; *Clough* v. *L. & N. Ry. Co.*, (1871) 7 *Ex.* 26, *Ref.*

[P 276 C 1]

K. S. Krishnaswamy Iyengar — for Appellants.

T.R. Ramachandra Iyer, C. S. Swaminathan, C. V. Hari Hara Iyer, K. P. Ramakrishna Iyer and *O. T. G. Namrtyar*—for Respondents.

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the Malabar Timber Co. Ltd., now in liquidation, against the defendants for a declaration that the two hills described in the plaint schedule are the jenmom properties of defendants 2 and 3 and of a Devaswom called the Mundayam Paramba alias Tharakkumeethal Bhagavathi Devaswom and that the plaintiffs are entitled to possession and enjoyment of the properties for the unexpired portion of the term of 72 years created by the lease dated 15th April 1915 executed by defendants 2 and 3 in favour of one Sri Manavedan Raja of which lease the plaintiffs claimed to be the assignees, and for an injunction restraining defendant 1, his servants, agents and assigns from interfering with the peaceful possession and enjoyment of the properties by the plaintiffs and for incidental reliefs.

The case for the plaintiffs is that the hills described in the plaint belong to defendants 2 and 3 and to the Devaswom of which defendant 2's tarwad is the manager, that by a registered lease dated 15th April 1915 executed by all the members of the tarwad and by the karnavan as representing the Devaswom the two hills were demised for 72 years on terms and conditions mentioned in the document, that the lessee Manavedan Raja was put in possession, entered upon possession and remained in possession till the 5th September 1919, when the Joint Magistrate of Tellicherry prohibited him from entering on the property and that the leasehold interest of Manavedan Raja was assigned by him on 13th September 1919 to one Govardhana Bhai Girdhar Bhai who in his turn assigned it to the plaintiff. It is alleged that defendant 1 who had a lease of two hills situated in the neighbourhood of the suit property attempted in 1919 to trespass upon item 1 of the plaint schedule taking advantage of the misunderstandings between Manavedan Raja on the one hand and defendant 2 on the other, that a breach of the peace was apprehended and the Joint Magistrate of Tellicherry instituted proceedings under Ss. 144 and 145, Criminal P.C. and by order dated 5th September 1919 prohibited the plaintiffs and defendant 1 from entering upon the two hills, that the Magistrate passed final orders on 20th September 1919 declaring that defendant 1 was in possession of the major portion of the two hills but that order was set aside by the High Court and the case was remanded, and that by reason of these proceedings the plaintiffs have been deprived of the actual possession and enjoyment of the hills to which the company as assignees of the lease are entitled and that the plaintiffs therefore claim the declaration and the reliefs prayed for.

The contesting defendant is defendant 1. He denies the claim of defendants 2 and 3 or the Devaswom to the two hills and their right to demise these hills. He denies also that defendants 2 and 3 are the sole uralans of the Devaswom and contends that their lease of the Devaswom property is invalid. As regards the plaintiffs' lease he says that the lease was determined by forfeiture and that there was no subsisting lease on the date of the transfer by Manavedan Raja to Govardhan Bhai Giridhar Bhai or by Govardhan Bhai Giridhar Bhai to the plaintiffs. He denies that Manavedan Raja was put in possession of these hills or exercised any acts of ownership. Then he says that the plaintiffs are not in possession, that the claim for injunction could not be granted and that the suit for declaration is barred under S. 42, Specific Relief Act, and also that the suit is barred by limitation.

Defendants 2 and 3 admit the plaintiffs' claim. As regards forfeiture which defendant 1 says, occurred, they say:

"2. These defendants also admit that the members of Kanakathitom tarwad leased these hills to Sri Manavedan alias Valia Kunhunni Thampuran on 15th April 1915 and put him in possession.

3. As the said lessee did not pay the consideration as stipulated in the lease deed in time, these defendants and the other members of the tarwad treating the leasehold right as forfeited demised the property on kanom to Kalliyat Nambiar, who paid the consideration as stipulated in the Kanom deed. But Sri Manavedan Raja disputed the title and the right of possession of Kalliyat Nambiar.

4. As subsequently agreed between the parties, Kalliyat Nambiar, surrendered his kanom right to these defendants and these defendants admitted the leasehold right in favour of the Thampuran as valid and subsisting."

Then they say that defendant 1 and his tarwad have no right, title or possession to these hills, that his interference with the possession of their lessee is unauthorized and unlawful and that

the plaintiffs are entitled to the declaration and injunction prayed for.

On these pleadings issues of fact and law were raised. The question of title to the hills formed the subject of issues 1 and 2. Issues 3 and 4 related to the contention that defendants 2 and 3 were not the sole trustees of the Devaswom and that even if they were the sole trustees the lease for 72 years was invalid and not binding on the Devaswom. Issue 5 was whether the lease in favour of Sri Manavedan Raja was true, valid, enforceable and subsisting. Issue 6 was whether he had possession. Issue 7 relates to the question whether if Sri Manavedan Raja and his transferees had no possession, the suit for a declaration alone was maintainable without a prayer for possession. Issue 8 is :

"whether the lease to Sri Manavedan Raja was determined by the lessors after 15th April 1916 and became forfeited and, if so, are the plaintiffs entitled to any relief in this suit on the strength of that lease ?"

Then follow issues about limitation and the validity of the assignment to the plaintiff and other issues which I need not consider at present.

The Subordinate Judge found on issues of fact as regards title to the property that the property was not proved to belong to defendants 2 and 3. As regards possession he found that none of the properties now claimed were put in possession of Manavedan Raja. As regards the trustees of the Devaswom he found that defendants 2 and 3 were not the sole trustees but there were other trustees also. As regards the lease his finding was that the lease was put an end to prior to the assignment to the plaintiffs and that on the date of the assignment by Govardhan Bhai Giridhar Bhai to the plaintiff there was no subsisting lease capable of assignment. He has found the other issues against the plaintiffs both of law and of fact. Against the decree of the Subordinate Judge the present appeal has been filed by the plaintiffs.

I think that, before any question of title could be gone into or determined in this appeal, the plaintiffs will have to show that the assignees have a valid or subsisting lease for, unless they can prove that fact, it does not matter in whom the title vests. On this part of the case I have come to the conclusion that the decision of the Subordinate Judge is right. (Their Lordships then discussed the evidence in detail and proceeded). On these facts the question is whether there was a subsisting lease. The Subordinate Judge looks at it from the point of view that Cl. (b), S. 111, applies and that ipso facto the lease became void at the expiry of one year. S. 111 T. P. Act, provides for the determination of a lease and the relevant clauses are Cls. (b) and (g). S. 111 (b) says :

"A lease of immovable property determines where such time is limited conditionally on the happening of some event by the happening of such event."

The Subordinate Judge treats the last clause of Ex. A as conditionally limiting the period of lease on the happening of some event, viz., the failure to *dis*charge the debts within one year, and thinks that the lessee having failed to discharge the debts within one year the lease became void ipso facto. Cl. (g) is as follows :

"A lease of immovable property determines by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease."

Whatever doubts there may be as regards treating this case as falling under Cl. (b), it seems to be clear that the case falls under Cl. (g). I have already set out the terms of the lease and the clause that provides that if the debts are not paid within one year all the stipulations shall become void and the lessee will have to lose the advance of Rs. 8,000 and odd which he had paid. It is no doubt true that in such cases the law treats the contract in the lease as voidable and this is borne out by the authorities cited by Mr. K. S. Krishnaswami Iyengar, namely, *Quesnel Forks Gold Mining Co. Ltd.* v. *Ward*, (1) and *Davenport* v. *The Queen* (2). But that does not make much difference in this case, as it has been avoided by Ex. 24. The lessors demised it again on the footing that the first demise had been determined. It is also clear that they wanted to do some act showing

(1) [1920] A. C. 222=122 L. T. 206=89 L. J. P. C. 13.
(2) [1878] 3 A. C. 115=37 L. T. 727=47 L. J. P. C. 8.

their intention to terminate the first lease and so they gave the fresh lease and according to the plaintiff himself put the lessee in possession of some at least of the properties covered by the demise. I may here refer to the documents Ex. AA series which are put in to show that Nambiar was in possession of some of the properties. So far, there can be little doubt from the evidence. But the contention of Mr. Krishnaswami Iyengar is two-fold. One is that it would not do simply to re-enter or to put an end to the lease or show some intention of putting an end to the lease, but you must also give notice to the lessee of your having done so. So far as the Act itself is concerned, there seems to be nothing to show that notice is to be given. I, for my part, think that, if the lessee comes to know of the fact, it is sufficient. It does not matter when he comes to know of it. No period is fixed for that. Of course, if without the knowledge by the lessee of the lessor's act he creates title bona fide in some third person, it is quite a different question ; or if the lessor has subsequently done something which the lessee wanted to take advantage of as a waiver that might be a different question. They do not arise here.

In this case I think it is perfectly clear from the evidence that Manavedan Raja was aware of the lease Ex. 24 in favour of Chathakutti Nambiar before he assigned his lease in favour of Govardhan Bhai Girdhar Bhai or the plaintiffs. I have pointed out that portion of the evidence on the plaintiffs' side which shows that the Nambiar was in possession of some at least of the properties demised when there were disputes between Nambiar and defendant 1. In para. 6 the plaint distinctly says that misunderstandings arose between Manavedan Raja on the one hand and defendant 2 and Chathukutti Nambiar on the other, that a breach of the peace was apprehended and that the Joint Magistrate of Tellicherry instituted proceeding under Ss. 144 and 145, Criminal P.C., and on 5th September 1919 passed an order prohibiting the parties from entering on the properties and afterwards passed the final order. It does not matter whether these orders were confirmed by the High Court or not. We have the fact that on 5th September 1919 there were disputes between Manavedan Raja and defendant 2 and Chathukutti Nambiar. That these disputes referred only to the lease executed in favour of Chathukutti Nambiar is clear and I have little doubt that by that time Manavedan Raja must have been aware that defendants 2 and 3 put an end to his first lease, or claimed a right to do so, and leased the property to Nambiar. Then we have the fact that O. S. No. 202 of 1919 on the file of the District Munsiff's Court, Kuttuparamba and O. S. No. 9 of 1929 of the Sub-Court, Tellichery, were filed, the plaints in which have been filed as Exs. 25 and 27; and Ex. 36 which is the report of the commissioner in O. S. No. 202 of 1919 shows that Manavedan Raja was actually at the time of the dispute in the locality. I find it difficult to believe that Manavedan Raja during that period was not aware that defendants 2 and 3 claiming to put an end to his lease, because he had not discharged the debts, purported to lease it to Chathukutti Nambiar. If he became aware of it, it is immaterial whether he got notice of it from the lessors or not. Where the lessors have done an act which unequivocally shows that they took advantage of the forfeiture—here they leased the property to somebody else—and that fact comes to the notice of the lessee, there is no reason to hold that because formal notice was not given his rights under the first document continues and the lessee can go on assigning his lease to somebody else and claim a right which had been put an end to by the lessor. It is not contended in this case that the lessee did perform his part. There was forfeiture when the lessee did not perform the covenant and the lessors were entitled to take advantage of the forfeiture.

I may also say that throughout these proceedings it was never asserted that Manavedan Raja had no notice that defendants 2 and 3 had put an end to his lease. He has not himself given evidence in this case although he was managing the properties on behalf of Govardhan Bhai Girdhar Bhai; and it seems to me that throughout the proceedings, although in the written statement it was said that there was this forfeiture and plaintiffs' rights were put on the ground that the first lease was revived after surrender of the property by Nambiar, it was never suggested that

the lease in favour of Nambiar was invalid because the first lease was subsisting. If the particular date was in question it was the duty of the plaintiff or Manavedan Raja to have given evidence as to exactly when Manavedan Raja had notice. It seems to me that he must have had notice at least by 5th September 1919 and that will be sufficient for the purposes of this case.

The other question is whether the release by Nambiar and the acceptance by defendants 2 and 3 of the original lease as subsisting would be sufficient to confer a valid right. If the first lease had been put an end to, it seems to me that there can be no question of the parties saying that the lease will subsist. The only way by which they can create a further right would be only by a fresh lease, the first lease having been determined. If any authority is required on this point, I think, I may refer to the case of *Chengiah* v. *Rajah of Kalahasti* (3). It is difficult to see how a transaction which the law requires to be in writing registered could be created by a declaration of the parties that an extinct lease subsists. In *Chengiah* v. *Raja of Kalahasti* (3), it was held by Sir Charles Arnold White, C. J., and Benson and Wallis, JJ., that where a right of forfeiture accrues to the lessor and he elects to determine the tenancy the election is irrevocable and the parties cannot by any subsequent agreement revive the old tenancy. Wallis, J., observes:

"I agree and will only add, I do not think that the framers of the Transfer of Property Act intended to depart from the well established rule of English law that where a right of forfeiture accrues to the lessor he is put to his election and if he manifests his intention to enforce the forfeiture that is an election to determine the tenancy and the election is irrevocable."

The learned Judge refers to *Jones* v. *Carter* (4), *Dendy* v. *Nicholl* (5), *Grimwood* v. *Moss* (6), *Evans* v. *Wyatt* (7), and *Clough* v. *L. & N. W. Ry. Co.* (8). Then the learned Judge goes on to say:

"In this case the lessor elected to determine, the election was irrevocable and the lease was at an end and could not be revived."

It is therefore difficult to see how, a forfeiture having been incurred and a fresh lease having been given, the lease could be revived by any act of the parties, simply saying that they agree to be bound by the terms of the old lease. I am therefore of opinion that the lease of Manavedan Raja was determined and the forfeiture was enforced and the plaintiffs acquired no title to the property.

This renders it unnecessary for us to consider the other issues and we say nothing about them. We leave the question of title and possession undetermined. That is a matter which should be fought out between defendant 1 and defendants 2 and 3, nor is it necessary to consider the contention that defendants 2 and 3 are the sole uralans of the temple and the questions whether the suit is barred by S. 42, Specific Relief Act, and whether an injunction could be granted.

It is rather unfortunate that the matter should be left thus; but the difficulty has arisen from the plaintiffs' conduct in not getting a fresh lease when Nambiar is said to have surrendered his rights. The Subordinate Judge held against them. They presisted in their attitude saying that the lease is valid and bringing up the matter here.

The appeal fails and is dismissed with casts of respondent 4.

Walsh, J.—I agree.

P.R.S./V.S. *Appeal dismissed.*

(3) [1913] 24 M. L. J. 263=15 I. C. 445.
(4) [1846] 15 M. & W. 718.
(5) [1858] 27 L. J. C. P. 220=6 W. R. 502=4 C. B. N. S. 376.
(6) [1872] 7 C. P. 360=20 W. R. 972=41 L.J. C.P. 239=27 L.T. 268.
(7) [1881] 43 L.T. 176=44 J. P. 767.
(8) [1871] 7 Ex. 26=20 W. R. 189=25 L. T. 708=41 L.J. Ex. 17.

A. I. R. 1930 Madras 276

WALLER, J.

P. L. N. K. M. Nagappa Chettiar — Applicant.

v.

Official Assignee, Madras — Respondent.

Petn. No. 405 of 1925, and Appln. No. 186 of 1929, Decided on 15th October 1929.

(a) Trusts Act, S. 63—Settlement of account cannot be followed.

A book adjustment of accounts between a firm and the insolvent cannot be treated as a passing of trust money, deposited with the firm in the name of insolvent, into the hands of the insolvent; this being merely a settlement of account, it cannot be followed: *In re, Hallett & Co. Ex parte Blane*, (1894) 2 Q. B. 237, *Ref.* [P 277 C 2]

(b) Trusts Act S. 66 — Trust property mixed up with private property—Whole property becomes trust property.

If a man mixes trust funds with his own, the whole will be treated as the trust property except so far as he may be able to distinguish what is his own: *Firth* v. *Cartlame*, (1865) 34 *L. J. Ch.* 301, *Rel. on.* [P 277 C 2]

V. Varadaraja Mudaliar and *K. P. Mahadeva Iyer* for *P. L. N. K. M. Nagappa Chettiar*—for Applicant.

K. V. Krishnaswami Iyer—for Respondent.

Judgment.—The applicant, as a co-trustee of the insolvent, asks that an account shall be taken of the amount due to the trust and for a first charge on the assets in the hands of the Official Assignee to the extent of the sum found due. In January 1916 there was a partition between the applicant and his brother on the one side and the insolvent on the other. At the time of the partition it was agreed that the parties should set aside two sums of Rs. 10,000 for each of two charities. The applicant's branch was to contribute 5/8, and the insolvent's share being the remaining 3/8. The applicant accordingly drew two hundis in favour of the insolvent on a firm styled O. R. M. O. M. S. P. The money realized on these hundis was left on deposit with that firm, an account being opened in the name of each of the charities, and was to carry interest at the nadappu rate. There it remained until February 1920, when the two accounts were transferred to the insolvent's own business. In 1925 he was adjudicated.

There can be no doubt but that in 1916 two trust funds were constituted. The agreement of that year is silent as to the manner in which the insolvent was to deal with the money, but it is now common ground that he was to pay interest on it at the nadappu rate and conduct the charities out of the income so realized. On this it is argued that the case is merely one of creditor and debtor and that the act of the insolvent in mixing the trust funds with his own money was not wrongful, for he was authorized, to invest them in his own business. A similar argument was negatived by Kumaraswami Sastriar, J., in *Krishnajee Bhat* v. *Sadasiva Tawker* (1). For the reasons given by that learned Judge, I negative the argument here also.

A more serious contention is based on the decision in *In re., Hallett & Co. Ex parte Blane* (2). On the evidence I am satisfied that what happened in February 1920 was this—that there was merely a book adjustment between the the firm of O. R. M. O. M. S. P. to which the insolvent owed money and the insolvent. Nothing really passed, but certain credit and debit entries were made in their respective accounts. No doubt the result was that a debt of some Rs. 18,000 which the insolvent owed to the other firm was wiped out, but I do not think that a book adjustment of this kind can be treated as a passing of trust money into the hands of the trustee. In the words of Lord Esher :

"All that can be shown is a settlement of account and a settlement of account cannot be followed."

Following the decision above cited, I must uphold the contention of the Official Assignee.

A further contention of the Official Assignee is that the fund in his hands is one on which the applicant can "in any event" have no claim. The legal principle is clear :

"that, if a man mixes trust funds with his own, the whole will be treated as the trust property except so far as he may be able to distinguish what is his own. *Firth* v. *Cartlame* (3)."

The Official Assignee has in his hands two funds. One consists of a sum of Rs. 5,000 which was not derived from the business in which the trust moneys were invested. The other consists of a sum of about Rs. 40,000 which represents a rebate of income-tax. The tax was paid in 1919, at a time when the trust funds were still in deposit with O. R. M. O. S. P. That being so, it seems to me clear that the money in question cannot be treated as trust property or as anything but the trustee's own property.

The application is dismissed with taxed costs.

P.R.S./V.S. *Application dismissed.*

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(1) A. I. R. 1927 Mad. 240.

(2) [1894] 2 Q. B. 237=63 L. J. Q. B. 573=1 Manson 25=42 W. R. 305=70 L.T. 361.

(3) [1865] 34 L. J. Ch. 301.

* A. I. R. 1930 Madras 278

VENKATASUBBA RAO AND REILLY, JJ.

Jethaji Peraji Firm—Appellant.

v.

Krishnayya and *others*—Respondents.

Civil Misc. Appeals Nos. 310 to 313 of 1925 and C. R. P. Nos. 627 and 628 of 1924, Decided on 17th January 1929 against order of Dist. Judge, Guntur.

* (a) **Provincial Insolvency Act (1920) Ss. 37 and 43—On annulment insolvent's property does not necessarily revert to him—In proper cases his property may be vested in Official Receiver—Petition under S. 54 by Official Receiver can be continued even after annulment—Provincial Insolvency Act S. 54.**

On an annulment of adjudication under S. 43 owing to the failure of the insolvent to apply for his discharge within the specified time the property of the insolvent does not necessarily revert to him. Under S. 37 the Court should, in proper cases, order the property to vest in the Official Receiver. In this way the insolvency proceedings not having come to an end, the proceedings started before the annulment by the Official Receiver to set aside a mortgage under S. 54 must be deemed to be pending, and, therefore, can be continued after the annulment : *Ex parte Lennard*, (1875) 45 *L. J. B. K.* 49 and *A. I. R.* 1929 *Mad.* 157, *Rel. on.* [P 281 C 2, P 282 C 2]

(b) Provincial Insolvency Act (1920), Ss. 27 (2) and 43—Application for discharge must be by debtor only—Application for extension of time can however be made by one interested and may be granted—To this extent S. 43 is not imperative.

Per *Venkatasubba Rao, J.*—From S. 27 and S. 43 read together it is clear that the party who can make the application for discharge is the debtor and no one else. It is equally clear that the Court has power to extend the period and it may be so done not merely at the instance of the debtor but on the application of anybody interested. S. 27 (2) merely requires sufficient cause shall be shown, but it does not say, that the debtor alone may apply for extension or shall show suffiicient cause. If then before the expiry of the term fixed, an application is made under S. 27 (2), it is obvious that it is not obligatory upon the Court under S. 43 to annul the adjudication. To this extent it is plain that the word " shall " is not imperative : *In re, Lord Thurlow, Ex parte Official Receiver*, (1895) 1 *Q. B.* 724, *Foll.* [P 280 C 1]

(c) Provincial Insolvency Act (1920), Ss. 27 (2) and 43—Before annulment under S. 43 Court may, on application, extend time under S. 27 (2) even after period fixed.

Per *Venkatasubba Rao, J.*—It is open to the insolvency Court under S. 27 (2) to extend the time, on a proper application, to that effect, made at any time before the adjudication is annulled under S. 43. This it can do, even though the application is made after the expiry of the period originally fixed: (*Case Law Referred.*): [P 280 C 2]

(d) Provincial Insolvency Act, S. 43—S. 43 is mandatory.

Per *Reilly, J.*—It is one thing to provide that on a certain thing happening or not happening the next step shall be such and such; it it quite another thing to provide that if a certain order of the Court is not carried out within a certain time a certain consequence shall follow. The latter provision is much more clearly mandatory than the former. It is very difficult to suggest any reasonable explanation why the words " shall be annulled " are used in S. 43, if something other than their plain meaning is intended, and it is not disputed that the plain meaning is mandatory. [P 283 C 2]

A. Krishnaswamy Aiyar and *V. Govindarajachary*—for Appellant.

S. Srinivasa Aiyangar, B. Somayya, V. Suryanarayana and *Kasturi Seshagiri Rao*—for Respondents.

Venkatasubba Rao, J.—Several connected appeals and revision petitions have been argued before us, but, in my opinion, C. M. A. Nos. 310, 311 and 312 of 1925 really raise the question of substance which presents itself for decision. If we decide these appeals in favour of the apellants there, our decision in them governs the other cases and the contentions raised in the latter by the respondents seem beside the point. Shortly stated, the question we have to decide relates to the construction and effect of Ss. 43, 37 and 27, Provl. Ins. Act of 1920.

The facts are undisputed and I shall briefly state them. Three brothers were adjudicated insolvents, first on their own petitions and subsequently on petitions filed by certain creditors. The orders of adjudication were passed on the debtors' petitions by the Official Receiver on 25th November 1921 and he fixed 18 months, as the period within which the debtors were to apply for their discharge. The same debtors were subsequently adjudicated by the District Judge on 12th December 1921 and the period fixed by him was 12 months. Pausing here for a moment, one fails to understand how two such sets of parallel orders came to be made; but this curious irregularity has no bearing on the question we have to decide.

The total liabilities shown amount to over $2\frac{1}{2}$ lakhs. The insolvents had, on 10th January 1921, executed a mortgage in favour of certain creditors, whom I shall, in this judgment, call the mortgagees, for about Rs. 60,000 and it is said that the mortgage deed comprises

the bulk, if not the whole, of the insolvents' property. In the insolvency petition, a proceeding was commenced by the Official Receiver under S. 54 for the annulling of the mortgage, He filed his petition under that section on 20th April 1922. Its trial began on 1st February 1923 and became a protracted one, the evidence being recorded piecemeal from time to time. In fact from 1st February 1923 to 1st May 1924, that is for 15 months, witnesses were examined off and on, but the trial was not even on the last mentioned date, concluded. I may mention that the evidence of 10 witnesses for the petitioner and 3 of the respondent had by then been taken. On 30th April 1924 a creditor by name Krishnayya applied under S. 43 that the orders of adjudication might be annulled, on the ground that the debtors had not applied for their discharge within the time fixed. The date chosen for making the application is significant. On 24th April the petition under S. 54 was adjourned to 1st May. The application to annul the adjudication was made, as I have said, on 30th April, that is, the day previous to the date fixed for the hearing of the substantive petition. On 1st May, I have already stated, the Judge heard the petition for annulling the mortgage. Curiously enough, on that very date, without notice to, or knowledge of, the creditors, an order appears to have been made on Krishnayya's petition directing the Official Receiver to submit a report. This petition came on 3rd May 1924 and the District Judge made an order annulling the adjudication. It must be noted that the petition under S. 54 stood adjourned from 1st May to 28th July. It was between these two dates, that, is on 3rd May, that the adjudication was annulled.

It is surprising that when this order was made without notice to creditors, the fact was overlooked that there was pending on the file of the Court, the petition under S. 54 which was being hotly contested. So far as the record goes, the Official Receiver does not appear to have taken any steps to safeguard the interests of the general body of creditors. This led to the strange result that the adjudication was unconditionally annulled. I use the words "strange result" advisedly. The order under S. 43 was made presumably to punish the debtors. But in this case the persons who are prejudicially affected, are not the debtors but the creditors generally. Another unexpected result of that order is, that the petition under S. 54 was held to have lapsed automatically and the mortgage, which was the subject of attack, became, for the time being, valid and final. The very object of the insolvency petitions, so far as the creditors collectively were concerned, became frustrated for it cannot be gainsaid that the creditors started the proceedings mainly, if not solely, for the purpose of getting rid of the mortgage. The rest of the story may be briefly told. Several creditors applied to the District Judge for review of the orders made under S. 43 and the review petitions were dismissed. As a necessary result, the Judge held that the petitions to annul the mortgage under S. 54 lapsed and that petition was accordingly dismissed.

The general body of creditors (whom I shall refer to as appellants) attack these orders of the learned District Judge whereas Krishnayya and the mortgagee support them. It is contended for the appellants that the word "shall" in S. 43 is not used in a mandatory sense, but must be held to be directory only. The argument is put thus: Generally, no doubt, it is the debtor that is punished by the annulling of the adjudication. The very terms of the section show that what is intended is in the nature of a penalty to the insolvent. If the adjudication is annulled, the section provides that the Court may re-commit the debtor to his former custody and that he shall be subject to all the processes that had previously been in force against him. But there may be cases where, if no discretion is left to the Court the very opposite of what is intended may result. In this case, it is asked, how are the insolvents really prejudiced by the orders? The parties who profited by them are the mortgagees, that is to say, the creditors fraudulently preferred. The honest ereditors, on the contrary, have been seriously prejudiced. Can this be the intention of the section?

I shall now deal with this contention. S. 43 provides that if the debtor fails to apply for his discharge within the period

specified by the Court, the order of adjudication shall be annulled. The learned Advocate General contends for the appellants, that the word "shall" is directory and the expression "shall be annulled" means "shall be liable to be annulled." S. 43, is, in my opinion, controlled by S. 27 which reads thus :

"27 (1) If the Court does not dismiss the petition it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge.

"(2) The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge and in that case shall publish notice of the order in such manner as it thinks fit."

From these two sections read together, it is clear that the party who can make the application for discharge is the debtor and no one else. It is equally clear that the Court has power to extend the period and it may be so done, not merely at the instance of the debtor but on the application of anybody interested. The section merely requires that sufficient cause shall be shown, but it does not say, that the debtor alone may apply for extension or shall show sufficient cause. If then, before the expiry of the term fixed, an application is made under S. 27 (2), it is obvious that it is not obligatory upon the Court under S. 43 to annul the adjudication. To this extent' it is plain that the word "shall" is not imperative. *In re Lord Thurlow, Ex parte Official Receiver* (1) is an authority on this point. In that case, the Court of appeal held the expression "shall adjudge" in S. 20, Cl. (1), Bankruptcy Act, 1883, to be directory and not mandatory on the ground that a discretion was left to the Judge under the words of another section, namely, S. 105 (2) which contained a provision to the effect that the Court may at any time adojurn any proceedings before it upon such terms, if any, as it may think fit to impose.

Then comes the question, supposing the Court is moved under S. 27 (2), after the expiry of the time originally fixed, but before the adjudication is annulled under S. 43, has the Court the power, to extend the period, within which the debtor could apply for his discharge? In the first place, I must observe that the adjudication does not get automatically annulled under S. 43 on the expiry of the original period. The words of the section show that the Court must make an order of annulment. This is the correct interpretation of the section and *Abraham* v. *Sookias* (2) supports this view. Next S. 27 (2) while saying that the Court may extend the time, does not say in express terms, that it may be extended either before or after the expiration of the period originally fixed. S. 148, Civil P. C., enacts that the rule to be applied under that code is that the time may be enlarged, irrepective of the fact that the application is made either before or after the expiry of the period originally specified. It is unnecessary to decide whether by reason of S. 5, Prov. Ins. Act, S. 148 of the Code is attracted or not for *Badri Narain* v. *Sheo Koer* (3) establishes clearly that the power of the Court is not fettered in the way suggested. That case was decided under the old Code which did not contain a provision similar to S. 148.

I am therefore disposed to hold that it is open to the Insolvency Court under S. 27 (2) to extend the time on a proper application to that effect, made at any time before the adjudication is annulled under S. 43. This is the view taken by Krishnan, J., in *Arunagiri Mudaliyar* v. *Kandaswami Mudaliyar* (4), by Devadoss and Wallace, JJ., in *Abbi Reddi* v. *Venkata Reddi* (5) and by present Chief Justice in *Manikam Pattar* v. *Nanchappa Chettiar* (6). The Lahore High Court has taken the same view in *Lakhi* v. *Molar* (7) and *Fateh Muhammad* v. *Mayadas* (8) the Burma Court in *K. S. A. R. A. Chettiyar* v. *Maung Myat Tha* (9) and the Calcutta High Court in the case already cited, *Abraham* v. *Sookias* (2). A different view was taken by Waller, J., who differing from Krishnan, J., held in *Arunagiri Mudaliyar* v. *Kandaswami*

(1) [1895] 1 Q. B. 724=64 L. J. Q. B. 479=43 W. R. 403=59 J. P. 309=2 Manson 158=72 L. T. 642.

(2) A. I. R. 1924 Cal. 777=51 Cal. 337.
(3) [1890] 17 Cal. 512=17 I. A. 1=5 Sar. 493 (P.C.).
(4) A. I. R. 1924 Mad. 635.
(5) A. I. R. 1927 Mad. 175.
(6) [1928] M. W. N. 441.
(7) A. I. R. 1925 Lah. 416.
(8) A. I. R. 1927 Lah. 763.
(9) A. I. R. 1927 Rang. 136.

Mudaliyar (4) that the Court has no such power. To the same effect are the decisions in *Venu Gopala Chariyar* v. *Chinnu Lal Sowcar* (10), *Thirumala Reddi* v. *Thamasu Reddi* (11) and in *Ram Krishna Misra, ex parte* (12). There is thus a conflct of authority on this point. But I am in favour of holding that, on the right construction of the two setions S. 43 and S. 27 (2) in the light of *Badri Narain* v. *Sheo Koer* (3) the Court may enlarge the time, even though the application is made after the expiry of the period originally fixed. Thus, in this case again, the terms of S. 43 are not imperative or obligatory.

I have so far dealt with two classes of cases but over and above these, there remains a third, namely, that has actually arisen in this insolvency. If, before the District Judge made his order under S. 43, there was before him an application to extend the time, he would have, as I have said a discretion to enlarge the period, and in the circumstances of this case, he would have exercised it properly by granting an extension. There are other provisions in the Act under which the debtor can be punished while an adjudication still remains in force. For one thing, his protection may be revoked while the proceedings may be continued for the benefit of the creditors. In this case, I cannot help remarking that the Official Receiver failed in his duty by not asking for an extension. However that may be the question is: is S. 43 to be construed as peremptory, in the absence of an application before the Judge under S. 27 (2)? In other words can the Judge suo motu refuse to make an order under S. 43 if he thinks there are sufficient reasons for adopting that course? The learned Advocate General argues that even in such a case, the sanction is not mandatory. There is no authority and I wish to reserve my own opinion on the point for I can rest my judgmeut for the appellant on a much firmer ground.

Section 43, after saying that the order of adjudication shall be annulled, adds that provision of S. 37 shall apply. That section runs thus :

"37. (1) Where an adjudication is annulled all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver shall be valid but subject as aforesaid the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such condition (if any) as the Court may by order in writing, declare."

Under this section it was open to the Court to have directed the insolvents' property to vest for the creditor's benefit in some person named for the purpose. This is not disputed. That is the order that in the circumstances, ought to have been made. Had such a conditional order been made though it would have revoked the status of the debtors as insolvents, it would not have proprio vigore put an end to the insolvency proceedings by legal implication. The District Judge held that as the annulment of adjudication had the effect of terminating the insolveney petition the proceedings instituted by the receiver under S. 54 in that petition lapsed as a matter of course. But this result could have been avoided. For, if as I have said action had been taken under S. 37, the annulment would not have been unqualified or absolute and in that case the Court would still retain control over the insolvent and his assets. The scheme of the Act shows that, in certain cases, the annulling of adjudication does not necessarily lead to the finally putting an end to the insolvency petition. This, in my opinion is the correct view and I am supported by *Ex parte Lennard* (13) and *Thimmappa* v. *Devasi Harpal* (14). In the last mentioned case the question arose, what was the effect of an order under S. 39 annulling adjudication which was made consequent on a scheme of of composition, approved by the Court under S. 38? It was held that the order did not bring the insolvency petition to an end and that the Court, although the adjudication was annulled continued to retain control over the insolvent's assets. I entirely agree with that decision, and the point is fully dealt with in the judgment of Wallace, J. But there is one observation made by the learned Judge, an obiter dictum with which I do not agree. While holding

(10) A. I. R. 1926 Mad. 942=49 Mad. 935.
(11) A. I. R. 1928 Mad. 265=51 Mad. 830.
(12) A. I. R. 1925 Pat. 355=4 Pat. 51.
(13) [1875] 45 L. J. B. K. 49=1 Ch. D. 177=24 W. R. 182=33 L. J. 553.
(14) A. I. R. 1929 Mad. 157.

that an order of annulment under S. 39 does not terminate the petition (that was the point that directly arose) the learned Judge incidentally observed that under S. 43 the case would be different. If what Wallace, J., meant was that an unconditional annulment under that section would bring an insolvency to an end that is a proposition to which no exception can be taken ; and in my opinion that is all that the learned Judge could have meant.

Now, turning to *Ex parte Lennard* (13) the facts are these : A composition scheme provided for the annulment of the bankruptcy and the assignment by the debtor of all his personal property to the trustee to secure the composition. The scheme having been approved and the bankruptcy annulled, a question arose whether the rights of an execution creditor under an execution that was void in the bankruptcy revived upon the annulment. The registrar granted an injunction restraining the creditors from proceeding with their execution. It was contended that the Court had no jurisdiction the bankruptcy having been annulled. The Court of appeal overruled the objection. James, L. J., observes :

"I am of opinion that under Ss. 28 and 72, Bankruptcy Act, 188), the Court of Bankruptcy has jurisdiction to determine all questions which may arise in the case of a scheme of arrangement . . . . But here, though the bankruptcy has been annulled, the composition was made in bankruptcy by the Court itself as a part of a scheme which was approved by the Court . . . . The order was therefore made in what continued to be a matter of bankruptcy and the question was a question to be decided under S. 72 for the purpose of making a complete distribution of the property."

At this point, a passage from Williams" Bankruptcy, Edn. 13, may be quoted. The learned author while commenting on S. 29, English Bankruptcy Act (which contains a sub-clause on which S. 37 of our Act is modelled) says thus :

"Although in cases where the annulment is on the ground that the adjudication ought never to have been made the Court will in all respects try to remit the bankrupt to his original position, yet in cases where the annulment is, as it is under S. 21, a continuance of the bankruptcy in another form the rights of and against the bankrupt or the person in whom the bankrupt's estate becomes vested by the order of the Court in respect of that estate will remain as they were under the Bankruptcy." (p. 135).

Assuming then that in the events that have happened S. 43 was mandatory the District Judge ought to have made an order under S. 37.

I would therefore in C. M. A. Nos. 310, 311 and 312 of 1925 set aside the order of the District Judge and under Ss. 32 and 37 annul the adjudication of the insolvents, subject to this condition, that their property shall remain vested in the Official Receiver.

The result of the view I have taken is, the insolvency petition not having come to an end, the proceeding started by the receiver under S. 54 must be deemed to be pending; and the lower Court is directed to complete the enquiry and dispose of the petition according to law in the ordinary course.

It only remains to add that S. 37, which deals with the consequences of annulling, validates all acts done previously by the Official Receiver. The word "acts" is wide enough to include receiver's act of avoidance under S. 54 "Void" in that section has been held to mean "voidable," that is, it is open to the Official Receiver, as representing the creditors, to disaffirm the transaction (the fraudulent preference). The effect of the saving in S. 37 is, to preserve the validity of the receiver's exercise of his option of avoidance. The result is, now that I have held that the insolvency petition has not been brought to an end, the proceeding under S. 54 subsists and can be continued.

I make an order accordingly in C. M. A. No. 314 of 1925. This is scarcely an independent order, for as a matter of fact, it follows as a consequence from the orders already made in C. M. A. Nos. 310, 311 and 312 of 1925.

These orders will really suffice to dispose of all the matters before us. In that view, I make no separate orders on C. R. Ps. No. 627 and 628 of 1924 and 173 and 174 of 1925.

In regard to costs, though collusion between Krishnayya and the mortgagees may be suspected, it cannot be said that either of them acted wrongly. I therefore direct that each side shall bear its costs of these appeals and petitions.

Mr. S. Srinivasa Ayyangar says that his client was brought on the record as alienee who acquired the interest, at a Court sale, of the mortgagees, Bhadri Narain and Soorja Narain. He contends

that he is protected by S. 54 (2). This is a question which must be left to be decided by the lower Court when it disposes of the petition under S. 54.

Reilly, J.—In these cases the insolvents did not apply for their discharge within the time specified; nor was any application made either before or after the expiry of that time for its extension. That being so, I do not wish to express any opinion on this occasion on the question whether the time specified can be extended by the Court after expiry. But in the circumstances stated, the District Judge was bound in my opinion under S. 43, Prov. Ins. Act to annul the adjudication. In the decisions of this Court on the question culminating in *Thirumala Reddi* v. *Kolakulu Thomasu Reddy* (11), the weight of authority is clearly in favour of the view that the words "shall be annulled" in S. 43 of the Act. are mandatory. But in *Manikkam* v. *Nanchappa* (6), where the question was not decided, the learned Chief Justice suggested that another view was possible and referred to *In Re, Lord Thurlow, ex parte Official Receiver* (1), as deciding that a similar provision in the English Bankruptcy Act was not mandatory. The learned Advocate-General has relied strongly on *Lord Thurlow's* case (1), in support of his contention that the expression "shall be annulled" in S. 43, Prov. Ins. Act is not mandatory, but directory, and that in this case the adjudication should not have been annulled. But, when we examine *In re, Lord Thurlow, ex parte Official Receiver* (1). I doubt with great respect whether the learned Chief Justice was right in suggesting that the Court of appeal was there interpreting an exactly similar provision of the English Bankruptcy Act. In that case the statutory meeting of creditors eventually passed no resolution, and it was contended for the appellant (the Official Receiver) that under S. 20 (1), Bankruptcy Act, 1883 in those circumstances it was obligatory to adjudge the debtor bankrupt forthwith. The Court of appeal decided that it was not obligatory on the Registrar to make the order of adjudication forthwith but that he had power to adjourn the matter. It was not explicity set out in S. 20 (1), Bankruptcy Act, 1883 that, if the meeting of creditors passsed no resolution, the debtor should be adjudged bankrupt forthwith, and even taking that section by itself I doubt whether "shall adjudge" was a mandatory provision which left the Court no discretion to do anything except to adjudge the debtor bankrupt forthwith; it appears to me rather to set out that the next step in the procedure was to make the order of adjudication. However, all the members of the Court of appeal called to their aid another section of the Bankruptcy Act, S. 105. which provided that the Court might at any time adjourn any proceedings before it, and reading that section with S. 20 (1) they had no doubt that the Registrar was not bound by S. 20 (1) to adjudge the debtor bankrupt forthwith. And it must be noticed that Rigby, L. J. indicated that he would have regarded the provision in S. 20 (1) by itself as obligatory and was only saved from doing so by reading it with S. 105; and even Lord Esher, M. R., eventually came to the conclusion that it was obligatory subject to the power of adjournment. Although it appears to me that, even taking S. 20 (1) of that Act by itself, the provision "shall adjudge" was not mandatory in the sense that, in the circumstances stated, the Registrar was bound to adjudge the debtor bankrupt forthwith.

It is clear that the Court of appeal did not decide that by themselves, the word "shall adjudge" were not mandatory in that sense. But in my opinion, in S. 43. Prov. Insl. Act, we have a different provision. It is one thing to provide that on a certain thing happening or not happening the next step shall be such; and such; it is quite another thing to provide that,if a certain order of the Court is not carried out within a certain time, a certain consequence shall follow. The latter provision is to my mind much more clearly mandatory than the former. It was very difficult to suggest any reasonable explanation why the words "shall be annulled" were used in S. 43 Provl. Insol. Act, if something other than their plain meaning was intended, and it is not disputed that their plain meaning is mandatory. The learned Advocate General has suggested that what the legislature meant by using those words was "shall be liable to be annulled," but he has not been able to suggest any satis-

factory reason why, if so, the legislature did not say what it meant. If anything less than mandatory provision was intended, it would have been the simplest matter to express the real intention. I am very averse to accepting suggestions, which are not infrequently made in this Court when the plain language of a statute appears to lead in particular circumstances to incovenient consequences, that the legislature has done its work carelessly, inefficiently and has not said what it meant or has said what it did not mean.

On the contrary we have no right to depart from the plain meaning of a statute except for some compelling reason, and our own view of what is convenient can seldom provide such a reason. In this instance, the use of the words "shall be annulled" becomes more marked when we conrast it with the provision "may be annulled" in S. 41, Presidency Towns Insolvency Act. It would be extravagant to assume that when framing S. 43, Provl. Ins. Act, the legislature had forgotten the wording of S. 41, Presidency Towns Insolvency Act, on the same subject; and if the latter provision had not been entirely forgotten, the words "shall be annulled" in S. 45, Prov. Ins. Act, can hardly have been chosen otherwise than advisedly and deliberately. But the learned Advocate-General has suggested that, even if the legislature used the words "shall be annulled" advisedly and deliberately, it would be possible for us to soften them by a kind of equitable interpretation, if experience showed that in certain circumstances they led to gross and uncontemplated hardship or to some unexpected conflict with the general purpose of the Act. In very exceptional cases it may be necessary for us to modify by interpretation even the most unambiguous words deliberately used by the legislature in a particular passage of a statute if we are convinced that in the circumstances under consideration they lead to consequences wholly uncontemplated by the legislature and repugnant to the purpose of the statute. The plainest words most deliberately chosen in a particular passage cannot be allowed to defeat the unquestionable intention of the legislature in framing a statute. But that is only one aspect of the fundamental rule that we must enforce a statute "according to the intent of them that made it." Before we depart from the plain meaning of particular words deliberately chosen by the legislature, we must be very sure of our ground; we must be convinced that we have to deal with circumstances which the legislature never foresaw and to which it never intended its words to apply, and of that we can hardly ever be convinced except by the clearest repugnancy to the purpose of the statute. It is true that our Insolvency Acts are intended not only for the relief of debtors but also for the fair treatment of their creditors and that, if the plain meaning of a particular passage, though deliberately adopted, led to the infliction of gross and obviously uncomtemplated hardship on a debtor or his creditors, which the legislature could not have intended, we might be driven to depart from the language used in order to do what the legislature clearly intended, not what it actually said.

But can it be said that there is any such compelling reason to depart from the plain language in this case? The annulment of his adjudication can inflict no such hardship on a debtor, as S. 10 (2), Provl. Ins. Act indicates that, if he has been prevented from making his application for discharge by some reasonable cause, the Court will permit him to present a new insolvency petition on the same facts as before. The hardship, which the learned Advocate General has pressed upon us is, hardship to the creditors or some of them, if the adjudication is annulled on account of the debtor's default, when it is clearly profitable to them that the realization and distribution of the debtor's assets should go on in the insolvency proceedings or disastrous to them that his property should again vest in the debtor. But it is to prevent any such hardship that the legislature has by the terms of S. 43 made the provisions of S. 37 applicable in such a case. It is not necessary, when the adjudication is annulled because the debtor has failed to apply for his discharge within the specified time, that his property should revert to him; it may be vested by the Court in some other person. In a case such as the present one the obvious course is that the Court should order

the property to vest in the Official Receiver. It has not been contended before us for the respondents that that would not be a proper order in this case or that, when the debtor's property, has so vested in the Official Receiver, he would not be able to realize it by sale and suit and to distribute it rateably among the creditors. In my opinion the annulment of the adjudication in these cases was correct and must stand, as the District Judge had in the circumstances no discretion to refuse to make an order of annulment, but he should have made use of the provisions of S. 37 and should have ordered the debtors' property to vest in the Official Receiver, which order we should now make. That order we can make in C. M. A. Nos. 310, 311 and 312 of 1925. But it will not serve the purpose of the appellant in C. M. A. No. 313 of 1925, another creditor, who objects to the dismissal of I. A. No. 402 of 1922 on the file of the District Court. That was a petition by the Official Receiver originally under Ss. 53 and 54, Provl. Ins. Act, but apparently pressed only under S. 54, for the annulment of a mortgage of almost the whole preperty of the debtors concerned as made with a view of giving the mortgagees a preference over their other creditors, and was dismissed by the District Judge as having abated when the adjudication was annuled.

It is contended by Mr. Srinivasa Ayyangar, who has argued the case for respondents 2 and 3 in this appeal, that, even if a debtor's property is ordered to vest in the Official Receiver under S. 37, Provl. Ins. Act, proceedings under S. 54 cannot go on after the adjudication has been annulled. He first argues that under the wording of S. 54 such a petition can only proceed while the debtor continues to be an adjudged insolvent, which he is no longer when the adjudication has been annulled. But that is not be found explicitly or implicitly in the section. It is true that, unless the debtor is once adjudged an insolvent, the receiver cannot move under the section. But apart from that essential, the words " if such person is adjudged an insolvent on a petition " are of grammatical effect in the section only to fix the identity of the petition from the date of which the period has to be calculated within which a transfer, etc., made comes within the scope of the section. There are no words in the section to express or imply that the petition, once properly preferred, can be prosecuted only while the adjudication is in force. And there is nothing incongruous in a receiver, if the property of a debtor has vested in him under S. 37 for realization and distribution, continuing to prosecute a petition under S. 54. It is the duty of the receiver in such circumstances, as before the annulment of the adjudication, to distribute the property rateably. A petition under S. 54 is only an incidental proceeding by which the receiver ensures a fair distribution by making the creditor to whom preference has been given disgorge what he has got in excess of his fair share. Such a creditor is not prevented from getting his fair share with the other creditors; in effect it is only the excess he must give up. But the objection of substance raised by Mr. Srinivasa Ayyangar is that the jurisdiction to annul the preferential transaction and to make the preferred creditor disgorge is peculiar to insolvency proceedings and it is only in the course of those proceedings that it can be exercised. That proposition is sound so far as it goes.

Outside its insolvency jurisdiction, the Court has no power to annul a preferential transaction merely because it gives preference to one creditor over others. But Mr. Srinivasa Ayyangar goes on to contend that immediately an adjudication is annulled, the insolvency proceedings came to an end. As a general proposition that is not so. Certainly it cannot be suggested that in this country annulment of adjudication puts the clock back as if the adjudication had never been. The opening part of S. 37, Provl. Ins. Act, which validates what has been done while the adjudication has been in force, is enough to dispose of any such suggestion. But apart from that, I think it is clear that the insolvency proceedings do not always stop at the moment of annulment. Ss. 39 and 40 show that insolvency proceedings continue after adjudication has been annulled on a composition or scheme being approved, so much so that on the debtor's failure to pay an instalment due in pursuance of the composition or scheme, the Court can re-adjudge him

insolvent, without any fresh insolvency petition being put in, which it could not do if the insolvency proceedings were at an end. That the insolvency proceedings continue in such a case was decided recently in *Timmappa* v. *Derasi Harpal* (14). And see *Ex parte Leonard* (13). It is true that in the former case, Wallace, J., said that an annulment of adjudication under S. 43 is evidently intended to put an end to the insolvency proceedings as a whole. But that statement was obiter dictum. It was not necessary for that case, and the question was not before him; and with great respect I doubt whether he considered fully all the consequences of his proposition. Mr. Srinivasa Ayyangar urges that we must infer from the fact that an annulment of adjudication under S. 43, a debtor, as indicated by S. 10 (2), is able in certain circumstances to present a fresh insolvency petition, on the same facts as before, that the previous insolvency proceedings came to a complete end when his adjudication was annulled. No doubt all such advantages as he got by adjudication then came to an end; but that does not necessarily imply that the whole insolvency proceedings came to an end. And, when once we reach the conclusion that under S. 37 the Court may order the property of the debtor to vest in a receiver for the purpose of realization and distribution among his creditors and that is admitted by Mr. Srinivasa Ayyangar—it is only by going out of our way that we can suppose that the receiver, who has been appointed by the Court in the exercise of its insolvency jurisdiction, is to be controlled and directed by the Court, as he must be controlled and directed, in the exercise of some other jurisdiction.

In a large proportion of the cases in which an adjudication is annulled otherwise than under S. 35 or S. 36, there will be further proceedings to be taken or superintended by the Court, and that must be done in the exercise of its insolvency jurisdiction. The Act does not say that insolvency proceedings cease in all cases with the annulment of adjudication, and Ss. 37, 39, 40 and 50 show that proceedings may continue, which must be proceedings before the Court in its insolvency jurisdiction. In my opinion, if the Court orders under S. 37 that the property of the debtor shall vest in a receiver, the insolvency proceedings will continue while the receiver's work goes on. That being so, there is no difficulty in the receiver continuing to prosecute in those circumstances a petition under S. 54 after the adjudication has been annulled under S. 43. Moreover, if, as in this case, the receiver has initiated proceedings under S. 54 before the adjudication is annulled, the position is still simpler. S. 37 validates acts done by him after the adjudication is made and before it is annulled. Even if we do not go so far as to say that the presentation of any petition to the Court in his capacity as receiver is an 'act' within the meaning of S. 37, the presentation of a petition under S. 54 must, I think, as the learned Advocate-General contends, be such an act. By presenting a petition under S. 54 the receiver exercises his option to treat the transaction concerned as void. The formal exercise of that option is an act within his competence. If, as can hardly be denied the institution of a suit in the interest of the debtor's estate by the receiver after the adjudication is made and before it is annulled, is an act which will remain valid under S. 37 after the adjudication is annulled for the benefit of the debtor or anyone else concerned, the formal exercise of his option to avoid a transfer must surely be an 'act' which under S. 37 will remain valid. If it remains valid after the annulment of the adjudication, then it is unreasonable to suppose that the receiver cannot continue to pursue the remedy provided by S. 54. I agree therefore that C. M. A. No. 313 of 1925 must be allowed and the dismissal of I. A. No. 402 of 1922 must be set aside and that petition must be remanded to the District Judge for fresh disposal. I agree also that C. R. P's. Nos. 627 of 1924, 628 of 1924, 173 of 1925 and 174 of 1925 against the District Judge's refusal to review his order annulling the adjudication should be dismissed as unnecessary and that in those revision petitions and in the four appeals each party should bear his own costs.

Mr. Srinivasa Ayyangar's contention that his client, as auction-purchaser in execution, is protected by S. 54 (2), Provl. Ins. Act as a purchaser in good

faith for valuable consideration, is clearly one which should be urged before the District Judge, when I. A. No. 402 of 1922 is reheard.

P.R.S./V.S. *Order accordingly.*

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* A. I. R. 1930 Madras 287

ANANTAKRISHNA AYYAR, J.

(*Lakkaraju*) *Anandarao* — Plaintiff—Appellant.

v.

(*Yellamraju*) *Venkatasubba Rao* and *another*—Defendants—Respondents.

Second Appeal No. 250 of 1926, Decided on 7th October 1929, from decree of Addl. Sub-Judge, Bapatla, in Appeal Suit No. 89 of 1925.

(a) Hindu Law—Marriage—No obligation on mother to marry her sons by borrowing on security of property inherited from her father—(*Obiter*).

In the case of a mother there is no obligation at all to get any of her sons married by borrowing money on the security of the property inherited by her from her father : 50 *M. L. J.* 221, *Not shaken by* 54 *M. L. J.* 618. [P 289 C 2]

*** (b) Hindu Law—Widow—Alienation—Setting aside—(Mitakshara)—Daughter's son is not member of last male holder's family — Widow of last male holder is not liable for daughter's son's maintenance. etc —Alienation by widow for such purposes is not justifiable.**

Under Mitakshara, the daughter's son is not a member of the last male holder's family, he belongs to the family of the daughter's husband. Nor could the daughter's son be a dependent member of the last male holder's family when his father is living and able to maintain him. Therefore the last male holder is not bound to maintain the daughter's son, and on his death his estate in the hands of his widow is not liable for the maintenance, education, upanayanam and marriage. Any alienation by the widow for such purposes is not justifiable : (*Case Law Discussed.*) [P 291 C 1]

G. Lakshmanna—for Appellant.

P. Satyanarayana—for Respondents.

Judgment.—The lands described in the plaint belonged to the last male holder Lakshmayya, who died about 20 years prior to the suit, leaving his widow defendant 2 and a daughter Subbamma, the mother of the plaintiff and defendant 3. On Lakshmayya's death, defendant 2 inherited the property. The daughter of defendant 2 (the mother of the plaintiff and defendant 3) died a year after Lakshmayya's death. The plaintiff and defendant 3 as the daughter's sons of the late Lakshmayya are the nearest reversioners to the estate of Lakshmayya. On 20th November 1918, defendant 2 sold the suit properties to defendant 1 for Rs. 1,500 ; the chief item of debt incurred by defendant 2, to discharge which she sold the properties to defendant 1, was thus described in the sale deed :

"Rs. 885-1-3, being the debt contracted by me and by my eldest grandson Suryaprakasa Rao (defendant 2) for our family expenses and for the upanayanam and the marriage of Ananda Rao (the plaintiff), one of my daughter's sons under my protection."

The plaintiff was a minor at the time of the sale, and he instituted the present suit on 22nd September 1922, for a declaration that the sale deed would not in any way affect his reversionary right in the property.

Defendants 2 and 3 did not appear. Defendant 1, the alienee, pleaded that the sale was made for legal necessity and was binding on the plaintiff, that the plaintiff and defendant 3 were under the protection of defendant 2, and that the plaintiff was even at the time of the suit living with defendant 2. He contended that the property was sold to him by defendant 2 for discharging the debts incurred by her for the maintenance, education, upanayanam, and marriage expenses of the plaintiff, and that the plaintiff equally with defendant 3 was estopped from questioning the same.

Both the lower Courts came to the conclusion that the debts incurred by defendant 2 for the discharge of which the properties were sold to defendant 1 were incurred by defendant 2 for the maintenance, education, upanayanam and marriage expenses of the plaintiff, that after the death of the plaintiff's mother (which event took place about one year after the death of defendant 2's husband) the plaintiff and defendant 3 were living with defendant 2 and were being maintained by her. The plaintiff's allegation, that the amounts were spent for debts contracted by defendant 3 in connexion with his gambling and other vices, was not proved. In these circumstances the first Court decreed the suit in plaintiff's favour, holding that the daughter's son had no legal claim for maintenance, etc., from the estate left by their maternal grandfather and that the widow was not justified in alienating the properties for meeting the upanayanam and marriage expenses of the plaintiff. On the appeal preferred by defendant 1, the learned Additional Subordinate Judge of Bapatla reversed the Munsiff's decision and dismissed the plaintiff's

suit. As already remarked, the lower appellate Court also held that the substantial portion of the debts incurred by defendant 2 to discharge which she sold the properties to defendant 1, was incurred for the maintenance, upanayanam and marriage expenses of the plaintiff, and it agreed with the trial Court in that respect.

The trial Court specifically remarked that the estate left by the last male holder (20 acres of land at Battibrolu and 13 acres at Chemudubad) yielded much more than was necessary for the maintenance, etc., of defendant 2. Unless therefore the widow was justified under Hindu Law in incurring debts for the maintenance, education, upanayanam and marriage expenses of daughter's sons, she could not validly sell lands forming part of the corpus of the estate. She is, of course, complete master of the income from the lands forming the estate and could utilize the same as she pleased and for any purpose she liked. But the question is whether she could legally sell a portion of the estate for such purposes as are proved in this case, and whether the sale would be binding on the ultimate reversioners.

The learned Subordinate Judge relied on the decision reported in *Chumum Lall* v. *Lalla Gunput Lal* (1) and *Rustome Singh* v. *Moti Singh* (2) and *Baijnath Rai* v. *Mangala Prasad Narayan Sahi* (3) in support of his view that the alienation was binding on the reversioners. I regret, I am unable to agree with him. In *Chumum Lall* v. *Lalla Gunpat Lal* (1), the facts of the case do not fully appear in the report. The only sentence relied on is that at p. 53 :

"We fail to see how the Munsif's grounds are imaginary, for he proceeds on grounds admitted by the Hindu Law to be grounds of necessity for such alienations, namely, the shradh of the widow's husband, the marriage of his daughter, the maintenance of his grandsons and the payments of the husband's debts. All these grounds are acknowledged by the Hindu Law as legitimate causes for raising money by a widow, and they have been found to be proved by the first Court."

We are now concerned only with the question of maintenance of the grandsons of the last male holder, and we are not concerned here with the other grounds of necessity mentioned by the learned Judges. No authority is quoted in support of the proposition in so far as the maintenance of grandsons is concerned as a justifiable ground of necessity for such alienation. Unless there be something peculiar in the Bengal Law, I do not feel justified in accepting that case as an authority justifying the sale in the case before me. In *Rustom Singh* v. *Moti Singh* (2), it was held by the learned Judges as follows :

"Ordinarily it is the duty of the father in a Hindu family to provide for his daughter's marriage; but where the father was not possessed of sufficient means to do so, and the mother in order to raise money to meet the expenses of the daughter's marriage, mortgaged property of her own which had come to her from her father, it was held that the mortgage was made for legal necessity and was a valid mortgage."

The only relevant portion is that contained at p. 475:

"There can be no doubt that it was the father's duty in this instance to get his daughter married . . . . The father was unable out of his resources to effect the marriage of his daughter, and thereupon the mother of the girl was obliged to have recourse to the property that came from her father to her. There is no doubt of its being the pious duty of the father to effect the marriage. He was unable to do so; so under these circumstances we think that the money, the consideration of this marriage was borrowed for necessary purposes, namely, the marriage of the daughter."

It is enough for our purpose to say that the case before me is not the case of the marriage of daughter's daugher. As there is no discussion of the principle of law on the point in the judgment, the same affords no help to me to dispose of the case before me, which is the case of maintenance, upanayanam and marriage of a daughter's son. The case in *Chudammal* v. *Nadamuni Naidu* (4) was a case exactly similar to the case in *Rustom Singh* v. *Moti Singh* (2). The Court remarked that it was not argued that the case in *Rustom Singh* v. *Moti Singh* (2) was not correctly decided. That also was a case of the marriage of a daughter's daughter, which is not the case before me. *Ramakoomar Mitter* v. *Ichamoyi Dasi* (5) related to the marriage of a (deceased) son's daughter. The statement in the decision in *Baijnath Rai* v. *Mangala Prasad* (3) referred to by respondent is to this effect :

"Under Hindu law, the liability of a woman who takes property either by inheritance or survivorship, to maintain those whose main-

(1) 16 W.R. 52.
(2) [1896] 18 All. 474=(1896).A.W.N. 155.
(3) A.I.R. 1926 Pat. 1=5 Pat. 350.
(4) [1909] 6 M.L.T. 158=3 I.C. 77.
(5) [1881] 6 Cal. 36=6 C.L.R. 429.

tenance was a charge upon it in the hands of the last holder, is the same as that of a man who inherits or succeeds to property."

In the present case it is not stated that the maintenance of the daughter's sons was a charge upon the estate in the hands of the last male holder during the lifetime of the last male holder. At that time, the daughter and the daughter's sons were living with the daughter's husband and not with the last male holder. No question of "dependent members" or of "maintenance being a charge upon the estate in the hands of the last male holder," therefore arises in the present case. At p. 355 of *Baijnath Rai* v. *Mangala Prasad* (3) it is mentioned that

"Ramsumaree Kuer would easily come within the description of such members as were dependent on the male coparceners when they were alive."

The decision in *Baijnath Rai* v. *Mangala Prasad* (3) also does not therefore really help me in deciding the present case. In Norton's Leading Cases on Hindu Law, Vol. 1. p. 48, I find it stated that

"Daughters and daughter's sons are entitled to maintenance in undivided families, under the Mitakshara: Sutherland's Full Bench Rulings p. 70 *M. Koomud Chunder Roy* v. *Sotakant Roy*,"

On referring to Sutherland's Full Bench Rulings p. 75 at p. 77, I find that the Court decided that

"the claimant who is granddaughter of Issur Chunder Roy cannot inherit any share of the estate."

The claimant's suit was dismissed, but there is an observation that "she is entitled to maintenance and nothing more." It is only an obiter dictum, and even that is with reference to granddaughter and not to grandson. So the authority quoted does not support the statement.

The learned advocate for the respondent referred to the case reported in *V. Tatayya* v. *G. Rama Krishnamma* (6) where the learned Judges Benson and Krishnaswami Iyer, JJ., upheld the gift of a very small portion of land inherited by a Hindu daughter from her father, made at the time of performing her father's sradha ceremony on the occasion of a peculiarly holy event among Hindus (the pushkaram at Rajahmundry occurring once in 12 years). Gifts made for similar spiritual benefit of the last male holder have been held to be valid by the Privy Council in the case reported in *Sardar Singh* v. *Kunj Behari Lal* (7) where their Lordships approved of the decision in *Tatayya* v. *Rama Krishnamma* (6). But I fail to see how those cases really help the contention raised by the learned advocate for the respondent in the preseut case. On the other hand there is some authority against the contention of the respondent. In *Rajagopalachariar* v. *Sami Reddi* (8), Devadoss, J., held that:

"under Hindu Law a daughter who inherits the property of her father is not entitled to alienate the same for the purpose of getting one of her sons married."

At p. 224 (of 50 *M. L. J.*) this is what the learned Judge observed:

"The question therefore arises whether a limited owner is entitled to charge the reversion with a debt contracted for the marriage of her son. No authority is shown for the position that a mother could alienate the property inherited from her own father for the purpose of getting one of her sons married. Mr. Viswanatha Ayyar's contention is that there is a moral obligation to get her son married and therefore she is entitled to borrow for the purpose of getting her son married. There is no obligation under the Hindu Law on the part of a mother to get any of her sons married. The case of a daughter stands on a different footing altogether. It is one of the duties of the father to get his daughter married. In the case of a mother there is no obligation at all to get any of her sons married by borrowing money on the security of the property inherited by her from her father. In *Rustome Lall* v. *Lalla Ganpat Lal* (2), the alienation by the mother was held to be good on the ground that the father was too poor to provide the marriage of the daughter, and the mother was obliged to find the money for celebrating the marriage of the daughter. This is quite in consonance with the principle of Hindu Law that a daughter should be married before she comes of age, and it is the duty of the father to see that she is married. If the father is too poor to do his duty, the mother could under the circumstances alienate her property for the purpose of getting her girl married. This would not support the contention of the respondent that the mother could also do the same thing for the son."

The learned advocate for the respondent rightly pointed out that this decision of the learned Judge Devadoss, J. was reversed on appeal in *Srinivasaraghavachariar* v. *Rajagopalachariar* (9). The decision of the appellate Court, however, proceeded on the ground of estop-

(4) [1909] 6 M. L. T. 158=3 I. C. 77.
(5) [1881] 6 Cal. 36=6 C. L. R. 429.
(6) [1910] 34 Mad. 288=20 M. L. J. 798=6 I. C. 240=(1910) M. W. N. 222.
(7) A. I. R. 1922 P. C. 261=44 All. 503=49 I. A. 383 (P.C.).
(8) A. I. R. 1926 Mad. 517.
(9) A. I. R. 1927 Mad. 438.

pel on the part of the plaintiff, the reversioner. The appellate Court did not consider the question of Hindu Law discussed by the learned Judge. The learned advocate for the respondent referred me to certain Hindu Law texts under which poor relations and other dependent members, whom a person used to maintain as being morally bound to do so, would after his death, be legally entitled to the maintenance from his heirs, provided he left sufficient property. He drew my attention tc Chap.11 of Sirkar's Hindu Law, where the text of Manu and Brahaspathi are quoted. The text of Manu is to the following effect:

"The father, the mother, the Guru, (an elderly relation worthy of respect), a wife, an offspring, poor dependents, a guest and a religious mendicant, are declared to be the group of persons who are to be maintained."

Elsewhere Manu has declared that:

"the aged mother and father, the chaste wife, and an infant child, must be maintained even by doing hundred misdeeds;"

Manu cited in Mitakshara II, 177. The case, therefore, of the aged mother and father, the chaste wife and infant child, stands on a different "footing from the poor dependents, a guest and a religious mendicant" mentioned in the text quoted. Bhrahaspathi's text is to the following effect:

"A widow inheriting her husband's estate should honour with food and presents (for their benefit) the husband's paternal uncle (and the like) venerable elderly relations, daughter's sons, sister's son and maternal uncle as well as aged and helpless persons, guests and females of the family."

In Vyavahara Madhaviyam, the text is translated as follows:

,'Let the widow honour the paternal uncles, preceptors, daughters'. sons and sister's sons of her husband, his maternal uncles, the old and the helpless, and the guests with food and drink: Setlur, Vol. 1, p. 389."

One is inclined to ask whether the above provisions are not merely advisory relating to moral duties, or whether they are legal duties which could be enforced in a Court of law. The reference to guests and helpless elderly persons would seem to indicate the former. As remarked by the Privy Council in the case reported in *Balwant Singh* v. *Rani Kishori* (10), at p. 285:

"Old Hindu Law text books and commentaries are apt to mingle moral and religious considerations not being positive laws, with rules intended for positive laws:"

see also the remarks of the Privy Council in "the-only-son-adoption case" reported in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (11), at p. 415.

In Mayne's Hindu Law S. 624, the passage from the judgment of the Privy Council in the case reported in *Collector of Masulipatam* v. *Cavali Venkata Narainappah* (12) at p. 550 is quoted:

"for religious or charitable purposes or those which are supposed to conduce for the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes; to support an alienation for the last she must show necessity."

In Trevelyan's Hindu Law it is mentioned at p. 206 that:

"an heir is legally bound to provide, out of the estate which descends to him, maintenance of such persons as the person from whom he inherits is legally or morally bound to support"

At pp. 463 and 466, the learned author notes certain matters as proper objects for the alienation of the property by a Hindu widow one of which is:

"to provide for the maintenance of dependent members of her family, whom her husband or other last full owner (as the case may be) was legally or morally bound to support, and for their marriages or other necessary religious ceremonies, on a reasonable scale having regard to the amount of the property and the position of the family."

At p. 205 it is pointed out that:

"grandsons have not as such, any right to be maintained by their grandfather, but apparently they have a right to be maintained out of his property if unable to maintain themselves, and granddaughters must be so maintained until marriage."

My attention has not been drawn to any reported case in which any Court has decreed maintenance to a daughter's son against the estate of the maternal grandfather in the hands of his widow (maternal grandmother) i. e., widow of the last male holder. As regards the texts quoted:

"Their tone is only preceptive, and the injunctions they contain are rather of ethical than of legal obligation,"

so far as daughter's sons are concerned. In the case before me there is the further circumstance that the plaintiff's father is a pleader possessed of sufficient property to maintain the plaintiff.

As regards the contention raised by the learned advocate for the respondent that the widow was bound to maintain "dependent members" as observed by the learned author (Sirkar Sastri) in his

(10) [1898] 20 All. 267=25 I. A. 54=7 Sar. 279 (P.C.).

(11) [1899] 22 Mad. 398=26 I. A. 113=7 Sar. 330.

(12) [1859-61] 8 M.I.A.529=2 W.R.61 (P.C.).

Hindu Law, that principle would apply only to persons who were actually residing with the last male holder and were in fact dependent on him. In the present case as I already remarked, it is not anybody's case that during the lifetime of the last male holder Lakshmayya, the plaintiff and defendant 3, or even their mother Subbamma were dependent of Lakshmayya in the sense described above. They were all living with Subbamma's husband in his family and, therefore, that principle has no application to the present case. Again there is the significant statement made by the District Munsif in para. 8 of his judgment, viz., that:

"the plaintiff's father is a pleader practising in this Court and it is admitted that he has sufficient property to maintain his sons."

In these circumstances, I do not think that any legal grounds are shown justifying defendant 2, in selling a portion of the lands belonging to the estate of defendant 1, to meet the expenses of the plaintiff's maintenance, upanayanam and marriage. The cases that decide that an indigent daughter, though married, is entitled to be maintained from her father's estate, in case her husband's estate is not able to maintain her, are not really relevant to the point.

The daughter's son is not a member of the last male holder's family, he belongs to the family of the daughter's husband. Nor could the daughter's son in the present case, be said to be a dependent member of the last male holder's family. Therefore the last male holder was not bound to maintain the daughter's son, and on his death his estate in the hands of his widow is not liable for the maintenance etc., of the daughter's sons. The Patna High Court in the case reported *Mt. Narainbali Kumri* v. *Ramdhari Singh* (13) decided, that

"outside Bengal, expenses for marriage of daughter's daughter whose father's father is alive and is in a position to arrange for the marriage, do not constitute such a legal necessity as will bind the estate left by a maternal grandfather."

The widow could not by her own voluntary act in bringing the daughter's son, the plaintiff, to her own house, contend that he is a dependent member and then claim to alienate part of the estate for expenses incurred in connexion with him. We have here no 'purpose connected with the husband's spiritual welfare'; nor, having regard to the circumstances of the plaintiff in relation to his father's wealth and position, have we to consider any moral claim on the last male holder's estate, which could be said to have assumed the form of legal obligation attached to the estate when the estate descended from the last male holder to defendant 2.

Defendant 2 was naturally anxious, after the death of her only daughter, to have the daughter's sons (plaintiff and defendant 3) live with her. One can understand her conduct in that respect. One can understand also her anxiety to start her daughter's son well in life by giving him proper education, etc. But I am bound to administer the law as I find it. Under Hindu Law, as at present administered, I do not feel justified in upholding the right claimed on behalf of a Hindu widow to alienate a portion of the estate for the purpose of the maintenance, education, upanayanam and marriage of her daughter's son, when his father is admitted to have sufficient property to do so himself.

The result is one which I should like to avoid if possible. The daughter's sons are the reversioners to this estate, and would be entitled to possession on the death of defendant 2 even now. The debts were incurred for the benefit of the plaintiff. The plaintiff's elder brother, defendant 3, has signed the agreement which preceded the sale and is the writer of the sale deed in favour of defendant 1. Defendant 3 is surely bound by the sale deed. If the plaintiff had not been a minor at the time, most probably he too would have joined in the agreement and the sale; but his minority at the time has practically furnished him with a ground for impugning the sale deed, though, as already remarked he was the person benefited by the same. The grandsons may often find the estate of their grandfather more useful to them for purposes connected with their education, etc. and they may not be fully benefited when the estate comes to them when they are old. But those are not matters by which I should be guided when I am called upon to apply principles of Hindu law as administered by Courts. I am therefore driven to the conclusion that the alie-

(13) [1916] 1 Pat.L.J. 81=20 C.W.N. 734=34 I.C. 277=3 Pat.L.W. 377.

nation in question is not binding on the plaintiff. Some arguments were advanced by the learned advocate for the respondent about the details of some of the debts mentioned in the sale deed. I, however, accept the findings of both the lower Courts that the debts were substantially incurred for the purposes mentioned by me.

I reverse the decision of the lower appellate Court and restore that of the District Munsif. The declaration will be granted that the alienation by defendant 2 in favour of defendant 1 evidenced by Ex. 4, dated 20th November 1918, would not be binding on the plaintiff and other reversioners of defendant 2's husband, late Lakshmayya, besides defendant 3 and other persons claiming under him. As regards defendant 3 and persons claiming under him, the same will be binding. In the particular circumstances, I award no costs to the plaintiff in any of the Courts; but I direct the parties to bear their own costs in all the Courts.

P.R.S./v.S. *Appeal allowed.*

A. I. R. 1930 Madras 292

KUMARASWAMI SASTRI AND WALSH, JJ.

B. Raghavendra Row and *others*—Plaintiffs—Appellants.

v.

Vobiah and *others*—Defendants—Respondents.

Appeal No. 108 of 1921, Decided on 18th July 1929, from decree of Sub-Judge, Bellary, in Original Suit No. 3 of 1920.

(a) Religious Endowments Act (20 of 1863), S 3—Public officer means public officer under Government of Madras.

The words "public officer" must, having regard to the other sections of this Act and to the provisions of Regulation 7 of 1817, mean public officer under the Government of Madras and not a public officer anywhere even outside British India, or a public officer outside the control of the Government of Madras. [P 294 C 1]

(b) Religious Endowments Act (20 of 1863), S. 3—Essentials for invoking S. 3, laid down.

Before S. 3 can be invoked, there should be two conditions satisfied, namely, that not only Regulation 7 of 1817 should be applicable, but also that at the time of the passing of the Act the nomination of the trustee, manager or superintendent should be vested in or exercised by the Government or any public officer, or such nomination should be subject to the confirmation of the Government or public officer. [P 294 C 1]

(c) Religious Endowments Act (20 of 1863), S. 3—To authorize temple committee to appoint trustee or to file suit for accounts case must come under S. 3.

To give jurisdiction to a temple committee to appoint a trustee or to file a suit requiring accounts from the trustee or directing transfer of property to trustee appointed by them, it must be shown that the case fell under S. 3. [P 294 C 2, P 295 C 1]

P. R. Ganapathi Aiyar—for Appellants.

V. S. Narasimhachari—for Respondents.

Kumaraswami Sastri, J. — This appeal arises out of a suit filed by the temple committee of Kudligi for a declaration that the suit temple which they say was called Hude Kampli Devaru is subject to the control of the plaintiffs, for directing the defendants to return to the manager who they allege was appointed by them, the properties of the temple, for accounts and other reliefs. The contesting defendants deny the plaintiffs' claim. Their case was that Kampli Devaru had no temple, that they had no concern with Kampli Devaru temple at Hude and the inam, that the right of appointing the pujari is in Mesa Naiks, that Kampli Devaru idol is permanently in Mysore territory and that the Court has no jurisdiction.

The suit was instituted in 1911. It came up twice to the High Court, as the suit was decided on preliminary questions. The Subordinate Judge who tried the suit, after both orders of remand, has found that Kampli Devaru is a Narasimha Saligrama image, which is the deity of the Mesa Naik caste, that it has no permanent shrine, that it is always on tour and that it has a temple and inam at Hude. He finds that the temple committee has or had no jurisdiction over this temple, that the temple was never under the control of the Board of Revenue and that the power of appointment of trustees was at least from 1800 to 1890 exercised by the Mysore Government and that no dharamakarta was ever appointed or confirmed by the Board of Revenue and dismissed the suit. Hence the appeal.

It is clear from the evidence that in 1810 the previous trustee or pujari was dismissed by the Dewan of Mysore and a fresh trustee was appointed. The order of the Dewan is on p. 30, Ex-P

(printed documents in appeal No. 186 of 1914). It refers to the dismissal of the first pujari's grandson, Dosa Gopaya and the appointment of Dasaya. Then it proceeds as follows :

"In future if to instal the patta of Gosi God, Kampli God, or any other God, they should come and inform you as well as the Sircar of it; a hachada and paga should be presented from the Sircar and when the relatives come and inform, you should have the patta installed ; when you instal patta you shall receive the najar usually payable, therefore, by them to the Sircar. When making the patta installation, careful enquiry should be held in the presence of respectable persons of the place and after a decision hachada and paga should be presented from the Sircar and the patta should be conferred."

This is dated 28th March 1810. The first person appointed continued in office until 1853. His son was the second pujari from 1853 to 1874. It appears that in accordance with the order of 1810, he was recognized as the trustee and the customary honours were given to him. Then his son Obaya was the pujari from 1874 to 1879 and was succeeded by his elder brother from 1879 to 1907. In 1907, disputes arose as to the successor. Several members of the community did not want the sons of Peddanna to be appointed, owing to the alleged immorality of their mother and there were various proceedings, civil and criminal, in the Courts of Mysore. The Subordinate Judge has found on the evidence that for nearly a century no sort of control was exercised by the Board of Revenue, or by any officials in British India, as regards the management of the temple and the appointment of trustees, that till 1890 the Mysore Government officials were informed of the persons who were selected by the community as trustees and they were recognizing them, that in 1890 the Dewan thought the Mysore Government did not concern itself with this endowment, as it was not one of the temples which had any grant from or subject to the control of the Mysore Government. Therefore, the question for determination in this case is whether on these facts which the Subordinate Judge has found and which we see no reason to differ from. the temple committee have got any right in the matter. The Subordinate Judge has given reasons for holding that the temple committee has no right. He deals with this question in para. 25 of the judgment onwards. We think that the decision of the Subordinate Judge on this point is right.

Act 20 of 1863 was an Act passed for the purpose of enabling the Government of India to divest itself of the management of religious endowments. It begins by saying :

"Whereas it is expedient to relieve the Boards of Revenue, and the Local Agents in the Presidency of Fort William in Bengal, and the Presidency of Fort St. George, from the duties imposed upon them by Regulation 19, 1810 of the Bengal Code and Regulation 7, 1817 of the Madras Code, so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindu temples, and for other religious uses, the appropriation of endowments made for the maintenance of such religious establishments, the repair and preservation of buildings connected therewith, and the appointment of trustees or managers thereof ; or involve any connexion with the management of such religious establisments."

Section 3 enacts that :

"In the case of every mosque, temple or other religious establishment, to which the provisions of either of the regulations specified in the preamble to this Act are applicable, and nomination of the trustee, manager or superintendent thereof, at the time of the passing of this Act, is vested in, or may be exercised by the Government or any public officer, or in which the nomination of such trustee, manager or superintendent shall be subject to the confirmation, of the Government or any public officer, the Local Government shall as soon as possible after the passing of this Act, make special provision as hereinafter provided."

The provisions are, inter alia, for the appointment and constitution of temple committees as provided for by S. 7. S. 4 enacts that:

"in the case of every such mosque, temple or other religious establishment which, at the time of the passing of this Act, shall be under the management of any trustee, manager or superintendent, whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act. transfer to such trustee, manager or superintendent, all the landed or other property which, at the time of the passing of this Act, shall be under the superintendence or in the possession of the Board of Revenue or any local agent and belonging to such mosque, temple or other religious establishment, except such property as is hereinafter provided.".

and on such handing over, it enacts that the power and responsibility of the Board shall cease. It has been found by the Subordinate Judge, and we accept the finding that the Board of Revenue never exercised any control over this ndowment, nor was the power of ap-

pointment of trustee, manager or superintendent vested in or exercised by the Government of Madras, or by any public officer under the Government of Madras. The contention of Mr. Ganapathi Aiyar for plaintiffs is that a "public officer", does not mean a public officer, under the Government of Madras, but means any public officer, wherever a public officer may exercise his function. He goes to the length of arguing that a public officer outside British India would also be a person in the contemplation of S. 3 and that any institution, the appointment of whose trusteeship is vested in or controlled by any public officer, whether in British India or outside, would fall under Act 20 of 1863 and give jurisdiction to the temple committee appointed under S. 7. I am unable to agree with this contention. I find it difficult to see how the Act can apply, so as to give jurisdiction to the Board of Revenue or the temple committee, in cases where a public officer subject to the control of another Government, presidency or province has been exercising the powers of of appointment or control. The words "public officer" I think must, having regard to the other sections of this Act, and to the provisions of Reg. 7 of 1817, mean public officer under the Government of Madras and not a public officer anywhere, even outside British India, or a public officer outside the control of the Government of Madras. I have already referred to the preamble and it refers to cases to which Reg. 7 of 1817 applied; and before S. 3 can be invoked, there should be two conditions satisfied, namely, that not only the Reg. 7 of 1817 should be applicable, but also that at the time of the passing of the Act the nomination of the trustee, manager or superintendent should be vested in, or exercised by, the Government or any public officer, or such nomination should be subject to the confirmation of the Government or public officer.

In the preamble to Reg. 7 of 1817, we find reference to the provinces immediately dependent on the Presidency of Fort. St. George. S. 2, vests in the Board of Revenue the general superintendence of all endowments, etc., in the several provinces dependent on the Presidency of Fort St. George. S. 3 says that it is the duty of the Board of Revenue to take measures to ensure that religious establishments are properly maintained and that other trusts are properly carried out. S. 7 enables the Board of Revenue to have local agents. S. 8 says that the Collector shall be one of the local agents and powers will be given to the Government to appoint other local agents if it so desires. S. 11 says that the local agent shall report to the Board of Revenue the vacancies and casualties as they may occur and other particulars as to whether the line of descent is by hereditary right or by election. S. 12 refers to cases where the nomination is vested in Government or public officer and S. 13 says what is to be done on the receipt of the report. It is clear from a perusal of the various sections referred to that the Madras Reg. 7 of 1817 was confined to the Government and territories administered by the Government of Fort St. George, and the "public officer" there was a public officer, subject to that Government and not any public officer, and in construing S. 3, I think it is clear that we must take "public officer" there to be a public officer who was exercising his functions under Reg. 7 of 1817.

Section 4 simply says that where S. 3 does not apply, i. e., where the Government would not have any power to transfer the management to local committees, any endowment which then belonged to such trusts shall be made over to the trustee in charge of the endowment and the Board shall divest itself of all concern in the management. The scheme of this Act, therefore, is that in all cases where Reg. 7 of 1817 applied, or in cases where the appointment of trustee was either made by the Government of Madras or one of its officers, or where the confirmation of such appointment had to be made by Government or by its officers, such powers were transferred to temple committees; in all other cases, property which was subject to the endowment was transferred to the then legally entitled trustee and the Board of Revenue had no other control, over such property. It is therefore clear from the scheme of this Act that to give jurisdiction to temple committees, they must show that the case falls under S. 3, otherwise it is difficult to see how a temple committee

can either appoint a trustee or file a suit like the present one, requiring property to be handed over to the trustee whom they had no power to appoint. I am, therefore, of opinion that the decision of the Subordinate Judge is right as the temple committee had no right to institute this suit.

The appeal fails and is dismissed with costs of respondents 1, 5 and 6.

Walsh, J.—I agree.

P.R.S./V.B. *Appeal dismissed.*

A. I. R. 1930 Madras 295

RAMESAM AND JACKSON, JJ.

(*Thazhekkat Manayil Karnavar*) *Narayanan Thirumumpu* and *another*—Defendants—Appellants.

v.

Poonthuruthi Edavalath Anadil Kizhakkinakath Kammaran Mootha Poduval and *others*—Plaintiffs—Respondents.

Appeal No. 127 of 1926, Decided on 12th September 1929, from decree of Sub-Judge, Tellichery, D/- 27th February 1926, in Original Suit No. 18 of 1925.

Hindu Law—Religious endowment—Management—Suit against co-trustees for account—No allegation of breach of trust—Suit is not maintainable.

A mere suit, asking the co-trustees to render an account of their management, without any allegation of breach of trust which has been committed or is about to be committed, is not maintainable and to hold that such a suit is maintainable is to allow any trustee wantonly to sue his co-trustees for accounts: *A. I. R.* 1927 *Bom.* 424, *Appr.*; *A. I. R.* 1922, *Mad.* 17 (*F. B.*); *A. I. R.* 1921 *Mad.* 388 and *Mad. Appeals Nos.* 323 and 368 *of* 1919, *Dist.*,

[P 298 C 1]

K. P. M. Menon and *K. Kuttikrishna Menon*—for Appellants.

P. Govinda Menon—for Respondents.

Judgment.—This appeal arises out of Original Suit No. 18 of 1925 on the file of the Sub-Court of Tellichery, which was a suit for an account of the management of the Payyanur Devaswam by defendants 1 to 6 in their capacity as uralers from 1909, for the recovery of the sum that might be found due as a result of the accounts from the defendants personally and from their family property and for an injunction restraining them from interfering with the management of the devaswam by plaintiff 11 who was appointed samudayi by plaintiffs 1 to 10. The claim in respect of plaintiff 11 was dismissed by the Subordinate Judge, but the relief in respect of the account was decreed. Defendant 1 filed the appeal. During the pendency of the appeal he died and his successor, the present karnavan of the Thazhekkat mana, has been added as his legal representative, appellant 2.

The suit devaswam is known as "Grama Kshetram" i. e. village temple, and is a famous temple of North Malabar. It was originally managed by the village council consisting of the karnavans of 16 Nambudri manas and 15 Poduval Karalars, 10 of them being Mootha Poduvals and 5 Elaya Poduvals. Ten Poduval families of the village are each entitled to send one Mootha Poduval to the temple council, the nominees being the karnavans thereof. Five of the said families have the further privilege of sending their representatives, the senior anandravans, to the same council who would be styled as "Elaya Poduvals." The first seven plaintiffs in this suit are Mootha Poduvals and plaintiffs 8 to 10 are Elaya Poduvals. Plaintiff 11 also claimed to be an Elaya Poduval. After the suit was filed plaintiff 4 became a Mootha Poduval after having performed the Moopu Thozhal ceremony and his place as Elaya Poduval devolved upon plaintiff 12. Defedants 1 to 6 are karnavans of six of the Nambudri manas and they are admitted to be uralers. Defendants 7 to 13, are, some of them, Mootha Poduvals and some Elaya Poduvals have not performed the Moopu Thozal and Elama Thozal ceremonies. The plaintiffs claimed that defendants 1 to 6 should render them an account in respect of the management of the devaswam from 1909. The defendants pleaded that defendant 1 acquired the hereditary right of samudayam by prescription. They also pleaded that there were seven other manas who have co-uraima right in the temple and the suit is bad on account of their non-joinder. They denied the right of plaintiff 11 to manage the temple and the liability of defendant 1 to render an account. As already mentioned, the Subordinate Judge found that the appointment of plaintiff 11 could not be upheld and dismissed that portion of the suit. In appeal the appellant urged several objections; (1) that the karnvans of the Tazhekkat mana are perpetual and hereditary samudayis, (2) that the suit is

had for non-joinder on account of not having impleaded at least two Nambudris, namely, the karnavans of Thavath and Thattiyeri manas, (3) that a suit for accounts by a uraler against a co-uraler without an allegation of breach of trust or a threatened breach of trust is not maintainable, (4) that the tarwad of defendant 1 is not liable for the misfeasance of defendant 1 unless the tarwad is in possession of the assets of defendant 1 or unless it is shown that the tarwad was directly benefited by getting possession of the funds belonging to the trust, and (5) that, in any event, as defendant 1 became karnavan only in December 1922 the relief for an account should not extend beyond the period from December 1922 to October 1924 when defendant 1 died.

There have been continuous litigation between the Poduval karalars on the one hand and the Nambudri Tirumumpus (uralars) on the other for a number of years in respect of this devaswam. For a long time the karnavans of Thazekkat mana were claiming to be the perpetual samudayis of the devaswam under a document which has been found not to be genuine and latterly defendant 1 has been asserting the right by reason of adverse possession. Though some of the Nambudri manas became extinct, attempts to revive some of the extinct manas by adoptions into those manas seem to have been made. One such attempt in respect of the Tayara Mangalath mana seems not to have been questioned and to have been recognized even by the Poduvals. The karnavan of that mana is defendant 2 in the present case. In respect of two other manas, the Thavath and Thattiyeri manas, similar adoptions were set up and the persons so affiliated into these manas having married female members of the Thazhekkat family were allowed to take part in the management of the trust. They were joined as parties in Exs. 1, 2, and 3 which were kanom deed and in Ex. 11, a kuzhikanom deed, and in fact wherever the document did not stand in the name of defendant 1 alone but in the name of several uralers they seem to have been allowed to come in. But the Poduvals never admitted their rights. On one occasion while not admitting their rights, the Poduvals impleaded these two individuals as defendants. That was a suit for defining the ceremonies which a karnavan has to undergo for becoming a Mootha Poduval and for an injunction against the uralers. The judgments in connexion with that litigation are Exs. HH, JJ and KK (AAA being the decree). It came up on second appeal to the High Court. In another litigation the suit was by some of the uralers impleading the karnavans of the Thavath and Thattiyeri manas as defendants. The other defendants pleaded that these two had no uraima right and the District Munsiff found against the right (Ex. 7). On appeal by them the Subordinate Judge of North Malabar found that there was a usage according to which their adoption into the Nambudri families of Thavath and Thattiyeri manas should be recognized as valid and allowed the appeal (Ex. 8). We are now invited to consider the question of the validity of the adoption of these two individuals into their respective manas aud if we find them valid, to dismiss the suit on the ground of non-joinder. It is even suggested that we should first implead them as parties so as to avoid the inconvenience of deciding the question behind their back. We may at once say that we do not see any reason to follow the latter course and as we think that the case can be disposed of on other grounds, we do not feel it necessary to decide on the status of these two individuals. They have given evidence as D. Ws. 4 and 9 showing that they were recognized. Ex. DD is another judgment in a suit in which they joined as plaintiffs, but nothing was decided. In our opinion this question of non-joinder among other questions in the case need not be disposed of in this suit as we think that the suit can be decided on simple grounds.

It is contended for the appellant that a mere suit for accounts against a trustee by a co-trustee without an allegation of breach of trust or threatened breach of trust is not maintainable. Para. 5 of the plaint alleges that the uralers :

> "have neither increased funds nor acquired property to the devaswam . . . . . On demand being made of defendants 1 to 6 to render accounts and to hand over to the devaswam the money on hand for the period the uralers exclusively conducted the management without the junction of the karalars, they have not done so. They have not even sent a reply for the registered notice sent to them."

Defendants 2 to 6 say that for a long time, i. e., from the time when the temple was restored after its destruction during the invasion of Tippu Sultan, defendant 1's mana was practically looking after the management and conducting the affairs of the temple and therefore they are not liable. The Subordinate Judge has found that defendants 2 to 6 have never taken part in the management of the devaswam though they are nominally uralers. There is a general allegation in para. 5 of the plaint that :

"As defendants 1 to 6 and their predecessors . . . . . appropriated the devaswam funds to their tarwads, the said defendants 1 to 6 are liable to the devaswam even in the capacity of karnavans of their manas."

This is very general allegation for the purpose of making not only defendants 1 to 6 personally liable but also liable in the capacity of karnavans. It is not an allegation made for the purpose of making out a breach of trust or a threatened breach of trust justifying a suit for an account. The allegation is too general and vague and does not relate to any particular period or particular amount and it is not clear whether any one of the defendants is charged or their predecessors are charged with the appropriation of funds. It is true that it has been held by this Court that a suit by a trustee against a co-trustee does not require the sanction of the Advocate General of the Collector under S. 92, Civil P. C.: vide *Appanna Poricha* v. *Narasing Poricha* (1), approving *Meenakshi Achi* v. *Somasundaram Pillay* (2). But it was not decided in those cases that any suit by a trustee against a co-trustee on any cause of action whatever is maintainable. In the present case the cause of action is said to be the appointment as samudayi of plaintiff 11 on 14th June 1924, by a Yogam consisting of the plaintiffs and defendants 7, 8 and 9 and other karalars and the obstruction of the plaintiff 11. The appointment of plaintiff 11 was not upheld by the Subordinate Judge. The question arises whether there is any other ground for maintaining a suit by the other plaintiffs against the defendants. In the Full Bench decision in *Appanna Poricha* v. *Narasing Poricha* (1), the right of the plaintiff as co-trustee was denied. The plaintiff was in possession of the mutt only; but the defendants got possession of the lands and the plaintiff had to incur expenses in connexion with the management of the mutt out of his own pocket. He had therefore to sue for a declaration that he was a co-trustee entitled to joint possession of the lands belonging to the mutt, for reimbursement of the moneys spent by him, for a scheme for the future management and incidentally for an account. In *Meenakshi Achi* v. *Somasundaram Pillay* (2) also, the suit was for a declaration of the plaintiff's right to share in the management and for joint possession of the trust properties, the plaintiff's right being denied by the defendants. In fact there was an alternative claim in that suit that the plaintiff was solely entitled to the management.

The respondent also relied on unreported judgments of Wallis, C. J., and Oldfield, J., in *Appeals Nos.* 323 and 368 *of* 1919. In *Appeal No.* 323 the parties were entitled to possession of the properties because his turn fell in. In *Appeal No.* 368 also the facts were similar. I do not see how these cases can help the respondents. In the present case there is no allegation of any specific breach of trust or threatened breach of trust on the part of the uralers so as to justify an apprehension on the part of the plaintiffs that they would also be held liable for the breach on the ground that they did not take proper action against their co-trustee who was himself not guilty of the breach and it therefore justifies an action by one co-trustee against another to prevent such a breach : vide Lewin on Trusts, p. 304, and Underhill, Edn. 7 397. These authorities relate to private trusts. But apparently the same principles would apply to public trusts also. In the case of public trusts one mode of investigation provided in England into the conduct of one trustee at the instance of a co-trustee is by applying to the public trustee for an investigation and audit of the conditions and accounts of the trust : vide Art. 441, 28 Hals. 217. Even in the case of a public trust it is said that any single trustee, when aware that his co-trustees are about to commit a breach of trust, may apply to

(1) A. I. R. 1922 Mad. 17=45 Mad. 113 (F.B.).

(2) A. I. R. 1921 Mad. 338=44 Mad. 205.

the Court to prevent it : vide Tudor on Charities and Mortmain, p. 249. Where a breach has been committed no doubt he can also sue. Where his own position as co-trustee is denied he can also sue. But a mere suit asking the defendants to render an account of their management without any allegation of breach of trust which has been committed or is about to be committed does not seem to be maintainable and to hold that such a suit is maintainable will be to allow any trustee wantonly to sue his co-trustees for accounts. The moment the litigation in respect of one period is finished another litigation in respect of another period will commence and so on ad infinitum. I do not think the policy of the law is to allow such a state of things. In *Jamnadas Gordhan Das* v. *Damodaradas Chunilal* (3), it was held by the Bombay High Court that a trustee cannot be regarded as accountable to a co-trustee and all that a co-trustee can require is that he should have inspection of all the papers, documents and accounts relating to the trust estate in the hands of his co-trustee. We agree with this decision. We think that a suit for a bare account which is the character of the present suit after the right of plaintiff 11 was negatived without any further allegation is not maintainable. On this ground we allow the appeal and dismiss the plaintiff's suit with costs throughout.

Memorandum of Objections.

The respondent filed a memorandum of objections questioning the finding of the Subordinate Judge about the validity of the appointment of plaintiff 11. When the appeal was argued, it was argued on the footing that the finding of the Subordinate Judge about plaintiff 11 should stand. No indication was given by the respondents that they proposed to question that finding. Nor was any argument addressed on the memorandum of objection. Apart from this we think the finding is right. Defendant 2 having succeeded to the karnavanship of his mana, ipso facto becomes a uralar, no ceremonies being necessary for the Nambudris. It is for the Poduvals to give notice to the uralers and to find out who the uralers are at their risk. The notice to the predecessors of defendant 2 ceases to operate with his death. The memorandum of objections is dismissed with costs.

P.R.S./V.S. *Appeal allowed.*

(3) A. I. R. 1927 Bom. 424.

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* A. I. R. 1930 Madras 298

RAMESAM AND JACKSON, JJ.

(*Chodavarapu*) *Subba Rao* and *others* —Defendants 1 to 4—Appellants.

v.

Veeranjaneyaswami—Plaintiff— Respondent.

Appeals Nos. 33 to 36 of 1926, Decided on 29th January 1929, from decree of Addl. Sub-Judge, Kistna, in Original Suit No. 11 of 1925.

(a) Limitation Act, Art. 134— Transfer under Art. 134 must be valid transfer—Time runs from such valid transfer.

Under Art. 134 there must be a valid transfer between the transferrer and the transferee though it might not be operative as against a trust or any other person, and the time runs only from the date of the transfer. [P 299 C 2]

(b) Transfer of Property Act, S. 51 — Principle underlying S. 51 explained.

The main principle of S. 51 is that a person must show that he believed that he was entitled to the land in such a way that he is not to be disturbed, whether it is a sale or perpetual lease he claims under : *Attorney General* v. *Davey* 19 *Beav* 521 ; *Attorney General* v. *Prattyaman* 19 *Beav* 538, *Rel. on.*; 6 *M. H. C. R.* 245; 12 *Mad.* 320, 17 *Bom.* 736 ; 21 *Bom.* 749 ; 24 *I. C.* 790 and 35 *M. L. J.* 281, *Ref.* [P 301 C 1]

*** (c) Part performance—Doctrine of part performance is only used to complete intended transfer—It is not operative against third persons.**

The doctrine of part-performance is only ussd to complete an intended transfer between the transferrer and the transferee, where there is no other objection to complete the transaction ; it cannot be used to complete a transaction against a third person such as the idol of a temple of a cestui que trust or a minor against whom it cannot be regarded as operative. [P 301 C 2]

(d) Evidence Act, S. 115 — Fraud committed upon creditors — Judgment-debtor cannot claim ownership of house (subject of fraud) or equitable interest in sums spent for building it.

Where the creditors have been successfully defeated by showing that the attached house did not belong to the judgment-debtor, the judgment-debtor cannot claim either the ownership in the whole house and site or the equitable interest to the extent of the sums spent in building the house. [P 300 C 1]

(e) Limitation Act, Art. 134 — Property belonging to idol transferred—Rent reserved being only eight annas — Such rent is not valuable consideration.

Where property belonging to the idol is transferred and the rent reserved in favour of the idol of the temple is only eight annas, such rent is not valuable consideration within,

the meaning of Art. 134: *A. I. R.* 1922 *P. C.* 123, *Rel. on.* [P 300 C 1]

P. R. Ganapathi Iyer and *A. Venkachalam*—for Appellants.

G. Lakshmanna and *B. T. M. Raghavachari*—for Respondent.

Ramesam, J.—These appeals arise out of the same original suit, O. S. No. 61 of 23, on the file of the Principal Subordinate Judge's Court of Masulipatam. The plaintiff sues as the trustee of Sri Veeranjaneyaswamuluvaru temple at Gudivada. Defendant 1 is in possession of item 1, defendant 2 is in possession of item 2 and defendants 3 and 4 are in possession of items 3 and 4, these being the four items which are the subject matter of the suit. The plaintiff's adoptive father Kameswara Pakayya and his father one Brahmaraju, endowed certain lands belonging to them in Gudivada for the purposes of the temple. They built the temple in 1886 and conducted it for three years. In 1889 they executed a gift deed Ex. A, by which they endowed the suit land for the purposes of the temple, making themselves dharmakarthas. The document shows that some portions were intended to be built upon. A thatched house was built upon item 1 in 1893. Afterwards, some time in 1905 it was replaced by a tiled house: vide D. W. 1. The evidence shows that from the beginning there was an intention on the part of Brahmaraju and Kameswara Rao to give item 1 to defendant 1 who is the brother's daughter of Kameswara Rao. A house was built upon item 2 in 1892. The evidence shows that it was intended originally for a sister of Brahmaraju, defendant 2 being her grandson. Item 3 was given to defendants 3 and 4 by means of a rent letter Ex. V (c), which purports to grant a perpetual lease of that item reserving an annual rent of Rs. 2. This was in March 1913. Item 4 is a vacant site placed in the possession of defendants 3 and 4 by a letter Exs. V (b), dated March 1910. It appears that there was a scheme suit in respect of the temple, and after that suit was disposed of the present plaintiff filed this suit to recover the various items from the respective defendants in possession. The lower Court granted a decree against the defendants and each of the defendants has filed a separate appeal. Appeal 33 is by defendant 2, Appeal 34, is by defendant 3, Appeal 35 is by defendant 4 and Appeal 36 is by defendant 1.

Each of the items will now be taken up for consideration. In the case of item 1, as I have already stated, a tiled house was built upon it in 1905. In 1913 Kameswara Rao applied to the chairman of the union to transfer the house to the name of defendant 1. In that document he says:

"It had been assigned by my father himself to my sister's son Boddapati Ponniah (husband of the said Ambamma) . . . The said house and site stand nominally in my name in the accounts and the tax is being paid through me and the entry in the accounts stands in my name but neither I nor my heirs, have any right in respect to it. It belongs to the said Boddapathi Ambamma herself."

The chairman ordered the change of name by an endorsement Ex. 1 (b), on 26th January 1914. There was no registered instrument transferring the right to the house to defendant 1 nor is it possible to regard such possession as defendant 1 and her husband had up to 1913 as adverse to Brahmararaju or his son Kameswara Rao. Under Art. 134, Lim Act, assuming for the present that the article applies to the case of a temple, there must be a transfer and time runs only from the date of transfer. This means that there must at least be a valid transfer between the transferrer and the transferee though it might not be operative as against a trust or any other person. Here we have nothing of the kind. The present suit which was filed in 1923 is within 12 years from Ex. 1 (b). It cannot be said that the transfer was made for any necessity binding upon the trust. The result is this appeal must fail so far as item 1 is concerned.

Taking up item 2, we find from the account books Exs. 3 and 3 (a) that some money was spent on the construction of a house by defendant 2's father who was then employed elsewhere and used to remit money to Brahmararaju and Kameswara Rao. The genuineness of these accounts is attacked by the respondents but we think it is unnecessary to say anything on this question. Assuming they are genuine and assuming that some money was spent by defendant 2's father and by defendant 2's grandmother: vide Ex. 4 series, on the

construction and upkeep of the house we find that some time prior to 1906 the house was attached by certain creditors of defendant 2 and then a claim petition was filed by Kameswara Rao claiming that the site belongs to him and the house was constructed by him and that defendant 2's father had nothing to do with the house. This claim petition was allowed. Obviously, the claim petition was instigated by defendant 2 himself. The creditors having been successfully defeated, it does not lie in the mouth of defendant 2 to say now that he possessed any kind of interest in the house after the order on the claim petition. He cannot claim either the ownership in the whole house and site or the equitable interest to the extent of the sums spent in building the house. In 1906 Ex. C was executed by Kameswara Rao in favour of defendant 2 in which these facts are set forth, and the house was purported to be transferred by the document. This document is registered and therefore there is no question of there being a valid transfer as between the transferrer and the transferee. The document reserves a rent of 8 annas a year payable to Sri Veeranjaneyaswamuluvaru and the transferee is to pay the Government revenue himself which comes to about 7 annas proportionately to the area of the site.

Now, by 1906 the town of Gudivada had altered. In 1886 it was a mere village. Some time about 1892 the District Munsiff's Court was opened and other public offices also have been existing there. A number of houses were built. As I have already said there was already a tiled house on item 2. It cannot be said that the only rent of 8 annas reserved in favour of the idol of the temple is a valuable consideration within the meaning of Art. 134. In *Vidya Varuthi* v. *Baluswami Ayyar* (1) it was observed by the Judicial Committee in respect of lands which were the subject matter of that case that an annual rent of Rs. 24 could not be regarded as a valuable consideration. In that case the land was six kulis in extent and the rent reserved was Rs. 24 at the rate of Rs. 4 a kuli. The permanent lessee afterwards sub-leased them for Rs. 1,250 In the present case on the footing that by the date of Ex. C the whole of the items belonged to the temple it cannot be said that a rent of 8 annas a year is other than a mere cloak to cover what was really intended to be a gift to defendant 2. Therefore, the terms of Art. 134 of the Act are not satisfied. The respondent argued that Art. 134 does not apply to a temple at all relying on the decision in *Vidya Varuthi* v. *Baluswami Ayyar* (1). That question has been very elaborately argued before us but we do not think it necessary to decide in this appeal whether Art. 134 applies generally to temples. The plaintiff's case is that there is a specific trust under Ex. A. It is argued that Art. 134 would apply. Though Art. 134 may apply to a specific trust for a temple, the other conditions are not satisfied here. Mr. Ganapathi Iyer appearing for the appellant argued at the end of the case that if Art. 134 does not apply Art. 144 may apply. But we think if the conditions were satisfied, Art. 134 is the proper article because we find there is a specific trust and if the conditions are not satisfied there is no limitation at all. On this ground the appeal in respect of item 2 fails.

The next item is item 3. A house was built upon this item and an account book was produced as Ex. 8 in respect of this item by defendant 3's husband. The evidence including even the plaintiff's evidence shows that defendant 3 was not a poor woman and however much Kameswara Rao wanted to help his daughters it does not follow that we must assume that defendant 3 was unable to incur the expense of building a house. We have no reason to suspect the genuineness of Ex. 8. It is true that defendant 4 does not appear to be a well-to-do lady ; but defendants 3 and 4 were acting together, their interests were never separated except in filing the appeals and even if one of them is not well-to-do we must find that defendants 3 and 4 were together able to incur the expenses of building a house on item 3. Ex. 8 shows that a sum of Rs. 1,470-15-0 was spent in building the house. There is no question of the title of defendants 3 and 4 in respec of this item being completed by pre-

(1) A. I. R. 1922 P. C. 123=44 Mad. 831=48 I. A. 302 (P. C.).

scription. The only question is whether we should not allow the value of the building in favour of the appellants before the plaintiff can get a decree. The respondent relied on three decisions of this Court *Perumal Gramani* v. *Mahamad Kasim Sahib* (2), *Govindswami* v. *Ellinajammal* (3) and *Venkatappier* v. *Ramaswami Iyer* (4), in which it has been held that the word "absolutely" in S. 51, Transfer of Property Act shows that the person entitled to the equity under that section must show that he believes he has absolute and not limited interest in the property. In the of course of the argument it was pointed out by my learned brother (Jackson, J.) that this section was based upon Act 11 of 1855 which applied only to cases governed by English Law. In that Act the words used are :

"If any person shall erect any building or make an improvement upon any lands held by him bona fide in the belief that he had an estate in fee simple or other absolute estate."

This shows that the main principle of this section is that a person must show that he believed that he was entitled to the land in such a way that he is not to be disturbed, whether it is a sale or perpetual lease he claims under. There are a number of English cases referred to before us in which tenants were held entitled to such improvements. I will only refer to one decision in *Attorney General* v. *Davey* (5), though this decision was reversed by the House of Lords on another point. Another is *Attorney General* v. *Prattyaman* (6), in which it was held that the lessee was entitled to the improvements though the lease was not actually completed. The case of a lease is therefore an a fortiori case. In *Mahalatchmi Ammal* v. *Palani Chetti* (7), and *Kunhammad* v. *Narayanan Mussad* (8), it was held that a tenant was entitled to improvements. A similar view was taken in *Dattatraya Rayaji* v. *Shridhar Narayan* (9), and *Dattaji* v *Kalka* (10), and two decisions of this Court, namely, *Gopalakrishna Ayyar* v. *Suhirtha Theenathara* (11), and *Tharasi Ammal* v. *Solai Ammal* (12), also take the same view. We prefer these cases to the other cases relied on by the respodnent and hold that before the plaintiff can eject defendant 3 he should pay to defendants 3 and 4 the present cost of the improvements effected on the site by way of the construction of the house. We direct the lower Court to estimate the cost of building the house now existing on the item. The plaintiff must pay the value of the improvements before taking possession of the house.

We now come to item 4. This item was placed in the possession of the appellants in March 1910; but there was no deed of transfer beycnd Ex. 5 (b) which is a mere letter and was not registered. Even Art. 144 cannot help the appellants so far as this item is concerned because the whole oral evidence does not show that anything was done upon this item so that there is not even adverse possession so far as this item is concerned. The appeal therefore fails in respect of item 4 also.

One argument is addressed by Mr. Ganapathi Ayyar, namely, that in the case of items 1, 3 and 4 though there is no registered instrument, as possession was given the doctrine of part performance as has been laid down in the Full Bench case in *Vizagapatam Sugar Development Co.* v. *Muthurama Reddy* (13) might be applied. But that doctrine is only used to complete an intended transfer between the transferrer and the transferee, where there is no other objection to complete the transaction. It has never been used to complete a transaction against a third person such as the idol of a temple or a cestui que trust or a minor against whom it could not be regarded as operative.

The result is Appeals Nos. 33 and 36 are dismissed with costs. In the lower Court, they will be liable only for the plaintiff's costs referable to the items separately. In Appeals Nos. 34 and 35 we call for a finding from the lower Court as to the present cost of the

(2) [1915] 28 I. C. 840.
(3) [1916] 1 M. W. N. 180=34 I. C. 1.
(4) [1919] M. W. N. 548=52 I. C. 517=10 M. L. W. 137.
(5) [1854] 19 Beav. 521=4 De. G. & J. 136.
(6) [1854] 19 Beav. 538.
(7) 6 M. H. C. R. 245.
(8) [1889] 12 Mad. 390.
(9) [1892] 17 Bom. 736=(1892) P. J. 348.
(10) [1897] 21 Bom. 749.
(11) [1914] 24 I. C. 790.
(12) [1918] 35 M. L. J. 281=7 M. L. W. 178=43 I. C. 643=(1918) M. W. N. 46.
(13) A. I. R. 1924 Mad. 271=46 Mad. 919 (F.B.).

improvements in the house on the site. Two months and ten days.

P.R.S./V.S. *Order accordingly.*

A. I. R. 1930 Madras 302

WALLACE, J.

Union Board, Devakotta — Plaintiff — Appellant.

v.

A. L. A. R. R. M. Arunachalam Chettiar—Defendant—Respondent.

Second Appeal No. 88 of 1926, Decided on 19th September 1929, from decree of Sub-Judge, Devakotta, in Appeal Suit No. 18 of 1925.

Madras Local Boards Act (14 of 1929). Ss. 235 and Sch. 10, R. 13—Union Board not validly constituted on date of suit—Union Board has no locus standi to maintain suit with regard to matters that vest in it under new Act.

The phrase "same Local Board" implies that there must have been a Local Board of the nature under the old Act, and since there was no Union Board under old Act, unless the Union Board was validly constituted on the date when particular suit was filed, the Union Board has no locus standi to maintain a suit in regard to matters which vest in it under the new Act. [P 302 C 2]

K. Bhashyam Iyengar—for Appellant.

V. Rajagopala Iyer—for Respondent.

Judgment.—The question for decision in this second appeal is whether the plaintiff has a right to sue. The plaintiff is the Union Board of Devakotta and sues to have it declared that the decision of the Survey Department that a certain plot of ground is the property of the defendant and is not public road vested in the plaintiff is a wrong decision, and for consequential reliefs. Both the lower Courts dismissed the suit on the ground that the plaintiff has no locus standi to maintain it and the plaintiff appeals.

The decision of the Survey Officer was on 12th May 1920. The plaint was presented on 6th June 1921 and is in time, but the ground for the lower Court's decision is that on the date of the plaint there was no Union Board validly constituted in which the right of action vested, and therefore no Union Board which could validly maintain the suit. The party who represented before the Survey Officer the claim of the public to the plot was the Taluk Board. The question for decision is whether between the date of his decision and the date of the plaint the right of action which was vested in the Taluk Board on the date of the decision had validly passed to the present plaintiff.

The old Local Boards Act (5 of 1884) set up the classes of Local Boards, the District and the Taluk Board: see definition of "Local Board" in S. 2 (5). These under S. 27 were corporate bodies in whom public property could be vested. They could make contracts and sue and be sued. The Act also set out rules for the appointment of Panchayats, that is, bodies of persons constituted for a Union: see S. 3 (vi) in areas declared by the Act to be Unions, but these Panchayats were not incorporated Local Boards, nor was public landed property vested in them. The new Act 14 of 1920 sets up three classes of incorporated Local Boards, District Boards, Taluk Boards and Union Boards: see (S. 6). S. 60 thereof vests in the Union Board all public roads in its area. The Union Board of Devakotta, the present plaintiff, was constituted under this Act on 1st April 1922 (see Ex. CCC). Consequently it was not so constituted on the date of the plaint.

The appellant contends that the situation is saved by the transitory provisions attached to Act 14 of 1920, particularly Ss. 235, 237, 238 and Sch. 10, Rr. 4 and 13. S. 235 says :

"all property, all rights of whatever kind, used, enjoyed, or possessed by a Local Board as constituted under the Madras Local Boards Act of 1884 . . . . shall pass to the same Local Board as constituted under this Act."

Under that section, the right to sue which belonged to the Taluk Board under the old Act will pass to "the same Local Board as constituted under this Act." What is "the same Local Board?" It may be the Local Board which has the same designation or the Local Board which has the same jurisdiction. There is no indication which it means. But the use of the phrase "same Local Board" to my mind implies that there must have been a Local Board of that nature under the old Act. Under the old Act there was no Union Board, so that the section in my view cannot apply to Union Boards. There is nothing improbable in this. It is just as likely that the legislature intended during the transitory period to continue the machinery of the old Act in working as that it intended to introduce the machinery of the new Act before the new Union Boards were actually constituted and set up.

It is argued that R. 13, Sch. 10, itself contemplates that the old Union Panchayats should be erected into new Union Boards during the transitory period, but I do not so read the section. Whatever it may have been intended to mean, it does not speak of the powers of the Union Board as such. It is only dealing with the powers and duties "of the president and members respectively" of such a Union Board. Now the powers of the president or members respectively do not include the power of suit by the incorporated Union Board. Hence R. 13 will not avail the appellant.

Rule 4, Sch. 10, is called in aid but I do not think that helps either. It says that

"notwithstanding anything contained in S. 4 the Local Government may, before the commencement of this Act, declare that any Union constituted under the old Act shall, from the commencement of this Act, be deemed to be a Union under this Act."

Now a Union under the old Act was an area and not an incorporated body, and all that the rule means to my mind is that such areas as were union areas under the old Act were continued to be union areas under the new. Nothing is said in R. 4 (1) about the new Unions having powers which the old ones did not have; rather the contrary in fact. If the rule was intended to mean what the appellant argues, it would have said: "any Panchayat constituted in respect of any Union shall be deemed to be a Union Board."

No notification has been brought to my notice which takes away, during the transitory period, the vesting under the old Act of the Union Boards in the old Taluk Boards. This also is significant.

The phrase "before the commencement of this Act" in R. 4 and in other rules is a very ambiguous one, not easy to understand or to apply. S. 237 apparently enables Government to bring the Act into operation piece-meal. By notifications Exs. ZZ and YY the Government brought R. 4 (1) into force on 25th and 26th January 1921, and by Ex. WW it brought the rest of the Act into force on 1st April 1921 although, as pointed out, the present Union was not constituted until 1st April 1922 under Ex. CCC. However, as R. 4 in any case has not been shown to assist the appellant, he cannot derive any support for his case from Ex. YY.

Section 60 of the new Act has been mentioned, but even if that section, the moment the Act came into force and before the Union Board of Devakotta was constituted under Ex. CCC, availed, to divest the old Taluk Board of the roads within the jurisdiction of the Union Board, that will not avail the plaintiff Board unless it was at the same time in being and able to take over the roads of which the Taluk Board had been divested. I have held that during the transitory period the plaintiff Board was not constituted a Union Board with the legal powers conferred on such a Board by the new Act.

It appears to me therefore that the plaintiff had on the date of the plaint no locus standi to sue. The lower Courts have therefore in my opinion committed no error of law. I dismiss this appeal with costs.

P.R.S./V.B. *Appeal dismissed.*

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* A. I. R. 1930 Madras 303

WALLACE AND WALSH, JJ.

Ganapathi Mudali—Appellant.

v.

Meera Sahib and *others*—Respondents.

Appeal No. 464 of 1925, Decided on 8th April 1929, from order of Dist. Judge, Chingleput, D/- 16th March 1925, in E. P. No. 21 of 1923.

(a) Civil P. C., O. 21, R. 57—Objections to execution must be made at earliest opportunity and cannot be allowed to be brought piece-meal.

Judgment-debtors odjecting to proceedings in execution must state at the earliest opportunity all their objections to the execution and cannot be allowed to delay proceedings by putting their objections forward piecemeal at whatever time they think most convenient to themselves. It is only those matters which could not have been made matter of objection at earliest opportunities that can be allowed at later stage : *A. I. R.* 1929 *Mad.* 404, *Ref.*

[P 304 C 2]

*** (b) Civil P. C., O. 21, R. 57—Judgment-debtors served in previous execution proceeding but allowing proceedings to go ex parte—They cannot put in their objection in subsequent proceeding under O. 21, R.57.**

If judgment-debtors are served in earlier execution proceedings, but allow the proceedings to go ex parte as against them, they cannot be allowed to put in their preliminary objections under O. 21, R. 57, in subsequent proceedings.

[P 304 C 2]

(c) Limitation Act, Art. 182—Order recording execution petition with permission to decree-holder to renew is improper but

if passed subsequent execution becomes continuation of previous one.

An order in execution proceedings recording the execution petition with permission to the decree-holder to renew is a wrong order to pass, but once such an order is made, a subsequent execution petition, becomes a continuation of the previous one: *A.I.R.* 1925 *Mad* 152; *A.I.R.* 1926 *Mad.* 453, *Ref.* [P305 C 1]

(d) Civil P. C., O. 21, R. 57—Attachment before judgment enures to benefit of decree-holder till execution is dismissed.

Unless there is a dismissal of an execution petition, an attachment before judgment enures to the benefit of a decree-holder : *A. I. R.* 1924 *Mad.* 494, *Ref.* [P 305 C 1]

Advocate General and *K. V. Ramachandra Iyer*—for Appellant.

S. Venkatesa Iyengar—for Respondents.

Wallace, J.—This appeal is presented in the following circumstances: A decree for Rs. 17,000 and odd passed by the High Court on its original side dated 20th September 1912 was transfered for execution to the Chingleput District Court on 29th January 1917, and the sale of certain property was asked for. The execution in that Court (under E. P. No. 40 of 1917 dated 28th February 1917) was opposed by the judgment-debtors on the ground that there had been no attachment of the property in execution. The District Judge on 28th November 1917 overruled the objection on the ground that an attachment effected before judgment enured. On appeal the High Court on 20th November 1918 confirmed that view. During the pendency of the appeal, the District Court, following a practice which has been condemned many times: see *Patannayya* v. *Pattayya* (1) and *Munisami Mudali* v. *Meenakshi Ammal* (2) "recorded" the execution petition "with permission to the decree-holder to renew." On 7th December 1922, the decree-holder put in the present E. P. 21 of 1923, again asking for sale of the property, and the judgment-debtors were served in person. Only defendants 4 and 6 put in any counter. On 13th December 1923 arguments were heard and the sale was ordered for 20th February 1924. On that date, a petition by the decree holder for leave to bid had not been disposed of and the sale was adjourned to 27th February 1924. On that date, what are styled claim petitions were filed by several of the defendants and the sale was postponed until they had been disposed of. These have been heard on three preliminary points by the District Court and the execution petition has been thereon dismissed. The decree-holder comes up in appeal.

Now the first and the most obvious remark to be made is that the judgment-debtors ought never to have been allowed to raise these preliminary points at all. They contain no new matter which could not have been made matter of objection by way of counter before the hearing on 13th December 1923 and heard at the time of the arguments on that date. This Court had laid it down more than once and in emphatic terms that judgment-debtors objecting to proceedings in execution must state at the earliest opportunity all their objections to the execution and cannot be allowed to delay proceedings by putting their objections forward peicemeal at whatever time they think most convenient to themselves. The latest ruling on this point is in *Govindas Krishnadoss* v. *Raja of Karvetnagar* (3). If these judgment-debtors did not put forward the present points at the hearing on 13th December 1923, they cannot put them forward now. If they put them forward then, they were overruled. In either case, the order for sale passed by the Court on 13th December 1923 is a final order binding on the Court as on the parties. It is not open to the Court to review that order on material which was available at the time it was passed. The three preliminary points treated by the District Judge are clearly points which could have been, ane apparently were not, put forward on 13th December 1923. Therefore they cannot be put forward now.

The first point is merely one of clerical omission. The second is treated by the District Judge in a surprising way. If we understand him aright, he holds that because the judgment-debtors were ex parte in the earlier proceedings, although they were personally served, that somehow gives them the right to be heard later. The very fact that they were served in the earlier proceedings and did not choose to put forward their objections then, is sufficient ground for not allowing them to put them forward now. As to the third objection, it is

(1) A. I R. 1926 Mad. 453.
(2) A. I. R. 1928 Mad. 215=51 Mad. 244.
(3) A. I. R. 1929 Mad. 404.

also on the merits untenable. There was no dismissal by the Court of E. P. 40 of 1917 for default of prosecution. Therefore the attachment did not come to an end by virtue of O. 21, R. 57. The attachment before judgment therefore did not cease (see the Full Bench ruling in *Meyyappa Chettiar* v. *Chidambaram Chettiar* (4). The order of the District Court in E. P. 40 of 1917 already quoted clearly meant that a fresh execution petition would be continuation of the previous one: see *Krishnayya* v. *Puttannayya* (5) and *Pattannayya* v. *Pattayya* (1) and the High Court has already held that the attachment before judgment was sufficient. The point is really res judicata and unarguable, and we find it difficult to understand the judgment of the District Judge. We may note that the objection now taken under O. 21, R. 57 was not taken before him. Obviously, the argument before him proceeded on the conceded position that E. P 21 of 1923 was a continuation of the former petition.

The order of the District Judge must therefore be reversed. As he has dealt only with certain preliminary points in the claim petitions we cannot dispose of these petitions finally here. They must be sent back for disposal there, but that disposal must be on the lines already indicated, namely, that the order for sale is final and binding on the Court and on the parties unless some fresh objection which was not available on or before its date is now put forward by these petitioners. The appeal is allowed with costs and the case sent back to the District Court for further proceedings.

Walsh, J.—I agree.

P.R.S./V.B. *Case remanded.*

(4) A.I.R. 1924 Mad. 494=47 Mad. 483 (F.B.).
(5) A. I. R. 1925 Mad. 152.

A. I. R. 1930 Madras 305

KUMARASWAMI SASTRI AND WALSH, JJ.

K. Ambu Nair—Defendant 1—Appellant.

v.

E. C. Kelu Nair another — Plaintiff and Defendant 3—Respondents.

Appeal No. 406 of 1924, Decided on 3rd October 1929, from decree of Sub-Judge, South Kanara, in Original Suit No. 56 of 1921.

1930 M/39 & 40

(a) Transfer of Property Act, S. 60—Clog—Suit for possession by usufructuary mortgagee—Rajinama decree embodying inter alia that mortgagor after depositing mortgage money should get possession of properties from mortgagee failing which mortgagee to continue in possession as mortgagee—If possession not delivered mortgagor to take out possession by execution proceedings—Execution proceedings dismissed as barred by limitation—Suit to redeem mortgage—Mortgage held to be subsisting and liable to redemption, condition reducing period of limitation being clog on redemption—Suit was held not barred by Civil P. C., S. 47.

A usufructuarily mortgaged his properties to *B* under a registered mortgage deed and himself remained as a tenant after the mortgage. *A* having fallen into arrears of rent, *B* brought a suit for recovery of possession of the properties and arrears of rent or in the alternative for recovery of the mortgage amount. But the suit was compromised between the parties and a rajinama decree was passed on 2nd January 1899, to the effect that if Rs. 31,000 which was fixed as the amount due on the mortgage, was paid within three years from the date of the decree, the mortgagor was to redeem the properties from the mortgage, that in default of such payment the mortgagee was to recover possession of the properties in execution of that decree and enjoy the same on usufructuary mortgage right, and that if Rs. 31,000 was paid at any time thereafter, possession was to be given up to the mortgagor together with all the mortgage right, failing which the mortgagor should take possession by taking out execution, that for three years after the date of the rajinama decree the mortgagor should be enjoying the properties and pay an annual rent of 2,000 paras of paddy to the mortgagee. The mortgagor having failed to pay the rent, the mortgagee obtained possession of the properties on 16th March 1900. *A* applied in execution proceedings to get back possession of the properties as mentioned in the rajinama decree, but this application was dismissed under Limitation Act. Art. 181, as it was filed after more than three years from the date of the decree. The mortgagor brought a suit to redeem the properties in 1921.

Held : that there was nothing in the compromise decree which put an end to the relationship of mortgagor and mortgagee and that the provision to take possession by execution in the compromise decree necessarily reduced the period of sixty years allowed by law for redemption to a period of three years and hence was invalid being a clog on the equity of redemption. [P 312 C 1, 2]

Held also : that the rajinama decree did not render the present suit res judicata and that Civil P. C., S. 47, was no bar to the suit ; 19 *Mad.* 249 and *A. I. R.* 1925 *P. C.* 63, *Rel. on* : 16 *Bom.* 659 (*F. B.*) and *A. I. R.* 1921 *Bom.* 284, *Ref* : 10 *Bom.* 461, *Dist.* [P 312 C 1, P 315 C 1]

(b) Practice—Terms of consent decree being against provisions of statute—Court in subsequent suit can give relief—Compromise.

In decrees founded on contracts the Court can give relief in a separate suit or in execution proceedings where the terms of the consent

decree are against the provisions of any statute. 24 *Mad.* 265 ; 26 *Mad.* 31 and 31 *Bom.* 15, *Rel. on.* [P 314 C 1]

(c) Civil P. C., O. 23, R. 3—Illegal term in compromise agreement embodied in decree is unenforceable—Compromise.

An illegal term in an agreement consented to by parties and embodied in consent decree does not make that term enforceable or a defence in a subsequent suit. For a judgment obtained upon such a contract cannot be of more validity than the invalid contract on which it is founded: *Great North West Central Railway* v. *Charlebois*, (1899) *A. C.* 114, *Foll.* [P 314 C 1]

T. Rangachariar, *B. Sitarama Rao* and *K. B. Venkatachala Iyer*—for Appellant.

P. Govinda Menon and *M. Krishnan Nambiar*—for Respondents.

Judgment.—Defendant 1 is the appellant. This appeal arises out of a suit filed by the plaintiff to redeem a mortgage. The plaintiff prays that defendant 1 may be directed to surrender possession of the properties mentioned in Sch. A to the plaint to the plaintiff on payment by him within a time to be fixed by the Court of such amount as may be found due to defendant 1 towards the usufructuary mortgage referred to in the plaint on taking an account of the amounts received by defendant 1 and the amount which he is liable for in respect of damages for waste committed on the properties and to hand over to the plaintiff all the title deeds, rent deeds and other documents connected with the property. The plaintiff also claims mesne profits at the rate of 2,000 paras of paddy per year.

The case for the plaintiff is that the properties described in Sch. A to the plaint originally belonged to defendant 2's tarwad, that the said properties along with two other items of property held by the tarwad on arwar or mortgage right were usufructuarily mortgaged by the tarwad to defendant 1's tarwad for Rs. 21,157-2-2 under a registered mortgage deed dated 8th December 1892 but that the properties were being enjoyed by defendant 2's tarwad as tenants after the mortgage, that defendant 2's tarwad having fallen into arrears of rent, defendant 1's tarwad filed O S. No. 22 of 1898 in the Sub-Court of South Kanara for recovery of possession of the properties and arrears of rent or in the alternative for recovery of the mortgage amount, that O. S. No. 22 of 1898 was ultimately compromised between the parties and a rajinama decree was passed on 2nd January 1899 to the effect that if Rs 31,000 which was fixed as the amount due on the mortgage for principal and arrears of rent and costs is paid within three years from the date of the decree, the mortgagor was to redeem the properties from the mortgage, that in default of such payment the mortgagee was to recover possession of the properties in execution of that decree and enjoy the same on usufructuary mortgage right, and that if Rs. 31,000 was paid at any time thereafter, possession was to be given up to the mortgagor together with all the mortgage right, that it was also provided that for 3 years after the date of the rajinama decree the mortgagor should be enjoying the properties paying assessment thereon and pay the defendant 1's tarwad and annual rent of 2000 paras of paddy, that defendant 2's tarwad having failed to pay the rent as mentioned in the rajinama decree, the mortgagee obtained possession of the properties on 16th March 1900, that there was a second mortgage for Rs. 1675, on which the mortgagee obtained a decree for sale of the equity of redemption in O. S. No. 44 of 1912, that in execution of a personal decree against defendant 2's tarwad the right of the mortgagor was purchased by one Subraya Kamathi in 1909 subject to the usufructuary and simple mortgage rights held by defendant 1's tarwad over the said properties and Subraya Kamathi conveyed his right to the plaintiff on 22nd April 1913, that the plaintiff who has thus become absolutely entitled to the equity of redemption deposited Rs. 6,115-12-0 being the amount due to defendant 1 as per decree in O. S. No. 44 of 1912 and redeemed the simple mortgage dated 7th December 1901, that as regards the two items of property submortgaged under the deed dated 8th December 1892, they were redeemed and a portion of the mortgaged properties was acquired by the Local Fund Department and the mortgagee received two sums of Rs. 490 and 450 towards the mortgage for which credit has to be given, that the mortgagee has been committing waste by cutting timber trees and pulling down buildings etc., that he is liable for damages to the

extent of Rs. 6,700 as per particulars given in the plaint which amount also is to be deducted from the amount due under the mortgage and that when the plaintiff applied in execution to get back possession of the properties as mentioned in the rajinama decree, the defendants contended that execution was barred by limitation and this contention was upheld both by the lower Court and the High Court. The plaintiff, therefore, files this suit to redeem the properties.

Defendant 1 (mortgagee) who is the contesting defendant admits the mortgage set out in the plaint and the decree in O. S. No. 22 of 1898. He admits having taken possession of the properties covered by the decree in execution of it. He also admits that the plaintiff became the purchaser of the equity of redemption but disputes that the sale certificate relied on by the plaintiff covers the entire mortgage property. He denies, however, that the plaintiff has any subsisting right to redeem on the ground that the original mortgage had been superseded by the decree in O. S. No. 22 of 1898 and that the plaintiff's only remedy is by execution which having become barred, the right to redeem is extinguished. He admits that he got a decree in O. S. No. 44 of 1912 on the simple mortgage of 7th December 1901 and that the mortgage has been redeemed. He denies that his getting the decree saves the plaintiff's right to redeem or gives him any cause of action. He denies that the property acquired by the Local Fund Department under the Land Acquisition Act formed any portion of the mortgage properties. He denies also that some other items which he specifies in para. 9 of the written statement formed part of the mortgage. He raises certain objections to the schedules in paras. 10 and 11. He denies that he committed any waste but on the contrary states that he and his ancestors effected improvements for about Rs. 30,000 of which sum he claims payment before redemption.

Defendant 3 who is the younger brother of defendant 2 filed a written statement admitting the plaintiff's claim.

The plaintiff as the karnavan of his Echekan tarwad sues defendant 1 as the karnavan of the Kodath tarwad and defendants 2 and 3 as representing the Beloor Maloor tarwad.

The Subordinate Judge passed a decree for redemption. He held that the present suit was maintainable and is not barred by reason of the judgment to the effect that the execution of the rajinama decree in O. S. No. 22 of 1898 was held to be barred by limitation. He was of opinion that the rajinama decree having been kept alive the relationship of mortgagor and mortgagee and the mortgagee having entered into possession in such a character under that decree the right of redemption is not put an end to and that the provision in that decree that execution might issue only gives a speedy and less expensive method of redemption and does not take away the right of a suit to redeem after three years which is the period of limitation for execution.

As regards the other issues relating to the various items, the parties put in a joint statement which the Judge refers to in his judgment the effect of which was that the objections to certain properties were not pressed, the plaintiff did not press his claim for damages and defendant 1 did not press his claim for improvements. As regards mesne profits, the correctness of the claim was not disputed, the Judge found that the plaintiff was entitled to mesne profits at 2000 paras of paddy a year. Hence the appeal.

The main contention of the appellant is that the present suit is maintainable as the plaintiff's only remedy is to obtain relief by execution of the decree in O. S. No. 22 of 1898 within the period of limitation prescribed by law and that as he has not done so the right to redeem has become extinguished. It is also contended that the suit is barred under S. 47, Civil P. C., also by res judicata by reason of the decree in O. S. No. 22 of 1898 and that there was no admission of the plaintiff's right by the defendant to prevent the bar of limitation.

For the respondents it is contended that on a proper construction of the decree in O. S. No. 22 of 1898 which was founded on the rajinama put in by the parties the relationship of mortgagor and mortgagee was not put an end to by that decree, that as the mortgagee admittedly entered into possession under the clause entitling him to possession

as mortgagee the relationship of mortgagor and mortgagee was not extinguished by the decree and that the right given to execute the decree has simply the effect of giving the mortgagor an alternaitve remedy of a suit for redemption. It is contended that as the effect of the clause in the rajinama limiting the rights of the parties to execution is to curtail the period of limitation of 60 years prescribed by Art. 148, Lim. Act, to three years which is the period prescribed for execution proceedings by Art. 182, there is a manifest clog on the equity of redemption and that such a clause in an ordinary mortgage document would be invalid and the consent decree puts it in no higher position. Under Cl. 2 of the rajinama decree as the sum of Rs. 31,000 had to be deposited in Court before an application for possession can be made by the mortgagor, there is no question of keeping the decree alive by steps-in-aid of execution and under S. 48, Civil P. C., the decree can even in such cases be kept alive only for 12 years. It is also contended that the mortgagee having got a second mortgage and sued on the second mortgage on the basis that the first mortgage was subsisting and having obtained a decree on that basis it is not open to him to repudiate his position as mortgagee especially as that suit was long after the right of execution under Art. 182, Lim. Act, became barred by limitation.

In order to appreciate these contentions it is necessary to set out the terms of the mortgage deed, rajinama, and the consent decree in O. S. No. 22 of 1898 in some detail. There is practically no dispute on the facts. The mortgage which is dated 8th December 1892 is filed as Ex. A in the suit. It purports to be a deed of illadarwar i. e., a usufructuary mortgage deed. The main terms are as follows:

"We have hereby usufructuarily mortgaged to you all the under mentioned entire properties. . . . .for Rs. 27,157-2-2 and we have received the amount of consideration as detailed below. . . . .we have received the sum of Rs. 27,157-2-2 in full as detailed above. Therefore, for the said entire amount you shall enter into the under-mentioned entire property and enjoy the same on illadarwar right by paying the tirva every year to the first of us. We shall pay the sum of Rs. 27,157-2-2, the kanam amount, to you whenever we get the same in one lump sum on the vishuday of that year and get back the said properties, the original documents and this document also together with your receipt for such payment."

Then follows the schedule of the properties.

It is admitted that although the deed purported to be a deed of usufructuary mortgage entitling the mortgagee to immediate possession, possession was not given. In such cases the law gives the party two remedies. One remedy is to sue to get possession which the party is entitled to under the terms of the mortgage deed and the other is to sue to get back the mortgage money. S. 68, Cl. (c), T. P. Act, gives the mortgagee the right to sue for the mortgage money in case where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him or to secure the possession thereof to him without disturbance by the mortgagor or any other person. There was some doubt as to whether this entitled the mortgagee to claim a charge on the property but it has now been held that he can apply for sale and we need only refer to *Subbamma* v. *Narayya* (1).

Suit No. 22 of 1898 was filed by the plaintiff, the main relief asked for being to recover possession which was wrongly withheld and the alternative relief was for sale if for any reason possession could not be given. This appears from the rajinama decree passed in that suit (Ex. C). It recites that the suit was for a decree either to get delivery of the mortgaged properties described in the plaint Sch. A and three years' mesne profits and further profits till date of delivery or in the alternative to recover the mortgage money with interest at six per cent per annum by sale of the mortgage properties. The main relief was a relief which flowed from the rights created by the mortgage document and was to enforce such rights which necessarily kept the relationship of mortgagor and mortgagee alive. The alternative relief was to extinguish that right and to get back the mortgage money which was asked if the first relief could not be granted. So that it is clear that the primary object of the mortgagee in filing that suit was to get possession as mortgagee. The rajinama was on the footing that possession was to be given as mort-

(1) [1918] 41 Mad. 259=33 M.L.J. 623=6 M. L.W. 738=43 I.C. 4=(1917) M.W.N. 828 (F.B.).

gagee and that the rights were to subsist. This is clear from the terms of the rajinama decree which simply embodies the terms entered into by the parties. The decree, after setting out the scope of the suit and the parties who appeared, says :

"upon perusing the rajinama put in by the parties and given below it is ordered that the terms of the said rajinama be and the same are hereby passed into a decree."

The rajinama which is set out in the decree runs as follows :

"1. We should pay in one lump sum to plaintiff within three years from this date on the liability of the plaint property mentioned in Sch. A of the plaint, Rs. 31,000 settled to be paid to plaintiff by us in respect of the plaint kanam amount and the arrears of rent due for this year, that is, due up to this 1074, Kollum and also for costs of suit and redeem the said property from plaintiff's arwar and take possession of the same together with the documents. If we fail to pay the amount on that vaide (due date), plaintiff should take possession of the plaint property from us by taking out execution of the decree which will be passed in terms of this raji, and should enjoy the same on payment of tirva by arwar right. When the property is being enjoyed taking possession of the same in that manner if we pay the said kanam amount of Rs. 31,000 to plaintiff on any year on the vishusankramana vaide, he should immediately relinquish his arwar right on the said property and deliver the same to us. If he fails to deliver the same to us in that manner we should take possession of it by taking out execution.

2. We ourselves should enjoy the said property on payment of tirva thereof till the above mentioned vaide of three years and pay to plaintiff rent fixed at the rate of 2,000 paras of paddy per annum every year from the ensuing 1075, Kollum before the end of Vrichika month, that is before 15th December conveying the same to Thilayipallayapore of Kollutu village and measuring the same by geni phara and obtain his receipts. If we fail to pay the said fixed rent or any portion thereof within the vaide in that manner, plaintiff should take possession of the plaint property by taking out execution, and enjoy the same on payment of tirva by arwar right and he should recover from us the said arrears of rent, that is, the price amount of the said paddy at the then rate by taking out execution. When he takes possession and enjoys the property in that manner if we pay the kanam amount of Rs. 31,000 mentioned in para. 1 on the vishusankaramana vaide of any one year in one lump sum, he should relinquish his arwar right and deliver the said property back to us. If he fails to deliver the same in that manner, we should take possession of it by taking out execution.

3. We ourselves should bear our costs of this suit. We should withdraw the suit No. 27 of 1898 filed by Nos. 5 to 51 among us. In that suit the plaintiff should bear his costs and we should bear our costs. To this effect we have agreed to the settlement made in the presence of the grihastas.

4. Number 1 among us is the karnavan of our tarward, No. 2, Kelu is the next karnavan. Defendants 6, 25 and 20 are dead. They have no other heirs except ourselves.

Therefore it is prayed that a decree may be passed in the manner stated above. Khauli submitted on the said date by the plaintiff Kodatha Kora Nair. It is true that the raji was effected between me and the defendants in the presence of the grihastas as stated above by them. I have consented to pass a decree in that manner."

It is admitted that under this raji the mortgagee took possession under Cl. 2 which provides that if the mortgagor did not pay the rent of 2,000 paras of paddy per annum as provided for in that clause, the plaintiff in that suit should be entitled to take possession of the plaint property by taking execution and enjoy the same on payment of tirva by arwar right i. e., mortgage right. The right under this clause of the mortgagor was to get back possession if he desired on payment of Rs. 31,000 on the vishu day of any one year. The mortgagee having taken possession under this clause, it is clear that his possession is possession as mortgagee on the footing that the mortgage between the parties subsists and there is nothing in the decree which puts an end to the relationship of mortgagor and mortgagee. As we said before, the main object of the suit was to recover possession under the mortgage deed and the decree only effectuates that possession. The mortgagee is to enter as mortgagee under the covenant for possession ; the mortgage deed and even if the rajinama decree should be taken to be the creation of a fresh right and the extinguishing of the one created by the mortgage propria vigore it creates the relation of mortgagor and mortgagee with all the incidents of a mortgage with possession. In fact the position which both the parties took up till we come to the suit was that the relationship was only that of mortgagor and mortgagee.

On 7th December 1901, defendant 1's tarwad, who were already the mortgagees under the first deed of mortgage dated 8th December 1892 and the rajinama decree dated 2nd January 1899, took a second mortgage of the properties from defendants 2 and 3's tarwad for Rs. 1,675 and O. S. No. 44 of 1912 was filed by the mortgagee to enforce his right under the mortgage. The plaint in that suit is filed as Ex. K and in para. 2 of the plaint it is stated that the

second mortgage was taken on the responsibility of the equity of redemption of the immovable properties described in the plaint schedule which were held by the plaintiff's tarwad on a usufructuary mortgage for a sum of Rs. 31,000. It appears from the plaint that in the meantime the equity of redemption was purchased by one Subraya Kamathi who was defendant 3 in that suit. Para. 7 of the plaint runs as follows :

"Defendant 3 had lately purchased the equity of redemption of some of the hypothecated properties in execution of a money decree obtained by him against defendant 1 subject to the suit hypothecation bond and the usufructuary mortgage referred to above and he is therefore made a party."

It is prayed that in default of payment of the sum of Rs. 3,931-9-6 which is claimed as being due on the second mortgage sued on the property may be sold and the sale proceeds applied :

"in payment of what may be found due to plaiutiff subject to or free from the previous usufructuary mortgage in favour of the plaintiff's tarwad as the Court deemed fit."

The judgment in that suit is filed as Ex. L. It appears from the judgment that all the parties admitted that the prior usufructuary mortgage was subsisting (see para. 8 of the judgment). This second mortgage seems to have been taken in the name of defendant 2 in that suit. The question was raised as to whether it was benami for the plaintiff and whether the plaintiff could sue and the Judge held that it was taken benami. In para. 15 of the judgment the Judge passes a decree and directs that the decree amount should be paid by the sale of the suit mortgage property :

"subject to the previous usufructuary mortgage in favour of the plaintiff's tarwad if defendant 1 and his tarwad do not pay the amount in six months from this date."

The decree Ex. M follows these directions and Cl. 2 of the decree runs as follows :

"that if such payment is not made on or before 22nd May 1913, the undermentioned plaint properties be sold subject to the previous usufructuary mortgage in favour of plaintiff's tarwad and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff's tarwad as aforesaid together with subsequent interest and subsequent costs and that the balance, if any, be paid to defendant 1."

It is clear therefore from these proceedings that in 1912 i. e. about 20 years after Ex. A the deed of mortgage and over 12 years after the rajinama decree the mortgagee treated the first mortgage as subsisting and got a decree on the second mortgage on that basis.

It appears that during the pendency of this suit the equity of redemption was sold and was purchased by defendant 3 in that suit. Ex. D is the sale certificate issued to Subraya Kamathi and it shows that the property was sold in execution of the decree in suit No. 184 of 1900 which was filed by Subraya Kamathi against the mortgagors on a personal debt. The sale certificate shows that on 20th December 1909 the property was purchased for Rs. 210. The sale was subject to the two previous mortgages and this accounts for the very small sum of Rs. 210 paid for this very valuable property. Subraya Kamathi assigned this sale certificate to the plaintiff's tarwad on 22nd April 1913, by Ex. F. This sale is for Rs. 1,250 and specifically states that it is subject to all equities, which means, we take it that it is subject to all the rights created by the previous mortgages.

There seems to have been litigation as regards the purchase by Subraya Kamathi as appears from Ex. G, judgment dated 22nd November 1915 in O. S. No. 330 of 1914 on the file of the District Munsif's Court of Mangalore, where the District Munsif upheld the purchase by Subraya Kamathi and the assignment by Subraya Kamathi. It also appears that this judgment was confirmed in appeal by the Subordinate Judge in Appeal No. 5 of 1917 and by the High Court in S. A. No. 1,423 of 1917.

So far as the suit on the second mortgage is concerned, the mortgagors rather than have the property sold paid the amount due under that decree. It appears from Ex. Q that on 17th December 1918 the person representing judgment-debtor paid into Court Rs. 6,115-12-0 due under that decree. In prayer 2 of the execution application it is prayed that the amount may be paid to respondent 1 (plaintiff) in full satisfaction of the decree in O. S. No. 44 of 1912. In the remarks column this is what is stated :

"That out of Rs. 31,000 made payable in raji decree in O. S. No. 22 of 1908 some amounts have been paid to the Kodath tarward and the petitioner reserves his right of tendering the balance amount after deducting the above-named payments and the damages caused by the Kodath tarwad by a separate petition."

Upon this notice was ordered and ultimately we find that on 12th March 1919 the following order was passed :

"By consent it is ordered that the amount in deposit shall be paid to respondent 1 (plaintiff) in full satisfaction."

Ex. S which is dated 27th August 1913 is a notice sent on behalf of Kelu Nair (plaintiff) to Ambu Nair who is defendant 1 in the suit. It states that certain trees on the mortgage properties were cut down and that the mortgagee who was in possession of the properties under the mortgage deed had no right to cut down the trees or authorize the cutting down of the trees. The letter winds up as follows :

"You shall therefore immediately make enquiry about this unlawful act which is being done through your want of vigilance and take the necessary steps in the matter, and inform me or Kelu Nair in writing of it. If you will not do so, you are hereby informed that since this act is causing great damage, the lawful value of the timber which has been cut till now and which may be cut hereafter will be appropriated from the kanom amount due to you under the above compromise decree."

This letter is clearly written on the footing that the relationship of mortgagor and mortgagee subsists as also the right of redemption and that if any act of waste is committed or is allowed to be committed, the amount of damages would be deducted from the mortgage money due on redemption. To this, the reply Ex. T dated 8th September 1913 is sent by the mortgagee. It runs as follows :

"I am in receipt of your registered letter dated 27th August 1913 on behalf of Echikana Charakere Kelu Nair. As mentioned therein I am not aware of the fact that the properties mortgaged to my tarwad were sold in auction and that they were assigned to the said Kelu Nair. I had not empowered anybody to cut trees from the properties mortgaged to me. The trees were not cut even. I did not cause any loss even."

There is no repudiation here of the allegation that the relationship of mortgagor and mortgagee subsists. It is not alleged that the mortgagor has lost his rights to redeem. These notices were in 1913. It is therefore clear that from 1892 till 1917 there was no question raised that the possession of the mortgagee under the mortgage dated 8th December 1892 and the compromise dated 2nd January 1899 was possession under a subsisting mortgage for Rs. 31,000 which was liable to be redeemed.

The plaintiff in this suit acting under the power conferred by Cl. (2) of the rajinama decree Ex. C deposited Rs. 31,000 in Court and filed an application for execution praying for redelivery of possession of the properties. This application was opposed by the mortgagee on the ground that the execution of the decree was barred by limitation. There were other grounds of objections which it is not necessary to consider now. It was contended for the plaintiff who was petitioner 1 in the execution application that time began to run only in default of the respondents to deliver possession on the petitioner's depositing the mortgage amount on the vishu day of any one year they chose within the period of 60 years fixed for redemption under the Limitation Act and that his cause of action only arises when the mortgagee refused to deliver possession on the money being paid. The Subordinate Judge, however, upheld the contention that the application was barred by limitation. As regards the maintainability of a fresh suit to redeem he did not decide the question. All that he said in para. 8 of the judgment was :

" whether a fresh suit for redemption by the petitioners will be barred by the aforesaid decree is a question which we need not go into at present. "

It appears also from the order dated 10th November 1920 that both the parties wanted the question of limitation to be taken up as a preliminary question. The order is filed as Ex. I. Against this order an appeal was filed in the High Court and on 20th December 1921 the appeal was dismissed and the order of the Subordinate Judge was confirmed. The judgment of the High Court is filed as Ex. 2 in the case. The learned Judges held that Art. 181 is the article applicable to a case like the present, that the starting point of limitation was the date when the right to apply for execution accrued and that the right to apply for execution accrued from the date of the decree and they preferred to follow the decision of the Bombay High Court in *Maruti* v. *Krishna* (2), to the decision of the Allahabad High Court in *Cheddi* v. *Lalu* (3). The learned Judge observed :

" On our construction of this decree it is not a case of option given to the mortgagors to make payment on successively recurring debts

(2) [1899] 23 Bom. 592=1 Bom.L.R. 31.
(3) [1902] 24 All. 300=(1902) A. W. N. 60.

and a number of other cases which have been quoted by the learned vakil for the appellants need not be dealt with by us for that reason."

The learned Judges did not express any opinion as to whether a suit for redemption would be maintainable. This judgment has become final and therefore it has to be taken that the remedy to redeem by way of executing the decree has become barred. The effect of this judgment is that the compromise which is embodied in the rajinama decree Ex. C virtually cut down the period of redemption from 60 years to 3 years if it should be held that executing the decree is the only method by which the mortgagor or his representatives could redeem.

We do not think the rajinama decree in O. S. No. 22 of 1898 renders the present suit res judicata. There was no adjudication in that suit of any of the questions raised here. We need only refer to the decision of their Lordships of the Privy Council in *Maina Bibi* v. *Vakil Ahmed* (4). In that case the heirs of deceased Mohammad filed a suit and obtained a decree that on payment of a certain sum of money they should get possession from the widow who claimed to be in possession in lieu of her decree debt and that if the money was not paid in six months the suit should be dismissed. They did not pay as directed and several years afterwards filed a suit for possession conditionally and alternatively on payment of the sum.

The main contention of the appellant before us is that S. 47, Civil P. C., which corresponds to S. 244 of the Act of 1882 and to S. 11 of the Act of 1861 bars a separate suit in all cases where the party can execute the decree. Section 47 runs as follows:

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

The contention is that the clause in para. 2 of the rajinama decree which states that if the mortgagors pay the kanom amount of Rs. 31,000 mentioned in para. 1 of the decree on the vishu sankaramana vaide of any one year in a lump sum, he the mortgagee should relinquish his arwar right and deliver the said property back to the mortgagors and that if he fails to deliver the same in that manner they should take possession of it by taking out execution, limits the right to the execution and that if that right is extinguished the right of redemption also is extinguished as a separate suit would not lie. As we pointed out before, so far as the parties to the rajinama decree were concerned, they neither at the time of the rajinama decree nor for several years thereafter thought that the right of redemption would be barred in 3 years. Till the execution application was put in 1920, in the various proceedings the parties acted on the footing that the mortgage was still subsisting and could be redeemed. It cannot be said that the parties when they entered into the rajinama agreed that there should be this clog on the equity of redemption, that the equity should be barred in 3 years when the law allowed 60 years to redeem. Even assuming that they did, it is clear that if such a clause was put in in a mortgage document, it would be void as a clog on the equity of redemption.

Section 60, T. P. Act, enacts that at any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee (a) to deliver the mortgage deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished, provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court.

It should be observed here that unlike other sections dealing with mortgages, S. 60 does not permit parties to contract themselves out of its provisions. In *Muhammad Sher Khan* v. *Raja Seth Swami Dayal* (5), the question was "whether a clause which suspended the right

(4) A.I.R. 1925 P.C. 63=47 All. 250=52 I.A. 145 (P.C.).

(5) A.I.R. 1922 P.C. 17=44 All. 185=49 I.A. 60 (P.C.).

to redeem was valid. Their Lordships of the Privy Council after referring to S. 60 observed the section is unqualified in its terms and contains no saving provision, as other sections do, in favour of contracts to the contrary. Their Lordships, therefore, see no sufficient reason for withholding from the words of the section their full force and effect."

The proviso as regards the right being extinguished by act of the parties has been in several cases held to mean an act done after the mortgage has been entered into, such as release of the right to redeem or of sale. In *Fairclough* v. *Swan Brewery Co. Ltd.* (6), Lord Macnaghten observed:

"It is now firmly established by the House of Lords that the old rule still prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption."

It has been argued that the strict rule of the Courts of equity has been relaxed and reference has been made to *G and C Kreglinger* v. *New Patagonia Meat Cold Storage Co. Ltd.* (7). We do not think the rule that you cannot clog the equity of redemption at the time of the mortgage has been affected by this decision. Lord Parker at p. 60 observes:

"if once you come to the conclusion that the parties intended that the property should be reconveyed on payment of the moneys secured, any provision which would prevent this must be rejected as inconsistent with and repugnant to the true intention. But, on the other hand, if you once come to the conclusion that this was not the real intention of the parties, then the transaction is not one of mortgage at all."

The conclusion which the learned Lord came to has been thus summarised by him:

"My Lords, after the most careful consideration of the authorities I think it is open to this House to hold, and I invite your Lordships to hold, that there is now no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem."

There can be little doubt that the intention of the parties in the present suit when they entered into the compromise embodied in Ex. C was clearly to keep the mortgage alive, that possession was taken under the mortgage and there is nothing to suggest that the parties ever intended that the equity of redemption should be lost if the mortgagor did not repay the mortgage money in 3 years, for, this is the effect of clause put in as to recovery in execution of possession. There can be little doubt that this clause if interpreted as extinguishing, the right to redeem if execution is not taken out within the time limited by law, that is 3 years, works a great hardship on the mortgagor. It is stated by the counsel for the respondent that the property is now worth more than a lakh of rupees, counsel for the appellant says that he is not in a position to give the value of the property. But having regard to the extent and nature of the property as disclosed in the schedules to the plaint, the income of the property which even according to the deed of compromise was considerable and the fact that the mortgagees were willing to lend money on a second mortgage, there can be little doubt that the value of the property at the date of the compromise and at the date when the mortgagor applied for execution by depositing Rs. 31,000 into Court was considerably in excess of the mortgage money.

Even if the decision in *G and C Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.* (7), establishes a new principle, we think the proviso to S. 60, which refers to the extinguishment of the right by act of the parties must, having regard to the authorities above cited, be an act subsequent to the transaction and it is difficult to see how, when the law has been codified by S. 60 which as interpreted by their Lordships of the Privy Council prevents any party from contracting himself out of it, it is possible to relax the rule on any of the considerations which influenced the Court in the case reported in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.* (7). Altered conditions may be a good ground for relaxing a rule of equity but can hardly be a ground for not applying the provisions of a statutory enactment.

It has been argued that even if the clause in the rajinama as to the execution was invalid and unenforceable, the fact that the compromise has been made a decree of Court validates the transaction. It should be noted in the

(6) [1912] A.C. 565=81 L.J.P.C. 207=28 T.L.R. 450=106 L.T. 931.
(7) [1914] A.C. 25=83 L.J.Ch. 79=30 T.L.R. 114=58 S.J. 97=109 L.T. 802.

present case that all that the Court did was to embody in the decree the terms of the compromise. It is not suggested that there was any adjudication or any enquiry by the Court before the rajinama decree was passed. All that the parties consented to as the agreement as embodied in the rajinama decree. We do not think in these circumstances the fact than an illegal term in an agreement is by consent of parties embodied in a consent decree could make that term enforceable or could be a defence in a subsequent suit to redeem. We may in this connexion refer to the decision of their Lordships of the Privy Council in *Great North West Central Railway* v. *Charlebois* (8). In that case a term which is ultra vires of a company was embodied in a contract and also in a consent decree of Court. It was contended that the fact that the term is embodied in the decree prevented the parties from disputing it. Lord Hobhouse in delivering the judgment of their Lordships of the Privy Council observed:

"But the difficulty is to reconcile an opinion that the contract is ultra vires with an opinion that a judgment obtained as this was, is a binding judgment. The authorities referred to by the Supreme Court do not relate to contracts ultra vires. It is quite clear that a company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done."

After pointing out that the legality of the act was not one of the points substantially in dispute and that if that was the subject of a fair compromise in Court, it may make a difference. His Lordship said that a judgment obtained upon such a contract which is ultra vires cannot be of more validity than the invalid contract on which it was founded.

So far as the decrees founded on contracts are concerned, it has always been held that the Court can give relief in a separate suit or in execution proceedings where the terms of the consent decree are against the provisions of any statute. In *Nagappa* v. *Venkata Rao* (9), a suit was filed by the landlord for arrears of rent and possession. The parties arrived at a compromise and the decree contained a stipulation that if default should be made in payment of rent within the time fixed for payment each year, the lease should be forfeited. Default was made and the plaintiff applied in execution for possession and arrears of rent. It was held that inasmuch as the decree passed by the Court was a mere adoption of the contract which existed between the parties to it, it was competent to the Court to relieve against the forfeiture under the general provisions of the law. In *Lakshmanaswami Naidu* v. *Rangamma* (10), it was held that any terms of a contract which are opposed to public policy are invalid and would not be enforced by the Courts and that if such terms are embodied in a compromise decree those terms would not be enforced. In this case the compromise decree provided for the sale of an office attached to a temple involving service of a personal nature and entitling the holder to receive emoluments, In *Krishnabai* v. *Hari Govind* (11), there was a consent decree passed which created the relationship of landlord and tenant and which contained a clause for forfeiture if the rent was not paid. There was nothing in the decree which provided any relief against the terms embodied in the decree. The plaintiff filed a suit for possession on the ground that the right to possession which was conferred by the consent decree accrued owing to forfeiture. It was held that as the consent decree created the relationship of landlord and tenant, the Court could relieve against forfeiture. Sir Lawrence Jenkins, C. J., after stating that as it was an incident of those relations that the right of forfeiture was subject to relief, that incident must still apply when these relations are established by a decree passed in accordance with the agreement, observed:

"It was laid down in *Wentworth* v. *Bullen* (12), and has since been repeatedly affirmed that the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded a command of a Judge and this in my opinion lends a sanction to the conclusion. I have expressed."

Beaman, J. observed:

"By private agreement converted into a decree, parties cannot empower themselves to do that which they could not have done by private agreement alone and referred to *Great North West Railway* v. *Charlebois* (8)."

(8) [1899] A. C. 114.
(9) [1901] 24 Mad. 265.
(10) [1903] 26 Mad. 31.
(11) [1907] 31 Bom. 15=8 Bom. L. R. 813=1 M.L.T. 370.
(12) [1829] 9 B. & C. 850.

Applying these principles to the facts of the present case the position is this. The compromise of the suit on the mortgage Ex. A, which is now the foundation of liability, did not put an end to the relationship of mortgagor and mortgagee but on the contrary affirmed it. The decree perpetuated the relationship of mortgagor and mortgagee and did not dissolve that relationship. It enforced the right of the mortgagor under the mortgage to obtain possession, and provided for the right of the mortgagor getting back possession on payment of Rs. 31,000. The ordinary incidents of that relationship are that even though a term is fixed for redemption by the parties the party is allowed to redeem within the period of 60 years provided by the Limitation Act and that any provision in the agreement which in effect limits the right to redeem by a clause that the right is to be exercised by execution (which necessarily reduces the period to 3 years) is as invalid as if there was a clause saying that if the property is not redeemed in three years the property should be lost. This clause was embodied in the decree by consent of all parties. It is therefore a case where the parties have done what S. 60, T. P. Act, prohibits. In a suit to redeem it seems to us to be no defence to state that the sole remedy is the remedy by execution, which remedy the parties had no right to insert as being a clog on the equity of redemption. In this view, S. 47, of this Code would not debar the plaintiff from filing a suit to redeem.

We think that on a proper construction of the compromise decree the clause that the mortgagor should take possession of the property by executing the decree is not the sole right which the mortgagor has. Unlike a decree for redemption under the Transfer of Property Act the decree does not say that if money is not paid as stipulated the right to redeem is lost. What the parties contemplated was that they should be entitled to the benefit of the summary way of getting possession. The fact that the plaintiff does not choose to exercise that right would not deprive him of the larger remedy he has of getting possession by suit. If he had applied within three years by execution to redeem the property, he would have had to pay only a few rupees as stamp duty under the Court-fees Act and he would have got possession on payment into Court of Rs. 31,000 If he wants to have it done by a suit, a very heavy stamp duty of about Rs. 1492 would have to be paid and as a matter of fact such a stamp duty was paid in the present suit to redeem. It also appears to us that the existence of that clause would not prevent redemption as the case falls within the decision of their Lordships of the Privy Council in *Sri Rajah Papamma Rao* v. *Sri Vira Pratapa H. V. Ramachandra Razu* (13), where the facts were shortly these. The plaintiffs sued to redeem a mortgage on the ground that it was discharged by the rents and profits appropriated by the mortgagee. The mortgagor undertook in the mortgage deed to repay a sum of Rs. 2,011 with interest by four annual instalments, mortgaging as security a village belonging to them. The mortgagee sued the mortgagors upon this bond and prayed for a decree directing the defendants to pay the amounts then due with interest by means of the mortgage property. The decree of the District Judge was:

"In accordance with the custom prevailing in the Courts in this presidency three months' time will be allowed to the defendants within which to pay up the whole sum now decreed, principal and interest and costs, failing which the plaintiff shall be put in possession of the immovable and moveable property specified in the bond sued upon, and in the plaint and schedule, as provided in the terms of the bond."

We may state in passing that in this case the decree was a consent decree which directed that if the mortgage was not redeemed in 3 years, the mortgagee should take possession of the properties. Under this decree, the mortgagee took out execution and got possession as the mortgagee in the present case acting under Cl. 2 of the rajinama decree got possession in execution. Then the plaintiffs mortgagors filed the suit to redeem, alleging that if an account was taken it will be found that the whole mortgage has been discharged by the usufruct. The defence was that by virtue of the terms of the decree the property had become the absolute property of the mortgagee and that it was not competent to the parties to go behind the decree. The Subordinate Judge dismissed the suit on the ground that the mortgage

(13) [1876] 19 Mad. 249=23 I. A. 32=7 Sar. 10 (P.C.).

was foreclosed if the money was not paid in 3 years. On appeal this judgment was reversed by the High Court. Their Lordships of the Privy Council affirmed the decision of the High Court. Lord Hobhouse in delivering the judgment of their Lordships of the Privy Council after referring to the decree of the District Judge and the fact that the decree stands because no appeal was filed against that decree observed:

"The decree therefore stands and is binding on the parties; and the mortgagee took possession under it. He has since sold the property but that does not affect the rights of the mortgagor. The question is in what character was the possession taken. If in the character of a mortgagee, the mortgagor had a right to redeem, which was not barred by the time the suit began."

His Lordship after dealing with the contentions of Mr. Mayne further observed:

"It is sufficient that the mortgagee, not being entitled to foreclosure, and not asking for it, got a decree which did not purport to work foreclosure. It purported to give possession, "as provided in the terms of the bond." That was impossible for there were no such terms; but it purported to do that, and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether. It could, though subject to correction on appeal, give possession, and did so. The mortgagee thereupon became mortgagee in possession; and as such he must submit to be redeemed."

It seems to us difficult to distinguish the facts of the present case from the facts of the case in the *Papamma Rao* v. *Vira Pratapa* (13) referred to above. The decree with which their Lordships were dealing was an executable decree and for the purpose of S. 47 the addition of a clause allowing parties to execute makes no difference if the decree is in fact executable. The test applied by their Lordships is "what was the character of the possession taken under the decree" and if the character was as mortgagor and mortgagee, their Lordships hold that the right to redeem followed.

Reference has been made by the appellant's advocate to *Hari Ravji* v. *Shapurji Hormasji* (14), and it was contended that the decision in that case lays down a contrary rule. We do not think the facts of that case are similar to the facts of the case with which we are dealing now. In that case a suit was filed by the mortgagees to recover their mortgage money by sale and a decree was passed in accordance with the award of arbitrators to the effect that the defendants were to pay in all Rs. 2,369 to the plaintiffs on a date which would be fixed and should redeem the land which till payment was to remain in the possession of the plaintiffs. This state of things continued from September 1825 and in 1877 a suit was filed to redeem. The Subordinate Judge held that the mortgage had entirely merged in the decree and that execution was barred. This judgment was confirmed by the High Court. Their Lordships of the Privy Council held that as the execution of the decree was barred, no fresh suit for redemption would lie on the rights created by the decree. Their Lordships held that on the frame of the plaint the plaintiff could not fall back on a right to redeem the original mortgage as he in the plaint did not seek to redeem the mortgage of 1806 which on the face of it would be barred but for some acknowledgment and no such acknowledgment was alleged. Their Lordships left open the question whether if a proper suit was filed on the original mortgage and an acknowledgment was proved so as to get over the bar of limitation, that suit would be maintainable. In the case before us the suit to redeem is not barred as it is within 60 years of the date of the mortgage. It is clear from the facts of the case in *Hari Ravji* v. *Shapurji Hormasji* (14) that the suit was not a suit to enforce the term of the mortgage as to possession and keep the rights of the parties subsisting but was on the contrary a suit by the mortgagee to get back his money. In cases where the mortgagee sues to get back his money of course the decree fixes the period for payment and provides either for sale or foreclosure. And the effect of the decree is to put an end to the relationship of mortgagor and mortgagee after the period mentioned in the decree and to substitute new rights created by the decree. This is clearly brought out by the provisions of the Transfer of Property Act and O. 34, Civil P. C. which relate to mortgage decrees.

This case has been considered by the Bombay High Court in *Abdul Rajack* v. *Yaman Ganesh* (15). That was a suit

(14) [1886] 10 Bom. 461=13 I. A. 66=4 Sar. 719 (P. C.).

(15) A. I. R. 1921 Bom. 284=45 Bom. 1335.

to redeem a mortgage of 1874. There was a previous redemption decree of 1881 the terms of which were that the plaintiff should pay the defendant Rs. 400 with interest by annual instalments and that if the plaintiff failed to pay any instalment, the defendant should take possession of the land mortgaged and receive the produce thereof in lieu of interest and on the plaintiff paying the principal amount at the end of any fasli year, the land belonging to the plaintiff should be returned to him. It was contended that the suit to redeem was barred by reason of the previous decree and reliance was placed on *Hari Ravji* v. *Shapurji Hormasji* (14). Sir Norman Macleod, C. J. observed :

"This case belongs to that numerous class of cases in which the question arises whether the mortgagor is in effect bringing a suit to execute previous redemption decree, or whether he is seeking to exercise the right to redeem, as a right which was reserved to him by the previous decree. On the authority of *Hari Ravji Chiplenkar* v. *Shapurji Hormasji Shet* (14), if the suit must be treated as a suit claiming a right to execute the previous decree, then undoubtedly it must be dismissed. But if it comes within the Full Bench decision of this Court in *Tani Bagavan* v. *Haribin Bhavani Dubal* (16), then the plaintiff is entitled to succeed. The decision must depend entirely on the nature of the decree in the previous suit; and the difficulty in reconciling the various decisions lies in the fact that the terms of the previous decree will generally vary, nnd further the decision of the question may depend upon whether the previous suit had been brought by the mortgagor or the mortgagee."

After referring to *Tani Bagavan* v. *Haribin Bhavani Dubal* (16), the learned Chief Justice observes :

"It seeme to me that in the decree in suit No 480 of 1881 the right to redeem was reserved and that the plaintiff is now entitled to sue for redemption."

Applying this test to the present case it seems to us that the compromise decree far from putting an end to the right to redeem was passed on the basis that the mortgage right should subsist. We are of opinion that in any view of the case the present suit is not barred by S. 47 as contended for by the appellant.

In the view we take, it is unnecessary to consider the contentions raised by the learned Advocate General for the respondents as to the defendants being estopped from contending that the mortgage is not redeemable by reason of the various proceedings we have already referred to or the contention that the decree in the suit on the second mortgage obtained by the mortgagees on the basis that the first mortgage was subsisting operates as res judicata or as an estoppel, or the contention that the mortgagees having admitted for over the statutory period of 12 years, their possession as being possession under the mortgage a fresh title to redeem arises irrespective of the compromise decree. The appeal fails and is dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

(16) [1892] 16 Bom. 659 (F. B.).

A. I. R. 1930 Madras 317

RAMESAM AND JACKSON, JJ.

(Raja) Vasireddi Bala Chendra Sekhra Vara Prasada Bahadur Garu—Appellant.

v.

Unnava Subbaya Garu and *others*—Respondents.

Civil Appeal No. 218 of 1927. Decided on 12th February 1929, from a decree of Sub-Judge, Masulipatam, in Original Suit No. 124 of 1925.

Contract Act, S. 16 (2) (a)—Pleader standing in fiduciary relation to his client—Rigid proof is expected from pleader to show that his client when gifting property had competent and independent advice.

A pleader standing in a confidential relation towards his client cannot entitle himself to hold benefits which the client may have conferred upon him, unless he can show to the satisfaction of the Court that the client, by whom the benefits have been conferred, had competent and independent advice in conferring them. The Court must be assured that the act is one done after fair, serious and well informed consideration ; and, knowing how easily its enquiry may be baffled by, for instance, a rigid avoidance of full disclosure, it will watch the transaction with a jealousy almost invincible. (*Case Law Discussed*).

[P 320 C 1 P 321, C 1]

Advocate General and *V. Govindachari*—for Appellant.

S. Varadachari—for Respondents.

Jackson, J.—Suit to recover possession of 18 acres of land. The lower Court decreed the suit and defendant 4 appeals.

The Rajah of Chellapalli had a daughter Rajyalakshmamma who had two children, a daughter, Lakshmidevamma and a son, defendant 4. The Raja was very fond of his daughter who either from him or her mother received property worth three or four lakhs. She died in July 1919, and this

stridhanam property devolved upon her daughter Lakshmidevamma for whom, the Raja acted as manager. But he was failing in health, and in March 1921 the Court of Wards took over his estate, and put it under the management of his son. In June 1921 he died. Then both his son and grandson defendant 4 set up claims to the property held by Lakshmidevamma. The son claimed lands she held on lease, and house property in Bandar; the grandson, setting up an oral will, claimed the estate of his mother Rajyalakshmamma, including a mitta in Chingleput District. Before any actual suit was filed by the contending parties certain minor disputes came to a head, such as the registration of ownership in Bandar and Chingleput, and the question of a succession certificate. The plaintiff, a First Grade Pleader, who had been her grandfather's legal adviser, advised Lakshmidevamma in these matters and by September 1921 brought them to a successful conclusion. Then in October 1921 there occurred the event which has led to the present suit, and which is best described precisely in plaintiff's own words (P. W. No. 6):

"After some proceedings ended favourably for Lakshmidevamma she sent word through her agent P. W. No 7 saying that she wanted to give me and Krishna Rao each 25 acres land and we should take each a sale deed. But I preferred to take one of 18 acres. Owing to some circumstances I wanted her to execute a sale deed in favour of defendant 5 for me. Her grandmother sent for me and and asked why I was not willing to take a sale-deed from Lakshmidevamma. I said there was no hurry. She said that as Lakshmidevamma was willing to execute a sale deed to me, I may take it. The sale deed is Ex. P I was then present."

This, which is pieced together from various parts of plaintiff's deposition is absolutely all that he has to say about the transaction itself. He does not say anywhere that Lakshmidevamma consulted him in the matter, or that he advised her.

The agent, P. W. No. 7, says that plaintiff met Lakshmidevamma and asked for 18 acres of land in Yeddunapudi, but the plaintiff does not himself suggest that there was a personal interview. The 18 acres was not a deduction of the original 25, but a more convenient parcel. Lakshmidevamma herself has not been called as a witness. Even at the time of the trial plaintiff had no clear idea why the land was given him. He says that he never kept accounts but some fees were due to him from Lakshmidevamma, her mother and grandmother.

The mother's account would be Rs. 3,000 or 4,000. He had no definite agreement with Lakshmidevamma, but it was after the proceedings ended favourably that her agent made the offer. He had no legal claim against her for the grandfather's account. She probably, however, took what was owned by him by her mother and grandfather into consideration and must have wanted to recompense him for being no longer adviser to the zamindar. He cannot say if the document was only on account of past services but there was no distinct understanding that it was his retainer till the end of the impending litigation. It was impossible to believe that when plaintiff was acting as Lakshmidevamma's legal adviser, and met her at any rate at the time of execution, he left everything in a state of doubt. The learned Advocate General in the course of his argument for the appellant estimated the value of the property at Rs. 1,000 per annum, which was not disputed. Probably Lakshmidevamma could only convey a life-interest, but when the document was executed, she was only 29.

The value of the property was out of all proportion to anything that Lakshmidevamma or her mother may have owed the plaintiff for professional services; and as he evidently thought that his fees had some connexion with the grant, he should have disabused the mind of his client on the matter. As he thought that she was also taking the Raja's debt into consideration he should certainly have told her that against her he had no legal claim. If he supposed that there was an idea of retaining his services for the future for his own and his client's sake she should have come to some precise understanding. He should have let his client know whether he was taking this life-interest with its inherent risks as an acquittance of all his claims or whether supposing that she died early, he would still hold her estate accountable. If he thought that she felt herself under some obligation to recompense him for losing the zamindar's practice, he might have told her that the mere fact of his having served her grand-

father who was in bitter enmity with his son, her uncle made it impossible for him to be retained, and his helping her had little to do with the matter.

In the plaint he gives as the outstanding reason for the grant the thousands owed him by the Raja for work from Fasli 1326 to 1330, and the thousands owed to him for going to Madras and elsewhere. And yet he never told his client, as he now freely admits that he had no legal claim against her for the fees due from her father. As observed above it is not creditable that with matters in this state nothing more passed between the client and her legal adviser than her offer of 25 acres, and his demand for 18 acres in another's name, with the single comment that there was no hurry. It is the less easy to admit plaintiff's candour for the fact that he has entirely failed to explain why he insisted on this grant being in another's name. He says that he had filed several petitions against Lakshimidevamma's uncle and brother and did not, therefore, like to prejudice her cause by taking the deed in his own name. But this is meaningless. It was quite notorious that he had helped the grandfather and Lakshmidevamma, and the fact that she had paid him his proper fees would not in any way prejudice her. The circumstance would only look ugly if the payment was out of all proportion either to the service or the legal claims, and that is probably why (accepting his own story) the moment he heard that he was to get this gift he was so particular in insisting that it should be in another's name. Because under no conceivable theory was the grant other than an exorbitant payment to plaintiff, and if setting aside the question of fees, it was to be regarded as a mere gift, it would be asked how far this was due to spontaneous generosity and how far to the fact that plaintiff held all his client's documents, and her fortune in the impending litigation was entirely in his hands.

As a matter of fact the three disputants compromised their quarrels that very year by the deed of settlement, Ex. 13. Since Lakshmidevamma has not been called as a witness statements attributed to her in that document can hardly be regarded as evidence but Mr. Varadachari was anxious to found upon them for the sake of the respondent. She says there that the document was nominally executed for the sake of convenience in business affairs. And another bit of hearsay is in the evidence of the agent P. W. No. 7 :

"It was in order that plaintiff might look after her future and pending litigations."

Even without accepting these statements as evidence, but merely pursuing the course of speculations to which plaintiff's reticence has driven the Court one might hazard the guess that Lakshmidevamma made the plaintiff this handsome grant from fear that unless she put him under a definite obligation her affairs would not prosper. This may be the motive for plaintiff's refusing frankly to tell the Court all that passed between himself and his client, and giving by way of substitute a version of the transaction so laconic as to seem opposed to all common dealing, courtesy and sense. But if plaintiff really did treat his client in the manner that he describes and allowed her to make him this grant of land from a false sense of obligation and erroneous calculation of his dues, his conduct would be equally opposed to the law governing the relations between a legal adviser or solicitor and his client.

In this respect, as freely conceded by Mr. Varadachariar the law of India does not differ from that of England. Perhaps the fullest exposition of the English Law on the subject is to be found in the judgment of Vaughan Williams, L. J., in *Wright* v. *Carter* (1). His Lordship begins by quoting Lord Eldon in *Hatch* v. *Hatch* (2) :

"It is almost impossible in the course of the connexion of ..... attorney and client ..... trustee and cestui que trust that transaction shall stand purporting to be a bounty for the execution of antecedent duty. There may not be a more moral act, one, that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the cestui que trust, taking it into his fair, serious and well informed consideration, were to do an act of bounty like this. But the Court cannot permit it ; except quite satisfied, that the act is that of nature ..... recollecting, that in discussing, whether it is an act of a rational consideration, an act of pure volition, uninfluenced, that enquiry is so easily baffled in a Court of justice, that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind, misled by undue kindness, or forced by oppression ; .... and therefore, if

(1) [1903] 1 Ch. 27=72 L. J. Ch. 138=19 T. L. R. 29=51 W. R. 196=87 L. T. 624.
(2) [1804] 9 Ves. 292.

the Court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud."

"Lord Eldon," proceeds Vaughan William, L. J.,

"was there dealing with the case of a gift, and it is perfectly plain that in the case of a gift the rule applied by the Court of Equity is much more stringent, is more absolute, than the rule that is applied in the case of a bargain or a contract. The principle that I understand Lord Eldon to be affirming is this—that whenever you have these fiduciary relations (and in the present case we have to deal with the particular fiduciary relation of solicitor and client), the moment the relation is established, there arises a presumption of influence, which presumption will continue as long as the relation, such as that of solicitor and client, continues ..... Now I am not saying that the presumption ..... is an irrebuttable presumption: I do not think that the cases go that length, and I do not think that Lord Eldon meant so to lay down."

"To my mind, all that he means is that, so long as this fiduciary relation continues, so long it will be very difficult to support the gift, and so long will the Court refuse to go into nice discussions as to whether the gift—taking the case of a gift by a client to his solicitor—was a gift which was advantageous to the client or whether it was not. I do not mean to say that, if the gift to the solicitor is manifestly one which a prudent man would not have given supposing the relation of solicitor and client to have determined in hac re, such a fact may not be taken into consideration as shewing that, notwithstanding the determination of the actual relation .... it is obvious that the influence of the solicitor had not ceased ..... So, on the other hand, the fact that the gift is a very trifling gift, or a gift made by a man with so ample a fortune that it must have been trifling to him, is a matter which might fairly be taken into consideration in considering whether the influence continues."

Of course, in the present case there is no question whether the relationship continued, it admittedly did, and it is only to that question that the size of the gift is said here to be relevant. Where the relationship has continued the Court will refuse to go into nice questions of advantage.

It is therefore laid down that the Court must be assured that the act is one done after fair, serious, and well informed consideration, and, knowing how easily its inquiry may be baffled by, for instance, a rigid avoidance of full disclosure it will watch the transaction with a jealousy almost invincible. What has the plaintiff done in this case to show that his client was fairly dealt with, seriously treated, well informed, or indeed helped to any sort of consideration?

The learned Advocate General has cited numerous other authorities, but they merely confirm the principles stated in this judgment, and there is the less need to consider them for the circumstances that no alternative view is pressed on behalf of respondent. Mr. Varadachariar confined himself to combating the extreme position taken in early cases, that the presumption is unrebuttable, and the solicitor in matters like this, must always show that his client had independent advice; neither of which propositions is advanced on the other side. He also quoted an obiter dictum of Lord Brougham's as regards the relationship of solicitor and client, which when closely examined does not deviate from the direct rulings on the subject:

"A client, for example, may naturally entertain a kindly feeling towards a solicitor by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift ..... No law that is tolerable among civilised men—men who have the benefit of civility without the evils of excessive refinement and overdone subtlety—can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to shew that deception was practised, or that the .... solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which he stands to the other party the proof lies upon him to shew that he has placed himself in the position of a stranger, that he has cut off, as it were, the connexion which bound him to the party giving ... and that nothing has happened, which might not have happened, had no such connexion subsisted:" *Hunter* v. *Atkins* (3).

These observations have little bearing on a case where the connexion still subsisted, and the gift was admittedly in some relation to the solicitor's fees and almost it only amounts to saying that a solicitor must afford full and satisfactory proof rebutting the presumption of undue influence. And this is the burden of all the rulings, that the solicitor must fully assure the Court that he had fully advised his client:

"The solicitor must prove that his client was fully informed of all the material facts, understood the transaction and that the transaction itself, both as to price and otherwise, was a fair one;" *Allison* v. *Clayhills* (4).

(3) [1834] 3 Myl. & K. 113.
(4) [1908] 97 L. T. 709.

Lord Halsbury observes in *Willis* v. *Barron* (5) :

"He was a solicitor too, and he was her trustee. Was he under no duty to his cestui que trust to tell her what her rights were, and what the rights were which she was giving up. My Lords, it seems to me, I confess, hardly susceptible to argument"

In *Liles* v. *Terry* (6) it is laid down in unequivocal terms that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. In this case Lord Esher holds that the gift is invalid ; as is held also in *Tomson* v. *Judge* (7) where Lord Thurlow, Lord Erskine and Lord Eldon are cited as ruling that it is not open to the attorney to show that the transaction is fair. If it be conceded that the modern rule is not quite so stringent, it is clear, nevertheless, that the showing of the attorney must be particularly full and comprehensive. The case law in the latter matter has recently been reviewed by the Privy Council in *Inch Noriah* v. *Shaik Allie* (8) where Lord Hailsham lays down that it is necessary for the donee to prove that the gift was the result of the free exercise of independent will :

"The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing ..... The fact to be established is that stated by Cotton, L. J., in *Allcard* v. *Skinner* (9) that the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will. If evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer."

So in this case if the plaintiff had proved that he cleared up his client's mind as to her obligations, the exact fees which were owing, and the services which he had rendered in the past or would render in the future, it would not be absolutely essential for him to have referred her to independent advice, though he would more easily have borne his heavy burden of proof, if he had taken that course.

To the same effect in another Privy Council case, *Soharah* v. *Chabak Binte*. Lord Haldane lays down that the plaintiff :

"can discharge the burden incumbent on him by showing that the relationship notwithstanding, the donor knew completely what he was doing, and acted of his own completely free will. In the case of a solicitor taking a gift from his client this is obviously much more difficult to establish than in other cases."

The plaintiff's suit might be dismissed on the very short ground that his statement of the circumstances surrounding this gift is so perfunctory that it cannot be accepted as true and, therefore, provides no rebuttal to the presumption of undue influence. But upon the large assumption that he has made a full disclosure of the circumstances, he must still fail, because on his own showing he did nothing whatsoever to put his client in complete possession of the full facts regarding her obligations and liabilities.

Mr. Varadachari, attempted to excuse his client on the ground that the pleadings did not apprise him of the case which he had to meet but he has no legal grievance on that account. Issue 8 refers back to the ground taken in para. 7 of defendant 4's written statement, and there it is definitely stated that plaintiff standing in a fiduciary position got lands conveyed to him in another's name from his client and the transaction was not valid. His further complaint that though plaintiff deliberately withheld the details of the transaction in his examination-in-chief, they ought to have been elicited in cross-examination deserves no notice.

Finally, it is argued for the plaintiff-respondent that whatever may be the rights of this transaction defendant 4 has acquired no title to challenge it. It is conceded that if Lakshmidevamma's title to the land in question has passed to defendant 4 her right to question the benami sale would also pass. But it is

(5) [1902] A. C. 271=71 L. J. Ch. 603=18 T. L. R. 602=86 L. T. 805.
(6) [1895] 2 Q. B. 679=65 L. J. Q. B. 94=44 W. R. 116=73 L. T. 428.
(7) [1855] 3 Drew. 306=1 Jur, (n.s.) 583=24 L. J. Ch. 785=3 W. R. 561.
(8) A. I. R. 1929 P. C. 3.
(9) [1887] 36 Ch. D. 145=36 W. R. 251=56 L. J. Ch. 1052=57 L. T. 61.

argued that the deed of settlement is in effect no more than a surrender of her claim by Lakshmidevamma and an acknowledgment of defendant 4's superior title under the oral will which he had set up. Therefore, defendant 4 in order to resist the plaintiff's suit must set up his own title and cannot rely upon any rights flowing from the title of Lakshmidevamma to which he has never succeeded. This plea turns upon whether under the settlement deed, Ex. 13, the parties intended and effected an actual conveyance, or merely provided for a mutual surrender of title. We have no doubt from a perusal of the document that a conveyance was intended. The exact wording is (in para. 7). It was settled that the land measuring 36.08 acres . . . together with the rights attached to it should pass to No. 2 (i. e., defendant 4) and, at the close of the para. also the rights of the muchilika which was executed in favour of Lakshmidevamma regarding the 36.08 acres and which is now in force should pass to defendant 4.

Mr. Varadachari suggested, following para. 39 of the lower Court's judgment, that defendant 4 may have been given the precise parcel conveyed to the plaintiff's benamidar out of deliberate malice, so as to enable him to attack his lawful possession. The imputation of malice must depend upon the light in which the benami transaction is to be regarded but the suggestion that there was a deliberate intention to attack seems to be well founded and if the parties intended defendant 4 to take action they would presumably also have intended to put him in a position to do so.

Moreover, it seems obvious that if the landlord's right against the tenant was transferred, the right of ownership was also intended to be conveyed. It is not a matter in which case-law is of any assistance. Every compromise of this Court must be considered according to the language of each document, and the peculiar circumstances of each case. No doubt having regard to the special case of a widow alienating property afterwards claimed by a reversioner it has sometimes been held that the document was no more than an acknowledgment of title, and no property was actually conveyed : cf. *Khunni Lal* v. *Govind Krishna Narain* (10). But in this case it is an undoubted conveyance. The learned Subordinate Judge concedes in his para. 34 that the document may amount to a transfer and reading it as a whole and considering its underlying intention, we have no doubt that that is the correct interpretation.

The rest of the judgment calls for no special remark except that in para. 24 the plaintiff's vague guesses are given as his positive version, as though he has assured himself that they warranted the grant. And the learned Subordinate Judge sounds too much in his para. 34 upon the circumstance that the defendants did not examine Lakshmidevamma. Primarily the plaintiff might have been expected to call his client, but since neither party has called her, it is idle to attempt to obtain her views in the matter either by surmise or by secondary evidence. No doubt the learned Subordinate Judge's difficulty lay mainly in the fact that he had no access to the English authorities, and did not know how heavily the burden lay upon the plaintiff.

For the above reasons the appeal is allowed with costs throughout.

Ramesam, J.—I agree.

P.R.S./V.S. *Appeal allowed.*

(10) [1911] 33 All. 359=10 I. C. 477=38 I. A 87 (P.C.)

A. I. R. 1930 Madras 322

WALSH, J.

Ibramsa Rowther—Defendant—Petitioner.

v.

Muhammad Esuf Rowther—Plaintiff—Respondent.

Civil Revn. Petn. No. 653 of 1928, Decided on 24th April 1929, from order of Sub-Judge, Tiruvarur, D/- 20th March 1928, in I. A. No. 24 of 1926.

(a) Civil P. C., O. 6, R. 17—Amendment setting up new case should not be allowed.

An amendment which in effect allows the plaintiff to set up a new case in contradiction to that set out in the plaint should not be allowed. 19 *W.R.* 12 (*P.C.*) ; 8 *M. L. T.* 284 and 11 *Bur. L. T.* 246, *Rel. on*; 26 *L.W. Short Notes* 92, *Dist.* [P 325 C 1]

(b) Civil P. C., S. 115—Material irregularity by granting amendment that should not have been granted—Revision lies.

The High Court will interfere in revision in a matter of procedure where the Court has acted with material irregularity by granting leave to amend a plaint, where such leave

should not have been granted. *A. I. R.* 1927, *Lah.* 71, *Rel. on.* [P 325 C 1]

V. C. Seshachariar and *N. R. Raghavachariar*—for Petitioner.

K. S. Desikan—for Respondent.

Judgment.—This is a revision petition against the order of the Subordinate Judge of Tiruvarur allowing an amendment of the plaint in A. S. No. 68 of 1925, which came up before him on appeal from O. S. No. 309 of 1923, before the District Munsif of Tiruvarur. The suit was to redeem certain properties in the possession of the defendant. The plaintiff's case was that he purchased this property from one Subbiah Pillai under a sale deed dated 9th October 1923 (Ex. B.) and that this Subbiah Pillai was the reversioner to the estate of one Veera Pillai, whose widow had enjoyed the property after her husband's death and had executed the mortgage-deed in question. The defendant set up the case that he had purchased the property from one Swaminatha Pillai the great-grandson of Veera Pillai's grandfather. From the genealogical tree filed by the plaintiff, it was obvious that his vendor, Subbiah (P. W. No. 4) was one degree more remote from the last male-holder, Veera Pillai, than two other persons Ramasami and Ayya Pillai mentioned therein. The evidence of P. W. No. 3 was to the effect that Ramasami was the nearest agnate at the death of Veera Pillai's widow, Muthachi and that he performed the obsequies at her death, and P. W. No. 4 the vendor expressly stated that he himself did not assert his rights at Muthachi's death, because Ayya Pillai, a preferential heir was alive. The trial Court disbelieved the relationship of the defendant's alleged vendor, Swaminatha Pillai, and gave the plaintiff a decree, from which an appeal was preferred to the Subordinate Judge. It does not appear to have been argued before the District Munsif, though it was perfectly clear from the genealogy filed by the plaintiff and from the evidence of P. Ws. 3 and 4 that plaintiff's vendor, Subbiah Pillai was not the next reversioner to Veera Pillai, the last male-holder of the property. On this point being taken in appeal, the plaintiff asked for leave to amend his plaint to show that Subbiah Pillai got his title from Ayya Pillai and Ramasami. This was allowed and the present revision petition is against the order allowing the amendment.

It is argued that the effect of the amendment is to allow the plaintiff to set up a new case in contradiction to that set out in the plaint. It is argued on the other side that the amendment is merely giving a more detailed account of how the plaintiff's vendor, Subbiah, acquired his title. It should be noted that in the plaint Veera Pillai is distinctly stated to be the last male holder and the recital in the sale deed by Subbiah Pillai to the plaintiff is that the vendor, Subbiah Pillai, is the next reversioner. These are perfectly specific terms the meaning of which is well-known and it seems to me that it is to change both the plaintiff's title and cause of action to say now that Veera Pillai was not the last male holder nor Subbiah Pillai his next reversioner. Although the Code of 1908 has given greater latitude with regard to the amendment of plaints, the Privy Council ruling in *Gopee Lal* v. *Sree Chandrolee Buhooji* (1) has not been affected. Their Lordships there laid down that they cannot :

> " depart from the rule which has always prevailed that a man must recover according to his allegations and his proofs. It would not enable their Lordships to allow . . . . . an entirely new case to be now brought forward before them, which is not even set up or hinted at in the plaint."

On behalf of the petitioner, *Pethasari* v. *Sendamarai Ayi* (2) and *Maung Tha So* v. *Maung Lu Pe* (3) were quoted. In the former of these, it was held that the plaintiff who had claimed certain property under the title of a widow's estate could not change that title into one of the widow's sridhana property. In *Maung Tha So* v. *Maung Lu Pe* (3) it was held that the plaintiff who set up title as a son adopted krittima could not change that into a title as a son adopted apatittha. On the other side are quoted *L. P. A. No.* 112 *of* 1925* *decided 22nd November* 1927 and *B. Satyanarayana* v. *S. Venkata Tirumala* (4). The facts in the latter case are not given. I have carefully perused the judgment, which I have called for, in

* 26 M. L. W. Short Notes 92.

(1) I. A. Sup. Vol. 131=11 B. L. R. 391=19 W. R. 12=3 Sar. 217 (P. C.).

(2) [1911] 8 M. L. T. 284=8 I. C. 385.

(3) [1917] 11 Bur. L. T. 246=41 I. C. 749.

(4) A. I. R. 1925 Mad. 794.

the former case and I think it is distinguishable from the present. In that case, plaintiff 1, who claimed the properties, alleged that they belonged to one Vasu Pattar who died leaving three daughters, that at the time the last of the daughters died, plaintiff 1's father was the nearest reversioner alive and that on his death he himself and defendants 9 to 11 became entitled to the properties. The contesting defendants 1 to 4 alleged that at the time the last of the daughters died, the reversioner was not plaintiff 1's father but the plaintiff 1 himself together with defendants 9 to 11 and two other persons from whom defendant 1 had taken an assignment of his rights. These two persons applied to the Court to be made parties. They claimed that they were also reversioners but denied having assigned their rights to defendant 1. Issues were raised and the suit was tried on the merits and it was decided that plaintiff and defendants 9 to 11 were not exclusively entitled to the property but that plaintiff, defendants 9 to 11 and defendants 12 and 13 were the reversionary heirs.

On appeal, the learned District Judge considered an amendment of the plaint was necessary but subsequently he came to the conclusion that an amendment should not be allowed and, therefore, reversed the first Court's decree and dismissed the suit. An appeal against his decision having been dismissed, the matter came up, on Letters Patent Appeal. Their Lordships held that from the time when the two persons mentioned as additional reversioners by defendants 1 to 4 were added as defendants 12 and 13, the suit should be treated as one relating to the estate of Vasu Pattar and not to the estate of plaintiff's father and that as a fact it was so treated by all the parties and tried as such and that the only question before the Court was whether the plaintiff was entitled to the larger share that he in the first instant claimed or only to the lesser share, if defendants 12 and 13 should also be allowed to participate in the property. They also found that the suit was not liable to be dismissed, because no formal amendment of the plaint had been made. The point whether the present suit must be dismissed, if the plaint is not amended, is not before me and I am only concerned with the question whether the amendment should have been allowed. It appears to me that this case reported in 26 *L. W. Short Notes, p.* 92. is a peculiar one and different in several vital respects from the present suit. In the first place the plaintiff was in that case on the contentions raised by the defendants themselves a direct reversioner on Vasu Pattar's death. His admitted title was actually a more direct one than that which he set up. In the second place, the Court found that, from the time when defendants 12 and 13 were added the suit related to the estate of Vasu Pattar and not of plaintiff's father.

These elements are altogether wanting in the present case. The plaintiff derives his title solely from his vendor Subbiah Pillai. It is not for me to say here whether he can succeed on his plaint if unamended. It is not the point before me, but when it is argued that he might simply have claimed from Subbiah, without detailing the latter's title it is almost certain that the defendant would in that case have called for specific information as to Subbiah's title.

The plaintiff cannot have a better title than his vendor. If Subbiah had filed the suit, as the next reversioner to Veera Pillai, it seems to me perfectly clear that he must have been non-suited as the genealogy filed and the evidence would show that he was not the next reversioner. This differentiates the case entirely from that in 26 *L. W. Short Notes p.* 92. where the plaintiff was actually the next reversioner himself and not his father through whom he claimed. To allow an amendment of this sort would, I think, open the door to most dangerous consequences. It happens in this case that it is the genealogy filed by the plaintiff himself and and the evidence of his own witnesses which shows that his vendor is not the next reversioner to Veera Pillai as he states, and it is also true that the defendant's case has not been believed by the trial Court. Nevertheless, it is difficult to see if an amendment of the plaint were allowed in a case like this, how it could be refused even where the existence of a nearer reversioner than the person through whom the plaintiff claimed title had been proved by the defendant. Even in the present case

supposing it were proved in trial after the amended plaint that the plaintiff's vendor Subbiah never succeeded even to the two nearer reversioners, would it be open to the plaintiff then to ask for a fresh amendment of the plaint to show that his vendor Subbiah, had title to the property through adverse possession or in some other manner ? I am of opinion that the proposed amendment distinctly alters the cause of action and that it is not correct to say that it merely supplies additional details. I do not think, therefore, that it should have been permitted. The High Court will interfere in revision in a matter of procedure where the Court has acted with material irregularity by granting leave to amend a plaint, where such leave should not have been granted : vide *Prem Das* v. *Gokal Chand* (5).

The revision petition will be allowed with costs and the order allowing the amendment of the plaint set aside.

P.R.S./V.S. *Petition allowed.*

(5) A. I. R. 1927 Lah. 71.

A. I. R. 1930 Madras 325

SUNDARAM CHETTY, J.

(*Nidamarthi*) *Venkataramayya* — Plaintiff—Appellant.

v.

Indian Industrial Bank Ltd., Calcutta—Defendant—Respondent.

Second Appeals Nos. 77 and 78 of 1926, Decided on 2nd September 1929, against decree of Sub-Judge, Rajahmundry, in A. S. Nos. 195 and 196 of 1924.

Companies Act S. 100 — Director mentioned in prospectus retiring — No notice given to allottee of shares — Allottee of shares is entitled to refund of money.

Where before allotment of shares in a limited company two of the directors mentioned in a prospectus retired and the fact of retirement was not communicated to the allottee of shares,

Held : that the allottee of the shares would be entitled to rescind the contract of allotment of shares and claim a refund of the moneys paid by him : *Re, Scottish Petroleum Co.* (1881) 17 *Ch.* 373 ; *Re, Kent County Gas Light and Coke Co.*, (1901) 95 *L. T.* 756, *Foll.*

[P 326 C 2]

G. Lakshmanna—for Appellant.

Judgment.—These are connected appeals. The plaintiff is the appellant in each appeal. The defendant respondent is the Industrial Bank, Limited ; but there is no appearance for the bank in both these appeals. The suits filed by the plaintiffs are for the refund of the moneys paid by them to the defendant bank on account of the shares which they agreed to take in pursuance of alluring prospectus issued by the company. The plaintiff's case is that the contract between them and the defendant was vitiated by fraud and misrepresentation, that there was no valid allotment of the shares and that they are entitled to rescind the contract and claim the refund of the moneys with interest at 6 per cent per annum. The learned District Munsiff in a lucid and able judgment discussed the questions at issue at great length and found that the plaintiffs are entitled to a decree for refund of the moneys with interest. The lower appellate Court reversed the decrees of the first Court but on a perusal of its judgment, I am constrained to observe that it missed the vital points in the case and proceeded to determine the issues on what seem to be somewhat irrelevant considerations.

The main contention urged on behalf of the appellants is, that two of the directors mentioned in the prospectus are said to have retired even before the allotment of shares, that the plaintiffs agreed to take the shares in the company on the faith of the representations made in the prospectus which entitled them to believe that these two important gentlemen would continue to be the directors in the usual course, and that, if the facts of their resignation had only been communicated to them, as it ought to have been done, before the allotment of shares, they would have rescinded the contract and claimed the refund of the moneys sent by them. It is an admitted fact that in these circumstances no notice of the resignation or retirement of these two directors was given to the plaintiffs after the issue of prospectus and before the actual allotment of shares. The suppression of this fact is alleged by the plaintiffs to be something which would amount to fraud in the eye of the law, justifying them in going back on their offer and claiming a refund of the moneys. In the course of the correspondence, it is even admitted by the defendant company in their letter dated 16th March 1922 : vide Ex. 20 that as regards the change in the directorate before allotment, the plaintiffs

were certainly entitled to notice, but they set up an acquiescence on the part of the plaintiffs to justify their refusal to refund the amount. On this question, there is the distinct authority of a leading .case reported in *Re, Scottish Petroleum Co.*, (1) (*Anderson's* case). The facts in that case appear to be on all fours with the facts of the present case. In that case, a subscriber for shares in a company received a letter of allotment and at the same time a letter informing him that two of the four directors named in the prospectus had retired. On the very same day he wrote to the company stating that he applied for shares on the faith of those two gentlemen being directors and asked for the cancellation of the allotment and removal of his name from the register of shareholders. What the duty of the company in such circumstances would be is clearly stated in the following passage in that judgment :

"I do not think there was when the prospectus was issued, because it was believed that Mr. Gibson and Mr. Ross would act ; but when the company found that these gentlemen would not act, they were bound to issue a new prospectus containing other names, and to inform those who had applied for shares, that before the allotment was made other directors had been appointed and then it would be for the applicants for shares to say, under those circumstances, whether they would adhere to their offer or would withdraw it."

The learned Judge in that case proceeded to say, that the directors ought to have said that they would give the applicants the option of withdrawing when the state of things on the faith of which they made the application no longer existed. Any persistence on the part of the company in refusing the option of withdrawing would be an unjustifiable thing in the opinion of the learned Judge. In the present case, what happened is exactly as stated above. To the same effect is the decision reported in *Re : Companies Acts* 1862 *to* 1900 ; *Re : Kent County Gas Light and Coke Co.* (2). Under similar circumstances, it was held that the shareholders were entitled to rescind the contract following the observation in Lindley's book on Company Law which is as follows :

"If an application for shares is made on the faith of a statement which is true when made but which is not true when the shares are allotted the applicant may refuse to take them."

In view of these clear principles of law it cannot be said that the plaintiffs are not entitled to rescind the contract and claim a refund. It is a pity that the lower appellate Court lost sight of these principles, though they were adverted to in the first Court's judgment. The fact that subsequent to the formation of the company after allotment of shares, there is every likelihood of a change in the directorate, has no bearing on the present question, because until the allotment of the shares, the plaintiffs have a right to withdraw their offer, if there should be any breach in the terms of the contract published in the prospectus. On this point alone the plaintiffs would be entitled to the relief asked for by them.

It is unnecessary to consider the other questions as regards the validity of the allotment of shares made by the defendant. If that allotment is found to be invalid or ultra vires, that would only be another ground for giving a decision in plaintiff's favour. In the result, these second appeals are allowed and the decrees of the Court of first instance are restored with costs in all the Courts.

P.R.S./V.S. *Appeals allowed.*

(1) [1881] 17 Ch. D. 373=50 L. J. Ch. 269= 29 W. R. 372=43 L. T. 723.
(2) [1907] 95 L. T. 756.

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* A. I. R. 1930 Madras 326

RAMESAM AND JACKSON, JJ.

N. Purushottama Rao—Defendant—Appellant.

v.

(*Mullavarapu*) *Ram Rao* and *another* —Plaintiffs—Respondents.

Appeals Nos. 256, 257 and 363 of 1927, Decided on 4th April 1929, from decree of Sub-Judge, Nellore, in Original Suit No. 43 of 1925.

*** (a) Hindu Law—Partition — Minor—Minor is incapable of exercising intention to separate—Minor is separated from family only after decree—Therefore property of minor son dying pending suit by his elder brother as guardian vests in father by survivorship.**

A minor is incapable of exercising the intention to separate by himself; the next friend does it for him. If the Court thinks fit to allow partition on behalf of the minor, the minor becomes divided; but until the decree is passed the minor's interest is not divided from the rest of the family. Where, therefore, a minor dies after the institution of partition suit brought by his elder brother acting as next

friend, his share vests in his father by survivorship. [P 327 C 2]

(b) Hindu Law—Alienation—Father—Antecedent debt—No pressure—Alienation is binding on son.

A father can certainly sell joint property for discharging antecedent debts even in absence of pressure: *A. I. R.* 1923 *All.* 535, *Diss. from.* [P 328 C 1]

K. V. Venkatasubramania Aiyar—for Appellant.

B. Somayya—for Respondents.

Ramesam, J.—These three appeals are filed against the judgment in O. S. No. 43 of 1925 on the file of the Subordinate Judge's Court of Nellore. The original plaintiffs were two brothers. The first was a major and the second a minor appearing by his elder brother as next friend. Plaintiff 2 died during the pendency of the suit. Defendant 1 was their father, defendant 2 was the brother of defendant 1 and the other defendants were the alienees of defendants 1 and 2. Defendant 8 was the special receiver appointed in the insolvency proceedings in connexion with the insolvency of defendant 1 who became insolvent while the suit was pending. The suit was filed to declare that the partition between defendants 1 and 2 in 1915 was unfair and therefore not binding on the plaintiffs, to set aside certain alienations made by defendants 1 and 2 and also for a partition of the shares of plaintiffs 1 and 2 and recovering possession of them. The Subordinate Judge found that the partition of 1915 was fair and binding on the plaintiffs and on that footing gave a decree to plaintiff 1 for partition and possession of his share of the properties that were allotted to his branch. Appeal No. 256 was filed by the receiver (defendant 8), Appeal No. 257 was filed by plaintiff 1 and Appeal No. 363 was filed by one of the alienees, the alienation in whose favour was declared not to be binding on the plaintiffs. We will now take up these appeals in order.

In Appeal No. 256 the only point raised by defendant 8 is that provision should be made in the decree for the discharge of defendant 2's debts out of the joint family properties and that the decree for partition should be only of the rest of the properties that remained after provision is made for the payment of the debts. Defendant 8 filed a written statement in the Court below saying that as the main object of the suit was to have the partition of 1915 and the alienations made by defendant 1 declared invalid and to have them set aside and not a partition between defendant 1 and his sons, the validity and binding nature of the debts cannot be gone into in this suit. Apparently, at the time when issues were framed with reference to this allegation the parties did not think it necessary to raise an issue relating to the debts. The result was that all the parties and the Subordinate Judge thought that no inquiry about the debts was necessary and the decree passed does not make any provision for any enquiry and the preliminary decree is a pure decree for partition. Now defendant 8 wants such a provision to be inserted. We think it is too late. After all, the creditors do not suffer by our refusing to adopt the course suggested and it does not injuriously affect the interests of any parties. This appeal is therefore dismissed with costs. The receiver may pay the costs and take his own costs from the estate of the insolvent.

In Appeal No. 257 plaintiff 1 is the appellant. He argues that he never intended to separate from his younger brother but his object was that he and his younger brother should be separated from his father and therefore he was entitled to two-thirds of the properties that were allotted to his branch or at any rate half of them and defendant 2 half. We think that both these contentions are not well founded. Plaintiff 1 being a minor, is incapable of exercising the intention to separate by himself. The next friend does it for him. If the Court thinks fit to allow partition on behalf of the minor, one can well say that the minor has become divided; but until the decree is passed one cannot say that the minor's interests are divided from the rest of the family. Plaintiff 1 has divided from the rest of the family. The result is that plaintiff 1 went out of the family and plaintiff 2 remained with the family, and consequently the share of plaintiff 2 vested in defendant 1 by survivorship. The Subordinate Judge is right in his conclusion. This point therefore fails.

The second point argued for plaintiff 1 is that the alienation in favour of defendant 6 was nominal. We

think that the Subordinate Judge is right in the conclusion he arrived at. His reasons are given in para 14 of his judgment with which we agree. The third point is that the partition of 1915 was really unfair. Here also we agree with the conclusion of the Subordinate Judge. The result is Appeal No. 257 also fails and is dismissed with costs. Some grounds are taken against respondent 3. So far as that item is concerned respondent 3 will be entitled to get costs proportionate to that item. The other respondents will get their proportionate costs, i. e., proportionate to their interests.

Appeal No. 363 of 1927 is by defendant 5. His sale deed is Ex. 5. It was effected for the purpose of discharging the prior mortgage debt under Ex. 1. It is also not disputed that the consideration for the sale-deed was paid in discharge of the mortgage debt as the endorsement on the deed shows. The Subordinate Judge following the decision in *Bandhu Ram* v. *Ram Kishun Sonar* (1), has held that there was no pressure for the sale and therefore the sale was not binding on the plaintiffs. Whatever may be the law as to the right of a manager to sell when there was no pressure, a father can certainly sell for discharging antecedent debts as here. There is no question about the existence of the antecedent debt or of the fact of its having been paid off. We do not agree with the decision in *Bandhu Ram* v. *Ram Kishun Sonar* (1). We allow this appeal and hold that this sale is binding on the plaintiffs. We direct that this item be exclnded from partition. Defendant 5 will have his costs in appeal and in the Court below.

P.R.S./V.S. *Appeal allowed.*

(1) A. I. R. 1923 All. 535.

A. I. R. 1930 Madras 328

PANDALAI, J.

Subramania Chettiar and *others*—Appellants.

v.

Angappa Asari—Respondent.

Appeal No. 53 of 1925, Decided on 30th April 1929, from appellate order of Dist. Judge, Salem, D/- 7th October 1924, in Misc. Civil Appeal No. 14 of 1924.

Limitation Act, Art. 181—Striking off on statistical or administrative ground—Application for judicial relief does not amount to judicial disposal.

The closing or striking off on statistical or administrative grounds an application for judicial relief does not amount to judicial disposal of it and for the purposes of limitation an application so struck off must be regarded as pending. [P 329 C 2]

R. V. Sesha Ayyangar—for Appellant.

L. S. Veeraraghava Iyer—for Respondent.

Judgment.—This second appeal is from an order to deliver property to an auction purchaser in execution. The sale took place in 1917. Its confirmation was opposed but it was confirmed on 5th March 1919, by the appellate Court. From that time onward for a period of more than 10 years the purchaser has been attempting to get possession. In the fourth and last application dated 28th September 1923, he was met by one of the three sons of the deceased judgment-debtor by the plea of limitation under Art. 180, Lim. Act. The first application for possession was dated 15th November 1919. An order was made for giving possession on that application but not carried out owing to the obstruction of the daughter-in-law of the judgment-debtor and so the application was treated as "closed". The second application dated 15th December 1919, was for removal of obstruction and possession but removal of obstruction could not be ordered or possession given on account of the pendency of obstruction proceedings followed by a suit filed by the obstructor during which the purchaser was prevented by an injunction and by reason of a stay order from the High Court in Civil Revision Petition No. 1919 filed by the judgment-debtors against the order confirming sale. Before those proceedings were closed, however, the application was itself treated as 'closed'. The third application was made on 12th October 1921, after the termination on 31st August 1922, of the obstructor's suit O. S. No. 287 of 1920. This application was returned to the applicant's vakil for representation with the certificate of the sale in one week. This was not done as the vakil who got back this application was in custody for a long time afterwards. On his release that petition was re-presented by another vakil on 20th July 1923, with the sale certificate on behalf of the purchaser with another application to excuse the

delay in re-presentation caused by the above circumstance. The Munsif by his order dated 24th November 1923, declined to excuse the delay but allowed in the meanwhile a fourth application dated 28th September 1923, to be filed as a continuation of the first and second application and it is this which the judgment-debtor's son now says is time-barred as it was filed more than three years after the confirmation of the sale.

The District Munsif held that in the circumstances stated above the first application can be treated as "closed" only for statistical purposes as the order for delivery made on that application was not carried out merely on account of the resistance of third parties and that the application, dated 28th September 1923, was a continuation of the previous proceedings. He, therefore, ordered delivery of possession to be given on 1st March 1924. One of the three sons of the judgment-debtor appealed to the District Judge. He held that the application of 28th September 1923 should not be treated as a revival of the earlier proceedings because the third application dated 12th October 1921, must be held to have been dismissed as it was not re-presented in time and the application to excuse delay was refused. But the learned Judge upheld a preliminary objection taken on behalf of the auction-purchaser that the appeal to him was incompetent as the question in dispute did not arise between opposite parties or their representatives and, therefore, do not fall within S. 47, Civil P. C., and, that, therefore, no appeal lay. The judgment-debtor's son has filed the second appeal.

Two questions were argued : (1) that the view of the lower appellate Court that no appeal lay to him was incorrect and (2) that the application for possession was barred under Art. 180. I do not propose to deal with the first contention as in my opinion there was more than one application for possession made within three years of the confirmation of the sale pending undisposed of before the Court sufficient to support the District Munsif's order. The first three applications were clearly made within three years of the date of the confirmation of the sale. On the first application an order for possession had been made but not carried out owing to no fault of the purchaser. To close such an application because the order made could not be immediately carried out on account of obstruction only means that the execution of the order had necessarily to be postponed not that the application is dismissed. Treating such a matter as "closed" can only be for statistical purposes. Similarly the second application for removal of obstruction and for delivery of possession could not be dealt with finally as the obstructor's suit intervened and an order could only be passed after it terminated and the injunction against the purchaser was dissolved. To "close" such an application on account of the pendency of other proceedings before the termination of which final orders could not be passed has no other meaning than that consideration of the matter is postponed and pending such consideration the application is for statistical purposes closed. The fact that the third application was not represented in time and that the Court refused to excuse to delay, in re-presentation of that petition does not mean that it was dealing with the previous two applications which were judicially undisposed of, because even before 24th November 1923, the date of the order refusing to excuse the delay in re-presentation of the third petition, the present or fourth application to continue the proceedings under the first two applications had already been filed on 28th September 1920, and it was disposed of only on 2nd February 1924 the date of the order now under appeal. I cannot agree with the learned Judge when he says that the first application was not merely closed for statistical purposes. He has said nothing about the second application. It is well recognized that closing or striking off on statistical or administrative grounds applications for judicial relief do dot dispose of them judicially and that for purposes of limitation they must be regarded as still pending. The appellant has absolutely no merits and the appeal is dismissed with costs.

P.R.S./V B. *Appeal dismissed.*

A. I. R. 1930 Madras 329

ANANTAKRISHNA AYYAR, J.

(*Kantipudi*) *Ramayya*—Appellant.

v.

Garapati Ramayya—Respondents.

Second Appeal No. 1739 of 1925, Decided on 27th March 1929.

Hindu Law -- Succession— Dancing girl cannot by custom inherit property of her husband—Daughter of such girl inheriting her father's estate cannot plead custom about taking property absolutely.

No custom among dancing girls could ordinarily provide for a case of a dancing girl succeeding to the properties of her husband because the very idea is that the "dancing girls" do not marry and do not have legal husbands whose properties they could "inherit." A daughter of such girl cannot, therefore, inherit her father's property absolutely. [P 330 C 1, 2]

Advocate-General—for Appellants.

S. Varadachariar—for Respondents.

Judgment.--Defendants 5 to 8 are the appellants in this second appeal. Defendants 1 to 4 are the daughter's sons of Seetharamudu on whose death Gangalakshmi his widow took possession of these properties. In the case of an ordinary family governed by Mitakshara Law the presumption will be that Gangalakshmi had only a life-estate (widow's estate) in the properties that came to her on the death of Seetharamudu. The appellants, that is, defendants 5 to 8 who are the alienees from Gangalakshmi and her daughters Rattama and Narasamma, set up a custom in the family of the parties by which in the properties inherited by a female, she would have absolute rights. The plaintiff claims as vendee from the daughters' sons, namely defendants 1 to 4. Under the ordinary Hindu Law the plaintiff as purchaser from the daughters' sons would be entitled to the property on the death of their mothers, namely daughters of Gangalakshmi. It is upon the appellants who claim as purchasers from the widow and her daughters to prove that they got an absolute interest in the properties.

The learned advocate for the appellants contends that by virtue of a special custom, his vendors were absolutely entitled to the property. All that is in evidence in this particular case is that the family of Gangalakshmi, Rattamma and Narasamma originally belonged to dancing women caste. But whatever might be the position of affairs before Gangalakshmi, it is clear that, Gangalakshmi left off her profession and married Seetharamudu, and it is by virtue of that marriage and as heir of Seetharamudu that Gangalakshmi claimed right to these properties. No custom among dancing girls could ordinarily provide for a case of a dancing girl succeeding to the properties of her husband because the very idea is that the "dancing girls" do not "marry" and do not have "legal husbands" whose properties they could "inherit." Therefore, it is not likely that there would be any such custom as is set up on behalf of defendants 5 to 8. Objection is, however, taken by the learned advocate for the appellants to the statement made by the learned Subordinate Judge at p. 2, namely :

"we have here the important fact that the women of this family have not been carrying on their caste profession and were leading married lives."

Therefore, the custom that exists in the family should not be held to be not binding upon them and it is complained that the lower appellate Court has not disposed of the case in a satisfactory manner. I am not, however, clear that the learned Subordinate Judge has in any way misdirected himself in the disposal of the appeal. But whatever that may be, the onus is really upon the appellants to prove the custom set up by them. On questioning the learned advocate for the appellant to point out to me the evidence that has been let in to prove the alleged custom he admitted (and very properly) that there is no such legal evidence at all in this particular case, as would prove a custom. That being so the finding on the first point raised before the Court is correct.

The second point raised is that the alienation evidenced by Ex. 1 under which the appellant's claim should be upheld because it was an alienation made not only by the widow Gangalakshmi but also by the next reversioners, namely, her daughters Rattamma and Narasamma. It is argued that because the next reversioners also joined with the widow in making the alienation, therefore, there is a presumption that the alienation was for binding purposes, and that the onus will be upon the ultimate reversioner to prove that the alienation was not binding. In this particular case there is the fact that the next reversioners who joined in the alienation are Rattamma and Narasamma who too had only life-estates. But without pursuing this point further, I may say that we have got in this case the finding of fact by both the lower Courts, on a consideration of all the circumstances and the evidence let in

the case, that no necessity for the alienation (Ex. 1) has been made out. That being so, no question of presumption arises. The finding has been arrived at having regard to all the evidence let in in the case. I think that finding is binding upon me in second appeal, and consequently I think there is nothing in the second point raised by the learned advocate for the appellants. This being my view on both the points raised on behalf of the appellants, I think the second appeal should be dismissed, which I hereby do, with costs.

P.R.S./V.B. *Appeal dismissed.*

** A. I. R. 1930 Madras 331
Full Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

In re, Karuthaswami Servai—Petitioner—Accused.

Criminal Revn. Case No. 941 of 1928, Crim. Revn. Petn. No. 681 of 1928, Decided on 22nd October 1929, from judgment of Sess. Judge, Ramnad, in Crim. Appeal No. 19 of 1928.

**** (a) Criminal P. C., Ss. 117 (2), 256 and 257—Security proceedings — Right of accused to recall for cross examinations is under S. 257 and not S. 256.**

An accused person who has been called upon to give security for good behaviour, has no absolute right fo recall prosecution witnesses for cross-examination under S. 256, but he has a right under S. 257 : *Case law discussed.*

[P 335 C 1]

(b) Criminal P. C., S. 112—"Order in writing setting forth substance of the information received" is equivalent to charge — Criminal P. C., S. 117 (2).

The words "no charge need be framed" in S. 117 (2) can only mean that no occasion can arise for framing a charge because under S. 221 (1) every charge shall state the offence with which the accused is charged. In security proceedings the place of charge is taken by the "order in writing setting forth the substance of the information received" prescribed by S. 112. This order has to be read over to the person in respect of whom it is made, and although the Code does not provide that he should plead to it, it resembles a charge in that it must contain a statement in abstract of the prosecution case.

[P 335 C 2]

Nugent Grant for *R. Kesava Aiyangar* —for Petitioner.

N. S. Mani for *the Public Prosecutor* —for the Crown.

Order of Reference.

Waller, J.—Mr. Grant on behalf of the petitioner raises two points of law. The first is that the notice served on his client did not conform to the requirements of S. 112, Criminal P.C. Assuming that it did not, the defect seems to me to have been cured by the fact that he was supplied with a copy of the charge-sheet. The next raises a more difficult question. The petitioner during the enquiry, asked the Mgisatrate to re-summon some of the witnesses against him for further cross-examination but his request was refused. Mr. Grant argues that, by virtue of sub-S. (2), S. 117, Criminal P. C.. the whole of the procedure applicable to a warrant case is applicable to a case of this nature. I have been referred to no authority of this Court that bears directly on the point. Indeed in the course of a long experience as a Magistrate, I have never come across a case in which it was even suggested to me that the accused in a security enquiry had the right now claimed. There are two decisions by other High Courts which directly negative it. One is *Chintamon Singh* v. *Emperor* (1). The other is *Bija* v. *Emperor* (2). I should be prepared to follow these decisions but for certain observations that occur in *E. Venkatachinnayya* v. *Emperor* (3).

The question that had to be decided was whether the accused in a security case was entitled under S. 250 (a), Criminal P. C., to demand that the witnesses against them should be re-summoned and re-heard, when there was a change of magistracy. The decision was that though the subsection very clearly refers to a trial and not an enquiry, they were so entitled. With great respect, it seems to me somewhat difficult to reconcile this view with the view expressed in other decisions of this Court as to the distinction between a trial and an enquiry. That, however, is a question that does not arise here. What is material is that two of the Judges, Ayling and Coutts-Trotter, JJ., expressed the opinion that the whole of the procedure governing warrant cases, was attracted by S. 117 (2), Criminal P.C., to enquiries in security cases of the kind I am now considering. The matter is of conside-

(1) [1907] 35 Cal. 243=7 C. L. J. 177=12 C. W. N. 299.
(2) A. I. R. 1927 Lah. 470=8 Lah. 265.
(3) [1920] 43 Mad. 511=38 M. L. J. 370=11 M. L. W. 435=56 I.C. 50=(1920) M.W.N. 280 (F.B.).

rable importance and, in view of the obiter dicta in the case in *E. Venkatachinnayya* v. *Emperor* (3), I think that the following question should be referred to a Full Bench:

"Is an accused person, who has been called upon to give security for good behaviour entitled to the benefit of S. 256, Criminal P. C. ?"

I may add that, as pointed out in *Chintamon Singh* v. *Emperor* (3), the object of S. 256 is to give the accused an opportunity of further cross-examination directed expressly to the case embodied in the charge, which seems to be superfluous where, as in security cases, the precise charges against him are known to him before the enquiry begins.

Anantakrishna Aiyar, J.—I agree that the question stated by my learned brother should be referred for the decision of a Full Bench.

Opinion :

Kumaraswami Sastri, J. -- The question referred to us for decision is :

"Is an accused person, who has been called upon to give security for good behaviour, entitled to the benefit of S. 256, Criminal P. C."

The sections dealing with security for good behaviour are contained in Chap. 8, Criminal P. C.

Section 110 empowers the Magistrates enumerated therein to require a person habitually addicted to the commission of offences mentioned in Cls. (a) to (c) to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding three years as the Magistrate thinks fit.

Section 112 provides that, where a Magistrate deems it necessary to require any person to show cause, he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties required.

Section 113 says that if the person in respect of whom an order has been made is present in Court, it shall be read over to him or explained to him if he so desires.

Section 114 says that if the person is not present in Court, a summons should be issued calling on him to appear.

Section 115 requires the summons or warrant to be accompanied by a copy of the order made under S. 112 and to be delivered to the person.

Then comes S. 117, the section which prescribes the mode of enquiry. It says that when the person appears in Court, the Magistrate shall proceed to enquire into the truth of the information upon which action has been taken and take further evidence as may appear necessary.

Clause (2) runs as follows :

"Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases; and where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed."

The form prescribed in Sch. 5 for the summons to be issued under S. 114 runs as follows :

"Whereas it has been made to appear to me by credible information that (then the substance of the information is set out) * *

* you are hereby required to attend in person (or by a duly authorized agent) (on a date specified in the form) to show cause why you should not be required to enter into a bond, etc."

So that Chap. 8 provides for the procedure to be adopted till the enquiry opens and S. 117 says that where the order requires security for good behaviour the enquiry shall be made as nearly as practicable in the manner prescribed for conducting trials in warrant cases. Turning to the mode prescribed for the trial of warrant cases which is provided for in Chap. 21, S. 252 provides for the discharge of the accused if no case is made out by the prosecution witnesses.

Section 254 enacts that if the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence, a charge should be framed.

Section 255 requires that the charge should be read and explained to the accused and that he should be asked whether he pleads guilty or has any defence to make and empowers the Magistrate to convict the accused if he pleads guilty.

Under S. 256 if the accused refuses to plead, or does not plead, or claims to be tried, then he has to state within the period mentioned in the section whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses

named by him shall be recalled, and, after cross-examination and re-examination, if any, they shall be discharged and the evidence of the remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination, if any, they also shall be discharged and the accused shall then be called upon to enter upon his defence and produce his evidence.

Section 257 runs as follows :

"(1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing :

Provided that, when the accused has cross-examined, or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court."

Under S. 258, the Magistrate has to record the order of acquittal if he finds the accused not guilty, and if he is guilty to pass sentence according to law.

Section 259 refers to the procedure to be adopted if the complainant is absent and the case is compoundable.

Now it is obvious that under Chap. 21 the Magistrate can frame a charge at any stage of the prosecution case. He is not bound to wait until all the prosecution witnesses have been examined. The sections following S. 254 presume that a charge has been framed and are only applicable on that basis. They also refer to offence and to acquittal.

It is obvious from the provisions of Chap. 8 that no charge is framed but the procedure till we come to trial is that the Magistrate proceeds ex parte until it comes to the stage of sending notice or summons to the person against whom security is required. Then under S. 112, the Magistrate gives the substance of the information received and the particulars as to the bond, and then the trial begins.

Reading the provisions of Chaps. 8 and 21 it is clear that so far as the person required to give security is concerned, the trial really commences from the point where notice has been given to him to show cause which contains the substance of the information and which must be treated as equivalent to a charge though not the charge itself. In this view effect can be given to all the provisions and under S. 256 the cross-examination of the witnesses should take place as if witnesses examined for the prosecution are witnesses examined after a charge has been framed. S. 257 would apply where for any reason he wants to recall and cross-examine the prosecution witnesses, the Magistrate having a discretion to refuse an application if he is of opinion that the application is made for the purpose of vexation or delay.

It has been argued by Mr. Grant that all that S. 117, Cl. (2), says is that no charge need be framed and that consequently if a Magistrate chooses to frame a charge, then there will be really two charges, one contained in the notice and the other in the charge framed. I find it difficult to see how any Magistrate can, having regard to the provisions of Ch, 8, frame any charge such as is contemplated by Ss. 221 to 223 in Chap. 19. The words "no charge need be framed" really mean that the charge shall be dispensed with because in the very nature of things it is not possible to frame a charge with the particulars enjoined by Ss. 221 to 223.

It is also argued that a party cannot know exactly for what he is tried until all the witnesses have been examined and it may be necessary for him to cross-examine the witnesses and that it would be a great hardship if the opportunity given to him by S. 256 is not given. Treating it as a mere question of hardship, I think S. 257 provides for all reasonable requirements. The Magistrate is bound, if he refuses the application, to state in writing that in his opinion the application is made for the purpose of vexation or delay or for defeating the ends of justice. Except for that reason the Magistrate is bound to issue process and there is no reason why if the right is going to be abused the Magistrate is still bound to issue summons. I agree with the observations of Shadi Lal, J., in *Ahmad Bakhsh* v. *Emperor* (4), that if there is no hardship

(4) [1916] 1 P. R. 1916 Cr.=32 I. C. 676=58 P. W. R. 1915 Cr.

to the other party under S. 287 it is desirable that proceedings under Chap. 21 should not be unduly delayed.

The view I take is amply supported by authority.

In *Chintamon Singh* v. *Emperor* (1) Rampini and Sharfuddin, JJ., observed :

" No doubt, under S. 117, Criminal P. C., the enquiry into bad livelihood cases should be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in warrant cases. But we do not think that the provisions of S. 256, Criminal P. C., indicate that the person called upon to show cause under S. 110, Criminal P.C. has a right to further cross-examine the prosecution witnesses under S. 256, Criminal P. C. inasmuch as the provisions of this section relate to cases where a formal charge as required by S. 254 has been drawn up and the accused has been called upon to meet that charge. In cases under S. 110, Criminal P. C. the order of the Magistrate under S. 112, Criminal P. C. is equivalent to a charge. The object in giving the substance of the information in an order under S. 112, Criminal P. C. is that the person called upon to show cause may clearly understand the matter that he has to meet in his defence, and a Magistrate has no power to go beyond the requirements of his order under S. 112, Criminal P. C."

In *Bija* v. *Emperor* (2), it was held that a person against whom proceedings have been taken under S. 110, Criminal P. C., has no right to further cross-examine the prosecution witness under S. 256 of the Code. Sir Shadi Lal, C. J., refers with approval to *Chintamon Singh* v. *Emperor* (1).

In *Ahmad Bakhsh* v. *Emperor* (4), Shadi Lal, J., observed :

" In security cases the order passed by the Magistrate under S. 112 is equivalent to a charge in a warrant case and the person against whom the order is made is fully aware of of what is alleged against him. The evidence is thereafter recorded in his presence and he has every reasonable opportunity of cross examining the witnesses. There is consequentiy no conceivable reason why he should be allowed the right of a second cross-examination and why he should thereby protract the proceedings unnecessarily. The reason which underlies the rule as to double cross-examination in warrant cases is entirely absent here and the principle of *cessente ratione legis, cessat ipsa lex* is fully applicable."

The learned Judge follows the view taken in *Chintaman Singh* v. *Emperor* (1) and dissents from the view taken in *Emperor* v. *Lansha* (5).

Mr. Grant has referred us to *Venkatachinnayya* v. *Emperor* (3). The question there for determination was whether S. 350 (1), proviso (a), Criminal P. C. which refers to change of magistracy during the pendency of a trial and the right to have a de novo trial applies to security proceedings and the Full Bench held it did. In dealing with the question, however, there are observations of Ayling and Coutts-Trotter, JJ. to the effect that the accused had a right under S. 256 to recall the prosecution witnesses. These observations are in my opinion obiter dicta as the learned Judges were not there dealing with the right now claimed.

Reference has also been made to *Emperor* v. *Lansha* (5) which is a case decided by the Chief Court of Burma and where it was held that S. 256, Criminal P. C. is applicable to proceedings under S. 110 by virtue of the provisions of S. 117, Cl. (2) of the Code. There is no reference to any authorities, and this case is dissented from in the case reported in *Bija* v. *Emperor* (2).

In *Emperor* v. *Tirlok* (6) Boys, J., after referring to the provisions of S. 117 and the provision that no charge need be framed, observed ;

" The reason for the exception is obvious. What is equivalent to a charge has already been framed in the order served upon the accused in accordance with S. 112."

The learned Judge then goes on to deal with Ss. 254 and 255 and observes that at any stage of the proceedings the Magistrate, if he is prima facie satisfied that there is a case against the accused, may interrupt proceedings for the purpose of asking the accused whether he pleads guilty or whether he has any defence to make and that if he does so and the accused wishes to defend, then the accused can recall for cross-examination witnesses examined up to that stage and if the Magistrate does not do so but waits till all the prosecution witnesses are called, the accused can, when he is asked if he wishes to defend, ask for the recall of prosecution witnesses. It seems to me that if the notice under S. 112 is equivalent to the charge aud if when that notice is read to accused he has the option of either executing the bond or denying his liability to do so, there is no necessity for the Magistrate interrupting proceedings. He cannot again issue a notice under S. 112 and there is no analogy to a Magistrate in warrant cases framing a

(5) [1910] 4 Bur. L. T. 24=9 I. C. 468=12 Cr. L. J. 89.

(6) A. I. R. 1927 All. 660=50 All. 71.

charge when only some of the prosecution witnesses are examined and then going on with the rest of the prosecution evidence.

I prefer to follow the view taken in *Chintaman Singh* v. *Emperor* (1), *Ahmad Baksh* v. *Emperor* (4) and *Bija* v. *Emperor* (2) and would answer the reference by stating that in security proceedings where the other side wants to recall any prosecution witness he has no absolute right to do so under S. 256, Criminal P. C., but has a right under S. 257 of the Code.

In this case it appears that the Magistrate rejected that application to re-summon on the ground that S. 256 does not give the accused that right. He has not applied his mind to the question whether it is necessary in the interests of the accused that the witnesses should be re-summoned nor does he state that he considered the application was one made for the purpose of delay. Whether this would be a ground for interference is a matter entirely for the Bench to decide.

Curgenven, J.—In deciding whether the right to recall prosecution witnesses for cross-examination, given by S. 256, Criminal P. C., can be claimed under S. 117 in security proceedings, it is of assistance to consider why the right is given in the trial of a warrant case. Two answers are possible :

(1) The charge shows the accused, perhaps for the first time, precisely what he has to meet. The first cross-examination may, therefore, have been conducted in some measure under a mistaken impression.

(2) Answers elicited from later prosecution witnesses necessitate the further questioning of earlier ones.

If the right had been given on ground (2), exercise of it would not have been restricted to the stage immediately after charge, since a charge may be framed before the examination of the prosecution witnesses is completed. It would have been fixed at the close of the prosecusion evidence. The fact that the stage in the case at which the right must be exercised is the stage at which the charge is framed supports the view that charge and right are related as cause and effect, and therefore no charge no right. There is no such right in proceedings where no charge is framed, e. g., summons cases, sessions trials, civil suits.

If the right is allowed in proceedings under S. 117, it must be on a loss qualified basis than in a warrant case. We must hold that it is exerciseable in all instances after all the witnesses for the prosecution have been examined. In so holding, instead of merely applying warrant procedure "as nearly as may be practicable," we should be going beyond it and conceding a right which it does not confer. We should be creating an inflexible rule in security cases where no such inflexible rule exists in warrantcases.

I agree with my learned brother Kumaraswami Sastri, J., that the words "No charge need be framed" can only mean that no occasion can arise for framing a charge; because under S. 221 (1) every charge shall state the offence with which the accused is charged. In security proceedings the place of charge is taken by the "order in writing setting forth the substance of the information received" prescribed by S. 112. This order has to be read over to the person in respect of whom it is made, and although the Code does not provide that he should plead to it it resembles a charge in that it must contain a statement in abstract of the prosecution case.

In *Venkatachinnayya* v. *Emperor* (3), the question for decision, so far as we are now concerned, was whether in security proceedings for good behaviour the effect of sub-S. (2), S. 117, Criminal P. C., was to render applicable the provisions of Ch. 21 of the Code, dealing with warrant cases, and those of Ch. 25, in so far as they deal with the mode of taking or recording evidence in such cases, or whether the subsection attracted the provisions of all sections of the Code which are applicable to warrant cases. The Full Bench had not to decide which of the provisions of Ch. 21, should be deemed to be inapplicable, so that any observations made upon that question were clearly obiter. I do not myself think that Ayling, J., in selecting S. 256 as what seems to have been a random illustration, meant that in his view its provisions had necessarily to be enforced. All that he says is that S. 350 is as much a matter of procedure as the right to have prosecution witnesses recalled and cross-examined conferred by S. 256. Accordingly there was

no ground for disputing the applicability of S. 350 merely because it occurred elsewhere in the Code. The line of reasoning is not vitiated by the circumstance that the provisions of S. 256, although a matter of procedure and therefore prima facie applicable, may, on special grounds, be found incompatible with the method of conducting a security inquiry. The observation of Coutts-Trotter, J., (as he then was), that the whole of the procedure in a warrant case must be adopted, was clearly no more than a generalisation.

I agree with the answer to the reference proposed by my learned brother.

Walsh, J.—I agree that the order calling on a person to show cause why he should not execute a bond to be of good behaviour is "equivalent to a charge" and there is ample authority for this position. It is impossible to frame a regular charge for several reasons. In the first place it is doubtful whether a person called on to show cause in such a case is an "acccused."

In *Jhoja Singh* v. *Queen-Empress* (7), it was held that he was: but in *Hopcroft* v. *Emperor* (8) more cautious language is used that "he stands in the position of an accused person" and finally in *Binode Behari Nath* v. *Emperor* (9), it was held that he was not an accused person so that *Jhoja Singh* v. *Queen-Empress* (7), must be held to have been overruled. *Queen-Empress* v. *Mona Puna* (10), does not deal with a case of security for good behaviour. No doubt *Queen-Empress* v. *Mutasaddi Lal* (11), remains and Coutts-Trotter, J., in *E. Venkatachinnayya* v. *Emperor* (3), seems to incline to the same view.

Secondly, it is doubtful if there is any "offence". In *E. Venkatachinnayya* v. *Emperor* (3), Ayling, J., remarked on p. 523 that no "offence" is involved in an enquiry under Ch. 8 of the Code and Coutts-Trotter, J., (as he then was) says:

> "If he cannot be said to be "charged" with an offence it is at least sought to be proved against him that he is a person with criminal or undesirable propensities."

I agree with my learned brothers in interpreting the words "No charge need be framed" as meaning that no occasion can arise for framing a charge. If the order under S. 112, Criminal P. C., which is equivalent to a charge is not a charge there is no stage at which or process by which it can become anything more. Neither evidence in support of it nor the Court's opinion that it is prima facie proved by the evidence tendered can enable anything else to be framed than an order under the terms of S. 112 and the Code does not contemplate two identical charges in the same case. I agree with my learned brother Curgenven, J., in his classification of the two reasons why a right to recall and cross-examine prosecution witnesses is given in a warrant case and I would say that Ss. 256 and 257 seem to me to deal respectively with those two rights. The right to cross-examine when the person first knows exactly what the charge against him is, is absolute and is dealt with under S. 256. It extends not to all the prosecution witnesses but only to those examined before the charge is framed and the Court may frame a charge at any stage. It does not mean as we should have to hold that it means if we accepted Mr. Grant's argument, a right to recall and cross-examine all the prosecution witnesses.

The right to recall and cross-examine earlier witnesses owing to what may be said by later ones is qualified and is dealt with by S. 257. As the "equivalent to a charge" is framed under Chap. 8 before any of the prosecution witnesses are examined the absolute right of recall cannot arise for the first purpose, but the qualified right for the second purpose does exist. It may be noted that Chap. 8 seems to be somewhat defective as it does not expressly provide for an examination of witnesses called for the defence and the only form of summons given in the Appendix, Sch. 5, is with regard to giving security for keeping the peace.

The balance of authority is certainly against a right of re-call and cross-examination of the prosecution witnesses under S. 256 (1). The remarks relied on in *E. Venkatachinnayya* v. *Emperor* (3) are obiter. Although the reference to us does not mention S. 257 I agree that we should answer the question in the manner proposed by my learned brothers.

P.R.S./V.S. *Reference answered.*

(7) [1896] 23 Cal. 493.
(8) [1909] 36 Cal. 163=1 I. C. 737=13 C. W. N. 151.
(9) A.I.R. 1924 Cal. 392=50 Cal. 985.
(10) [1892] 16 Bom. 661.
(11) [1898] 21 All. 107=(1898) A. W. N. 185.

A. I. R. 1930 Madras 337

ANANTAKRISHNA AIYAR, J.

(*Devavarapu*) *Venkataramayya*--Defendant—Appellant.

v.

(*Devavarapu*) *Venkatappayya* and *others*--Plaintiffs—Respondents.

Second Appeal No. 2358 of 1927, Decided on 11th April 1929, from decree of Sub-Judge, Bezwada, in Appeal Suit No. 96 of 1926.

(a) Hindu Law — Reversioner — Proof of title—Onus of proving that property belongs to last male holder is on reversioner.

The onus of proving that the property claimed by the reversioners was the property of the last male holder is heavily upon the plaintiffs. There is no presumption that any property in the possession of a Hindu widow or Hindu female was the property either of her husband or of any male ancestor : 26 *Cal.* 871 (*P. C.*) and 33 *M. L. J.* 665, *Foll.* [P 337 C 2]

(b) Evidence—Appreciation of—Cummulative effect of relevant evidence, and not each piece of evidence, should be considered.

The proper and satisfactory way of appreciating evidence is to consider, not whether each piece of evidence proves the case by itself, but to consider the cumulative effect of all the relevant items of evidence adduced in the case: 31 *All.* 412 (*P.C.*), *Foll.* [P 338 C 2]

G. Lakshmana and *K. Kameshwara Rao*—for Appellant.

C. Rama Rao—for Respondents.

Judgment.—Defendant 2 is the appellant before me. The plaintiffs, four in number, filed the original suit for partition and delivery of four out of seven shares in the property described in the plaint schedule, which the plaintiffs allege belonged to one Chandrayya, the last male holder. Chandrayya died about 1876 leaving a widow Punnamma. Punnamma died on 24th March 1924, and the present suit for partition was filed on 2nd May 1924. Defendant 4 and defendants 1 and 2 are cousins of the plaintiffs and are according to the plaintiffs the other three sharers who are entitled to the other three shares in the property as reversioners to the estate of Chandrayya.

The main pleas of the appellant, who was defendant 2 in the lower Court, were that the properties did not belong to Chandrayya and that defendant 2 had been adopted to Chandrayya after Chandrayya's death by his widow. Both the lower Courts held against the defences set up by defendant 2, and the first contention has been reiterated before me here. Both the lower Courts held against the validity of the adoption and that question is not before me in second appeal.

The substantial ground taken in second appeal before me by the learned advocate for the appellant Mr. Lakshmanna is this. The onus of proving that the property claimed by the reversioners was the property of the last male holder is heavily upon the plaintiffs. There is no presumption that any property in the possession of a Hindu widow or Hindu female was the property of either her husband or any male ancestor. I agree that this proposition could not possibly be contested. The leading case on the subject is the decision of the Privy Council in *Dewan Run Bijai Buhadur Singh* v. *Indarpal Singh* (1), where their Lordships had to consider the case of a Hindu widow in possession of large properties. It was proved in that case that the husband was very rich. The privy Council held that the fact that the husband was rich did not in any way go to prove that the property in the possession of the widow was the property of the husband. The privy Council held that the onus of proof was on the reversioners, and he had to prove that the property claimed by him was property belonging to the estate of the last male holder as reversioner to whose estate, he claims the property. This decision was followed by a Bench of this Court, consisting of Spencer and Srinivasa Iyengar, JJ. In *Vikrama Deo Garu* v. *Vikrama Deo Maharajulugaru* (2), where their Lordships went further and observed that the presumption that a person in possession of property is the owner and absolute owner thereof applied equally to Hindu women also. It is therefore clear that the onus in the present case lies heavily on four plaintiffs who, as reversioners, claim their 4/7ths share of the suit properties. On such proof that these properties were the properties of Chandrayya, both the lower Courts found that the plaintiffs are entitled to their shares of the properties.

The learned advocate for the appellant criticized minutely the arguments and reasonings by which the lower Courts have arrived at their conclusions and he took me though the evidence of

(1) [1899] 26 Cal. 871=26 I. A. 226=7 Sar. 578 (P.C.).

(2) [1918] 33 M. L. J. 665=43 I. C. 679=(1918) M. W. N. 69.

P. W's. 1, 2 and 3, on whose evidence the lower Courts have largely relied. Left to myself, I may not be in a position to come to the conclusion of the oral evidence in this case that the properties have been proved to have belonged to Chandrayya. The evidence of P. W. 1 shows that Chandrayya died about 1876 some months after P. W. 1's father sold him the lands, and that his father told him that the properties were sold very cheap. As I understand, my function, sitting in second appeals, is not to appreciate the evidence and to come to any independent conclusion on my own account on questions of fact arising in the case. The Privy Council in *Durga Chowdharani* v. *Jewahir Singh Chowdhri* (3), held that the findings of the 1st appellate Court based on relevant evidence before it cannot be disturbed by a Court sitting in second appeal, however erroneous or unsatisfactory the findings, if examined, might be : see also *Ram Ratan Sukal* v. *Nandu* (4). I am bound by the said rulings when examining the question of the correctness of the findings of fact arrived at by the lower appellate Court in this case. When the lower Courts have believed P. W. 1 the son of the vendor to Chandrayya to the effect that P. W. 1's father sold these properties to Chandrayya, I do not think I can interfere with that finding. There are also other reasons mentioned by the District Munsif to show that the properties have been proved to belong to Chandrayya.

Two circumstances have been mentioned in the lower Courts' judgment (1) the prior suits O. S. No. 109 of 1913 and O. S. No. 165 of 1918. These were brought by the reversioner, and the Courts held that the adoption was invalid and that the suit properties belonged to the estate of Chandrayya; and (2) there is also the circumstance that soon after the alleged adoption of defendant 2 by Punnamma, she transferred the patta of these properties in the name of defendant 2, the alleged adopted son. The lower Courts argue that ordinarily a Hindu widow would not transfer her own stridhan or separate properties to the adopted son ; and taking all the circumstances of the case into consideration they drew the inference that the properties were not the stridhanam properties of Punnamma, and the fact that she transferred the patta in the name of defendant 2 was an indication that the suit properties belonged to Chandrayya, and not to herself as her stridhanam. As I said, I am not concerned here to examine the evidence in detail myself to see whether I would myself be prepared to act upon the same or not. There are items of evidence which the lower Court have believed and as pointed out by the Privy Council in *Parbati* v. *Nannihal Singh* (5) at p. 428, the proper and satisfactory way of appreciating evidence would be to consider, not whether each piece of evidence proved the case by itself, but to consider the cumulative effect of all the relevant items of evidence adduced in the case. As it seems to me that the lower Courts have considered the cumulative effect of the evidence and expressed their opinion that it has been sufficiently proved that the properties belonged to Chandrayya, I am not in position to interfer with the findings of fact in second appeal.

The last argument of the learned advocate for the appellant is that the lower Courts were wrong in having given a decree not only for the four-sevenths shares of the plaintiffs but also in having allotted the other remaining three shares to defendants 1, 2 and 4. The suit was one for partition and delivery of four out of seven shares of the estate to the four plaintiffs who with defendants 1, 2 and 4, are the reversionary heirs to the estate; the other three heirs were made defendants 1, 2 and 4. The first Court passed a decree as mentioned above. The contesting defendant 2 preferred an appeal against the said decree. But I do not find that this point was taken on appeal to the lower appellate Court. Seeing that Punnamma died only in 1924, and the rights of the three defendants entitled to the three shares are not barred by limitation, and that no objection was taken to this in the lower Courts, I think I would not be justified in disturbing this portion of the decree in second appeal. I, however, modify the decrees of the lower Courts by declaring that each of defendants 1, 2 and 4 would be entitled to one share

(3) [1891] 18 Cal. 23=17 I. A. 122=5 Sar. 560 (P.C.).
(4) [1892] 19 Cal. 249=19 I. A. 1 (P.C.).
(5) [1909] 31 All. 412=3 I. C. 195=36 I. A. 71 (P.C.).

(out of the seven shares) in the suit properties and that the share of each would be separated and delivered to each in this suit on paying the proper court-fee payable thereon.

In the result, I find against the main contentions of the learned advocate for the appellant and dismiss the second appeal with costs.

P.R.S./V.S. *Appeal dismissed.*

A.I.R. 1930 Madras 339

ANANTAKRISHNA IYER, J.

(*Kuruganti*) *Sivaramiyya* and *others* —Defendants—Appellants.

v.

Rajah of Venkatagiri and *others*—Plaintiffs—Respondents.

Second Appeal No. 1891 of 1926, Decided on 2nd May 1929, from decree of Sub-Judge, Bapatla, in Appeal Suit No. 181 of 1925.

(a) Evidence Act, S. 114—Long continued enjoyment of claim—Presumption of legal origin arises.

Court would persume a legal origin where there has been a long continued enjoyment of a claim if the claim could have had a legal commencement. [P 341 C 1]

(b) Evidence Act, S. 114—Long continued payment of higher rate—Contract to pay higher rate may be presumed.

Court can presume a contract to pay the higher rate and a legal origin and consideration therefor from long continued payment of higher rate: 42 *Mad.* 475, *Rel. on.* [P 341 C 2]

(c) Civil P. C., S. 100—Case of presumed contract—Finding of legal origin is one of fact.

In a case of presumed contract, it is a question of fact in each case, whether the Court responsible for recording finding of fact would in the circumstances find a legal origin or not in support in such a case. [P 340 C 1]

V. Govindarajachariar—for Appellants.

Advocate General—for Respondents.

Judgment.—The Rajah of Venkatagiri instituted O. S. No. 51 of 1923, on the file of the Additional District Munsiff's Court of Ongole, to recover jodi and some other dues from the defendants who are agraharamdars of Konagarivari Palem alias Bodapalem agraharam. The main question in dispute so far as this second appeal is concerned is whether the plaintiff is entitled to recover jodi at the rate of Rs. 173 per fasli, or whether he is entitled to recover only at the rate of Rs. 17-8-0. Both the lower Courts upheld the plaintiff's claim to recover at the higher rates and the defendants have preferred this second appeal.

The facts in connexion with this matter are not in dispute. From Ex. 1, which is a copy of the Sannad granted to the predecessors-in-title of the defendants, i. e., to the original agraharamdars in 1721, it is seen that the jodi payable was Rs. 17-8-0. It has also been found by both the lower Courts that even from a period prior to 1802, the date of Ex. B, the Rajah of Venkatagiri has been collecting from the agraharamdar jodi at the rate of Rs. 173 per fasli. The question for decision, therefore, as stated by the lower appellate Court is:

"Whether having regard to the admitted fact that for over a century the defendants and the predecessors-in-title have been paying jodi at a far higher rate than that fixed under the Sannad Ex. 1, they are not barred from questioning the Raja's right to collect jodi at the rate of Rs. 173 as stipulated in Ex. B of 1802"

The lower appellate Court, after referring to the decision of Privy Council reported in *Secy. of State* v. *Rajah of Venkatagiri* (1) remarked that the settlement of the Venkatagiri zamindari did not come within the purview of Madras Regn. 25 of 1802 and held that from the long and uniform course of payment of jodi at rate of Rs. 173 per fasli for more than 100 years it was entitled to presume that there was a valid agreement between the parties to pay at the rate, and that it was prepared to presume a lawful origin for such practice and was prepared also to presume that the agreement was supported by consideration.

Before me the learned advocate for the appellants (defendants), while admitting that it was open to Courts to presume a lawful origin in support of existing practice (if there be no legal impediment for such presumption) contends that in the present case the jodi fixed at the time of the grant of the agraharam in 1721 being known to be five pagodas (Rs. 17-8-0.)—see Ex. 1, — notwithstanding the subsequent payment for a long period of a higher rate the rule of presumption referred to by the lower Courts, could not be applied to the present case. It is only, he argued, when nothing else was proved, that the presumption of a legal origin could be made and because in this case the original amount of jodi fixed in 1721 is known, the

(1) A. I. R. 1922 P. C. 168=44 Mad. 864=48 I. A. 415 (P.C.).

rule of presumption referred to has no application in the present case. I am unable to accept this argument. It is a question of fact in each case depending upon presumed contract whether the Court responsible for recording finding of fact would in the circumstances find a legal origin or not in support in such a case. If there be other circumstances such Court is bound to have regard to the other circumstances also. Here both the lower Courts have paid due regard to the circumstance that under Ex. 1 of 1721, the amount of jodi payable is only Rs. 17-8-0; they have also had due regard to the circumstance that for over a century the agraharamdars have been paying the Rajah jodi at the rate of Rs. 173 a year. With these items of evidence before them, they were bound to come to a conclusion as to the proper amounts of jodi payable by the agraharamdars at present. The have come to the conclusion that the proper amount payable is Rs. 173 a year, and that a legal origin should be attributed to the practice which has been prevailing for over a century and, and they have presumed the existence of an agreement between the parties after 1721 and also presumed that the said agreement was supported by consideration and was valid and binding on the parties. I think it was quite open to them to come to such a finding and that sitting in second appeal it is not open to me to say that the finding is vitiated in law.

The lower appellate Court relied on the decision of the Full Bench of the Madras High Court reported in *Peria Karuppa Mukkandan* v. *Raja Rajeshwara Sethupathi* (2). The learned Judges who took part in that case were not all agreed in their opinions Sir John Wallis, C. J., observed at p. 486 as follows:

"The question . . . is, whether the Court can infer consideration for a contract to pay rent at an enhanced rate solely 'from a long continued course of payment of the enhanced rate.' My answer is that it may if that is the sole fact it has to go upon, but that, in dealing with with the question of presuming the agreement and the consideration therefor that together make up a contract, the Court should not be governed by that fact alone but should come to a conclusion on all the circumstances of the case."

Coutts Trotter, J., (as he then was) at p. 490 observed as follows:

"A Court with nothing before it but the fact of a long continued payment by a tenant would be amply justified in presuming a legal origin for that payment. But the word "enhanced" clearly carries an implication of a further fact viz., that the tenant had previously paid a lower rent than that sought to be enforced. . . . For a Court to infer consideration from a long continued course of payment is a totally different thing when that is the sole fact before it, and when it is complicated by other considerations as in this case. In the latter event it comes in effect to a balancing of probabilities; and no Court should, in my opinion, presume consideration passing from the landlord, unless it thinks it inherently probable that consideration could and did exist in fact. . . . . The Court . . . should obviously pay the greatest attention to the fact of the long continued payments of the enhanced rents by the tenants: it is no light matter to overset a state of things which has existed without question for a long period of time."

And finally

"if the continued payment of rent were the sole fact before the Court it would be entitled to presume consideration from it: but that if, as in the present case, there are other facts before the Court, it must refuse to treat the payment as raising a presumption, and, while giving it such weight as it thinks fit, perhaps a determining weight, treat it merely as a portion of the evidence in the case, subject to be weighed against and perhaps overtopped by the evidence on the other side."

Kumaraswami Sastri, J., in the same case says at p. 496.

"The question referred to the Full Bench is whether the Court can infer consideration solely from a long continued course of payment of enhanced rent in cases where it is sought to base liability to pay enhanced rent on an alleged contract to pay it. . . . . I am of opinion that it is open to the Court from a long and a uniform course of payment to presume that there was an agreement to pay which had a lawful origin and was supported by consideration where it is satisfied that it would be unreasonable from lapse of time or other circumstances to call upon the landlord to give direct evidence as to the terms and circumstances that gave rise to the payment and when circumstances exist which would render the drawing of the presumption reasonable in law and probable in fact. If all that appears is a long course of payment, I do not see why the presumption should not be drawn."

His Lordship referred to the principle that:

"a legal origin should be presumed where there is a long continued assertion of a right to it if such a legal origin were possible and that in such cases Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title."

At p. 498 his Lordship refers to

"the ordinary presumption which might well be raised that a person and his predecessor-in-title would not have paid for a series of years, more than what was payable, voluntary

(2) [1919] 42 Mad. 475=36 M. L. J. 320=50 I. C. 16=(1919) M. W. N. 161.

rily and without any legal or binding obligation to do so."

It was, however, contended by the learned advocate for the appellant that the above principle should not be applied when we have in this case the fact that jodi payable in 1721 was only five pagodas, and he referred me to the judgment of Ayling and Seshagiri Ayyar, JJ. in the Full Bench case already referred to us supporting his contention. On behalf of the respondent it was, however, argued that certain passages at p. 489 of the report suggest that Ayling, J's. observations where limited to the circumstances that existed in that case, and that in any event the opinion of the majority of the learned Judges in the Full Bench case was in support of the view taken by the lower appellate Court in this case.

After having read the opinion delivered by the learned Judges in the Full Bench case *Peria Karuppa Mukkandan* v. *Raja Rajeshwara Sethupathi* (2), I think that the opinion of the majority of the Judges is in favour of the view contended for by the respondent in this case.

It is a well established principle of law that Courts would presume a legal origin where there has been a long continued enjoyment of a claim, if the claim could have had a legal commencement. It would be otiose to set forth at length authorities in support of the above principle.

The principle on which Courts have acted in such cases is this. Where there has been long continued possession in assertion of a right, the right, should be presumed to have had a legal origin, if such a legal origin was possible and this presumption applies even if the alleged right in its inception rests on a foundation invalid in point of law, and the Court will presume the performance, of all acts and the existence of all circumstances necessary to create a subsequent valid title, unless the subsequent enjoyment is shown to be more consistent with the illegal origin than with the legal origin. In *Phillips* v. *Halliday* (3) Lord Herschell observed as follows:

"Why should the house or the Court refuse to presume, or abstain from presuming a legal title to this alleged right, which they would otherwise have presumed, because in its inception it may be shewn to have rested upon a foundation which would not support it? Why does not the doctrine which I have referred to, the maxim which has been so often acted upon, apply just as well as to the acts necessary to confirm a title originally invalid as to the acts necessary to create a valid title in the first instance? It seems to me that the argument of the learned counsel for the appellants must go this length, that for however many centuries it may be proved that an alleged right has been asserted and enjoyed, if it can be shewn in its inception to have rested upon a foundation invalid in point of law, then, although the title might have been perfectly, well validated by some act which you would otherwise have presumed, you are never justified in presuming that act to have been done. My Lords, I am perfectly unable to see upon what basis such a principle can rest. It seems to me that the very reason which has been held not only to justify, but almost to compel, the Court to make presumptions of this description, applies just as much in the latter, case as in the former."

The appellants' learned advocate, however, relied on the opinion of Ayling, J., and Seshagiri Ayyar, J. in the Full Bench case in *Peria Karuppa Mukkandan* v. *Raja Rajeswara Sethupathi* (2) and he also referred me to the decision of the house of Lords in *Gann* v. *Free Fishers of Whitstable* (4). *Gann's* case (4) was referred to by the Full Bench and I am of opinion that the opinion of the majority of the Full Bench is that the Court can presume a contract to pay the higher rate and a legal origin and consideration therefor from long continued payment of higher rate; and in this case both the lower Courts have considered the circumstance that in 1721 the jodi payable was only Rs, 17-8-0, and that for more than 100 years prior to the suit the agraharamdars have been paying jodi at Rs. 173 a year; they have in the circumstances come to the finding that the proper amount of jodi payable at present is Rs. 173 a year. I am of opinion that it was open to them to come to that conclusion and there is no legal impediment shown to me in the way of their finding accordingly.

In an unreported case (*S. A. Nos.* 443 *to* 446 *of* 1920). the High Court had to decide whether what was called "ashtamsam" deduction i. e., deduction of 1/8th from the proper rent, was claimable by the ryots. The landlord had appealed to

(3) [1891] A. C. 228=61 L. J. Q. B. 210=55 J. P. 741=64 L. T. 745.

(4) [1865] 11 H. L. C. 192=35 L. 5. C. P. 29 =20 C. B. (N.S.) 1=13 W.R. 589=12 L.T. 150.

the High Court complaining against such deduction in the patta. The District Court of Chingleput while allowing the "ashtamsam" deduction, did not allow in favour of the landlord what was called "nadikarasu." The High Court (Ayling and Krishnan, JJ.), observed as follows in their judgment:

"The "Ashtamsam" deduction and the charges under the head of "nadirkarasu" are all unexplained; but all have been given effect to for 50 years without question. We think all should be treated on the same footing."

The High Court allowed "ashtamsam" deduction in favour of the ryots, but allowed "nadikarasu" in favour of the landlord. No doubt the judgment is very short and the question is not discussed in the judgment. But the decision of the High Court was in 1921, about two years after the decision of the Full Bench in *Peria Karuppa Mukkandan* v. *Raja Rajeswara Sethupathi* (2).

I think the lower Courts were entitled to come to the conclusion that jodi at present payable is at the rate of Rs. 173 a year. I, therefore, dismiss the sec nd appeal with costs.

P.R.S/V.P. *Appeal dismissed.*

A. I. R. 1930 Madras 342(1)

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Suppiah Mooppanar--Petitioner—Appellant.

v.

Mallappa Chetty and *others* — Insolvents—Respondents.

Appeal No. 369 of 1926, Decided on 16th July 1929.

(a) Provincial Insolvency Act (1920), Ss. 27 and 43—Any one interested can apply for extension of period.

Section 43 is controlled by S. 27 and an application for extension of period can therefore be made by any one interested and is not restricted merely to the debtor : *A. I. R.* 1930 *Mad.* 278, *Foll.* [P 342 C 2]

(b) Provincial Insolvency Act, S. 27 — Notice to alienee is desirable—But no prejudice caused—Omission of notice is immaterial.

Where no notice of application for extension of period is given to an alienee, though it is desirable that it should be so given, and if it does not prejudice him, it is immaterial. [P 342 C 2]

T. L. Venkatarama Iyer — for Appellant.

T. R. Ramachandra Iyer, *R. Jayaram Iyer* and *T. S. Swaminathan* — for Respondents.

Venkatasubba Rao, J. — The first point taken by Mr. Venkatarama Aiyar is that under S. 43, it is the debtor alone that can apply for extension. But as has been pointed out in *Jetaji Peraji Firm* v. *T. Krishnayya* (1), S. 43 is controlled by S. 27 :

"It is equally clear that the Court has the power to extend the period and it may be so done, not merely at the instance of the debtor but on the application of anybody interested. The section merely requires that sufficient cause shall be shown, but it does not say that the debtor alone may apply for extension or shall show sufficient cause."

In this case, it was a creditor that applied for enlargement of time and the Official Receiver agreed to an order being made. This objection is therefore overruled.

The second point raised by Mr. Venkatarama Aiyar is that his client, the alienee, was not given notice of the application. We may point out that it is desirable that in such cases notice should go to the alienee. In this particular case, however, the appellant has not been able to show that any prejudice has resulted and we are therefore unable to set aside the order of the District Judge.

The appellant complains that the delay in the disposal of the proceeding to annul the alienation causes him great hardship. We direct the lower Court to expedite its hearing. The appeal is dismissed with costs.

P.R.S./P.R. *Appeal dismissed.*

(1) A.I.R. 1930 Mad. 278.

A. I. R. 1930 Madras 342(2)

JACKSON, J.

Secy. of State—Defendant—Petitioner.

v.

Saminatha Nadar — Plaintiff — Respondent.

Civil Revn. Petn. No. 1520 of 1928, Decided on 26th April 1929, from an order of Dist. Munsif, Tiruvarur, D/- 29th October 1928, in I. A. No. 757 of 1928.

Evidence Act. S. 123—Officer and not Judge shall decide whether evidence shall be given or withheld.

The public officer concerned and not the Judge is to decide whether the evidence referred to shall be given or withheld. If the objection is taken by the proper person the Court will not go behind it. *A. I. R.* 1921 *Cal.* 282, *Rel. on.* [P 343 C 1]

Govt. Pleader—for the Crown.

A. Ramasami Iyengar — for Respondent.

Judgment.—The question for decision is whether certain documents items 1 and 7, are open to the lower Court's inspection. The point is concluded by *Irwin* v. *D. J. Reid* (1) which follows the English Law, see Halsbury's Laws of England, Vol. 11, pp. 84 and 137.

The public officer concerned and not the Judge is to decide whether the evidence referred to shall be given or withheld. If the objection is taken by the proper person, the Court will not go behind it.

The order directing the open production of the documents is cancelled. The petition is allowed with costs.

P.R.S./V.P. *Petition allowed.*

(1) A. I. R. 1921 Cal. 282=48 Cal. 304.

A. I. R. 1930 Madras 343

PANDALAI, J.

Kutiyan—Petitioner.

v.

Vaithilinga Pandaram and *others*—Respondents.

Civil Revn. Petns. Nos. 363 and 1130 of 1928, Decided on 5th March 1929, from orders of Sub-Judge, Salem, D/- 29th February 1928, in I. A. Nos. 26 and 27 of 1928.

Civil P. C., O. 41, R. 27—Additional evidence can be admitted only if there is substantial ground and in interest of justice—Such application should not be heard unless appeal is heard or evidence is considered.

The appellate Court is empowered on the application of party, for any substantial cause, ro permit additional evidence to be taken under O. 41, R. 27 (1) (b). But this power should be used sparingly and on grounds which can be called "substantial." Ordinarily it would not be desirable to hear an application for further evidence under this provision until the appellate Court has heard the appeal or considered the evidence already on record with a view to see whether substantial grounds exist in the interest of justice to allow some lacuna to be filled up or some matter to be cleared up: *A. I. R.* 1923 *P. C.* 128, *Ref.* [P 343 C 2]

A. Srirangachariar—for Petitioner.

W. Kothandaramayya —for Respondents.

Judgment.—The learned Subordinate Judge on an application by respondents 1 and 2 (appellants in his Court) made an order on 29th February 1928, allowing further evidence to be taken on their behalf, i. e., to re-call P. W. 3 in order to get his accounts produced and to examine three new witnesses who had not been examined at all at the trial. Immediately after this order the petitioner (respondent 1 in the lower Court) by his lawyer asked that if additional evidence was to be allowed to respondents 1 and 2, he also might be allowed to adduce further evidence to rebut that evidence. This also the learned Judge allowed by another order but without asking the petitioner or knowing from him what evidence he proposed to tender.

These petitions are directed against the first of the two above orders on which the second also depends. It is now settled that the appellate Court is empowered on the application of a party for any substantial cause to permit additional evidence to be taken under O. 41, R. 27 (1) (b), Civil P. C.: see *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (1). Though the power is there, it should be used sparingly and on grounds which can be called "substantial." Ordinarily it would not be desirable to hear an application for further evidence under this provision until the appellate Court had heard the appeal or considered the evidence already on record with a view to see whether substantial grounds exist in the interests of justice to allow some lacuna to be filled up or some matter to be cleared up. If such safe-guards were not adopted every appellant would press the appellate Court to allow him to cure the effects of his own laches by plea of hardship and there would be no inducement for parties to exercise diligence in producing all available evidence at the trial.

The allowance of fresh oral evidence unless under the most exceptional circumstances should thus be discouraged. In my opinion the learned Subordinate Judge was guilty of material irregularity in not applying any of the required safeguards at all before allowing further evidence. His order shows that the appellant had not asked for the production of P. W. 3's accounts in the last summons to that witness nor had he even cited two out of the three new witnesses. The appeals had not been heard. The learned Judge was not in a position to say in what way the evidence was intended to fill up any gap; nor does it show that there was any guarantee that the witnesses were of

(1) A. I. R. 1923 P. C. 128=2 Pat. 676=50 I. A. 183 (P.C.).

such status that their evidence could be safely relied upon to be true. The result of his orders taken together was that for no apparent reason except that the appellant urged that he had been negligent in the Court below, he was allowed to re-open the whole case and when he got such an advantage the respondent got a like advantage without the appellate Court even knowing what was the evidence to be tendered. The orders of the Subordinate Judge must be and are set aside. Nothing in this order should be deemed to affect the power of the Subordinate Judge if at a later stage after hearing the appeal, he thinks it necessary in the ends of justice and for substantial grounds to act under O. 41, R. 27 (1) (b).

The petitioner will have his costs in C. R. P. No. 363 of 1928 from respondent. 2.

P.R.S./V.B. *Petition allowed.*

A. I. R. 1930 Madras 344

RAMESAM AND ODGERS, JJ.

(*Kattari*) *Nagayya Kama Rajendra Ramasami Kamaya Naicker Avergal*—Defendant—Appellant.

v.

Karuppayyee Ammal—Plaintiff—Respondents.

Civil Misc. Appeals Nos. 63 and 64 of 1925, Decided on 30th April 1929, from orders of Sub-Judge, Dindigul, D/- 3rd January 1925, in E. A. No. 298 of 1924.

(a) Hindu Law—Widow— Representation of estate—Widow represents not only in dispute between her husband's estate and another estate, but also when there are rival claimants to his estate.

A widow may represent the reversioners in a litigation and the decree obtained against her may bind the reversioners not only in cases where she was suing or defending on behalf of her husband's estate, the dispute being between that estate and another estate, but also where there are rival claimants to her husband's estate: 11 *Cal.* 186 (*P.C.*); 10 *Cal.* 985 (*P.C.*) and 14 *C. L. J.* 90, *Foll.* [P 346 C 2]

(b) Decree—Execution of — Suit by illegitimate son against widow of zamindar—Decree for half share in separate estate of zamindar and in outstandings due to zamindar — Decree-holder trying to proceed against the other half share of zamindar for outstandings — Decree-holder held entitled to proceed against property of zamindar and half share of zamindar.

A zamindar died leaving a widow, a daughter, daughter's son, an undivided coparcener, a concubine and an illegitimate son by her. The widow entered into possession of zamindari. The coparcener brought a suit to recover the zamindari but under a compromise decree the widow was allowed to enjoy the estate during her lifetime. In 1902 the illegitimate son filed a suit against the widow wherein the Court decreed that he was entitled to half a share in the separate estate and partition of the same, and also awarded half the amount of the outstandings due to zamindar. During the pendency of appeal the widow died and the daughter's son was brought on record as the legal representative. In execution proceedings the illegitimate son claimed, as part of separate estate, property consisting of jewels belonging personally to zamindar and to proceed against the other half for the outstandings.

Held: that the final decree of the High Court certainly gave to the illegitimate son a half share of such jewels as formed the separate property of the zamindar.

Held also: that as the decree-holder sought to execute his decree against items of jewels which the widow never asserted to be hers as streedhanam but which he claimed to be hers, there was certainly some burden of proof on the decree-holder but at the same time the reversioner also should show that they formed part of the zamindar's estate.

Held further: that the decree-holder was entitled to proceed in execution of his decree against all the items found to belong to zamindar and only a half share in the items belonging to zamindar as separate property but not against the other half which belonged to the reversioner. [P 348 C 1, P 349 C 1]

K. V. Krishnaswami Iyer—for Appellant.

P. N. Appuswamy Iyer — for Respondents.

Ramesam, J. — These appeals are against orders in execution. To understand the contentions raised in these appeals, it will be convenient to set forth the history of the prior litigation.

The zamindar of Bodinaickanur died in 1888 leaving a widow, a daughter and daughter's son (the zamindar of Septur) and undivided coparcener, a concubine and an illegitimate son by her. The widow at once entered into possession of the zamindari. In 1889 the undivided coparcener brought a suit to recover the zamindari. The widow resisted the claim on the basis of a will left by the zamindar. That suit was compromised in May 1890. Under the compromise the right of the plaintiff therein to succeed to the zamindari was recognized but as a price for the compromise the widow was allowed to enjoy the zamindari for the rest of her lifetime. In 1902 the illegitimate son filed a suit to recover the zamindari alleging that his mother was a married wife of the late

zamindar and puting forward an alternative claim even on the basis of his being illegitimate. He also alleged that the will put forward by the widow was a forgery. In that suit, O. S. 31 of 1902, the widow (defendant 1), the daughter (defendant 2) and the daughter's son (defendant 3) were all made parties. Defendant 1 pleaded that the plaintiff therein was not entitled to inherit in preference to the other heirs of the zamindar. She also pleaded that the will she put forward was genuine. In para. 15 of the written statement, she referred to the earlier suit by the undivided coparcener and said :

"The said O. S. No. 16 of 1889 terminated in a compromise by which the said Kandasami Naick withdrew his claim and transferred all his rights in the said properties in favour of this defendant during her lifetime; a decree was passed accordingly."

Thus, she pleaded all possible titles for the purpose of resisting the plaintiff. The suit was dismissed by the Subordinate Judge of Madura. There was an appeal to the High Court. In that appeal a distinction was made for the first time between the zamindari proper and the separate estates acquired by the zamindar out of the income of the zamindari. After calling for a finding, the High Court, while confirming the dismissal of the suit in so far as the zamindari was concerned, held that the plaintiff was entitled to a half share in the separate estate as the illegitimate son of a Sudra and gave a decree for partition of the separate estate. Against this decree defendant 1 appealed to the Privy Council. During the pendency of the appeal defendant 1 died and defendant 3 who was then a minor represented by the Court of Wards brought himself as the legal representative. The Privy Council affirmed the decree of the High Court : see *Kamulammal* v. *Visvanathaswami Naicker* (1). The plaintiff is seeking execution of that decree for partition. One of the items of the separate estate is the outstandings due to the zamindar amounting to Rs. 57,000 odd. Defendant 1 denied that she ever collected the outstandings. The High Court found on evidence that she did collect and the decree given included a half of the amount claimed, Rs. 27,000 and odd. Another item claimed as part of the separate estate consisted of jewels belonging personally to the zamindar. But these were not described separately from the rest of the jewels in the possession of the zamindar, at the time of his death, all the jewels being described in one schedule, namely, Sch. C along with other moveables. But the final decree certainly gives to the plaintiff, half share of such jewels as formed the separate property of the zamindar. Immediately on the Rani's death a box of jewels was taken possession of by the Collector of Madura and continued to be in his custody. The present execution petition was filed in August 1921, for recovery of the value of half the outstandings with interest and the decree-holder sought to attach the jewels left by the late zamindarni. On 10th March 1924, a letter was sent to the Collector of Madura purporting to be a prohibitory order in pursuance of the order of attachment. It runs thus :

"The plaintiff having applied under O. 21, R. 52, Civil P. C., for an attachment of property now in your hands the under-mentioned jewels of the late zamindarni, Kamalu Ammal of Bodinaikanoor, I request that you will hold the said property subject to the further order of this Court etc."

Description of jewels :

"The jewels of gold, silver, etc., belonging to Kamalu Ammal, late zamindarni of Bodinaikanoor."

It is seen from the above prohibitory order that only the jewels belonging to the zamindarni were sought to be attached. It does not purport to claim that all the jewels in the box, possession of which was taken by the Collector are jewels belonging to the zamindarni, though perhaps the Collector regarded it as such. He made reference to the Court in which he mentioned that part of the jewels were claimed by the zamindar of Saptur as his own as he happened to reside with the zamindarni at the time of her death. The Court replied that only the jewels belonging to the zamindarni were the subject of attachment. This reply did not improve matters. The notice was also issued to the zamindar of Saptur. When the batta amin went to his palace it was said he was absent at Madura and the notice was affixed to the outer door. Whether this affixture was justified or not, there is no doubt that it came to the notice of the zamindar afterwards though we are not told exactly when, and the zamin-

(1) A. I. R. 1923 P. C. 8=46 Mad. 167=50 I. A. 32 (P.C.).

dar did not then object to the order of attachment by the Court. The plaintiff subsequently attempted to bring the properties to sale. The present petition is filed by the zamindar of Saptur objecting to the sale of the properties on the ground that the jewels attached did not belong to the zamindarni but formed part of the separate property of the zamindar. Incidentally in this petition he also said he was not served properly with notice of the attachment and that the attachment of the property was irregular and not valid. As the Subordinate Judge remarked that he is not entitled to raise the latter point in this petition he filed another petition to raise that question. This was on 18th December 1924. In this petition he conceded that the jewels in the custody of the Collector comprised three separate classes (1) the jewels belonging to the zemindarni, (2) the jewels belonging to separate estate of the late zemindar, (3) other jewels not falling under the above two descriptions but consisting of the regalia of the zamindari and other items. The petitioner concedes that the decree of the High Court and the Privy Council awards to the plaintiff half of the second category, that he is entitled to execute his decree against the first category but not against the defendant's half share in the second category. The undivided coparcener who was defendant 6 in the suit objected in respect of the third category but there is an order against him and he never appealed. Anyhow defendant 3 the zamindar of Saptur, has no interest in that item. The Subordinate Judge disallowed the objections of defendant 3 and dismissed both the petitions. The present appeals are against these orders. C. M. A. No. 63 being against the order on the petition objecting to the validity of the attachment and C. M. A. No. 64 being against the order on the petition claiming that portion of the jewels are not the assets of the zamindarni. The appellant of course concedes that the plaintiff's decree can be executed against the stridhanam jewels of the zamindarni but his contention is that all the jewels in the box are not such stridhanam jewels and the matter must be enquired into.

Mr. Sitaram Rao who appeared for the respondent contended that even assuming that part of the jewels form separate estate of the zamindar, they are liable to be proceeded against in execution as in collecting the outstandings she represented the line of heirs including herself, the daughter and daughter's son of the last zamindar in so far as the separate estate was concerned. He contends that she was sued as a widow, that she defended as widow, that the decree against her was given as a widow represented the inheritance of the zamindar and, therefore, defendant 3's reversionary interest is also liable to be proceeded in execution of the decree as it was for the benefit of all the line of heirs that she defended the suit. He relies on *Jugal Kishore* v. *Jotendra Mohun Tagore* (2), *Partabnarain Singh* v. *Trilokinath Singh* (3), *Risal Singh* v. *Balwant Singh* (4) and *Lalji Sahai Singh* v. *Karki Jha* (5). The decisions in *Partabnarain Singh* v. *Trilokinath Singh* (3) and *Risal Singh* v. *Balwant Singh* (4), show that a widow may represent the reversioners in a litigation and the decree obtained against her may bind the reversioners not only in cases where she was suing or defending on behalf of her husband's estate the dispute being between that estate and another estate, but also where there are rival claimants to her husband's estate. In *Risal Singh* v. *Balwant Singh* (4) the rival claimant was an adopted son. In the case before us the rival claimant is an illegitimate son. In such cases, a decree for mesne profits or for costs may be executed against other widow's estate not the subject of the litigation in the hands of her reversioners after her death on the ground that her litigation was for the benefit of the whole of the estate she inherited from the husband and passed on to the reversioners. On this principle Mr. Sitaram Rao contends that the decree against the zamindarni of Bodinaikanoor for half the outstanding and half the jewels may be executed against the other half of the separate estate for which he did not obtain a decree and which has now descended to defendant 3 after the zamindarni's death because it is said, she was defending the

(2) [1884] 10 Cal. 985=11 I. A. 66=4 Sar. 553 (P.C.).
(3) [1885] 11 Cal. 186=11 I. A. 197=4 Sar. 567 (P. C.)
(4) A. I. R. 1918 P. C. 87=40 All. 593=45 I. A. 168 (P. C.).
(5) [1909] 14 C. L. J. 90=2 I. C. 654.

suit for the benefit of all the heirs who were entitled to the separate estate of the last zamindar. In resisting the illegitimate son's claim she was working not only for the benefit of herself but for that of her daughter and daughter's son. But in the present case what is sought to be executed is the decree for half of the outstandings. So far as the jewels are concerned there is no difficulty? whatever jewels in the box are found to be separate jewels, it is conceded that the plaintiff is entitled to his half and it is even said that defendant is willing to pay down their price and retain the jewels of the separate estate himself. But the question is whether the decree for outstandings can be executed against the other half shares of such jewels. This depends on not in what capacity the decree of the High Court and the Privy Council was given against defendant 1 but in what capacity she collected the outstanding. There is no doubt that the decree was given against her as widow, but it is not equally clear in what capacity she claimed and collected the outstandings from the debtors of the zamindar. As early as 1889 she put forward a will of the zamindar. That will make no distinction between zamindari or the separate estate of the zamindar. What estate she claimed under the will as legatee we do not know, whether she claimed a widow's estate or a mere life-estate or an absolute estate. We are informed that this question is the subject of another litigation. The oral evidence relating to the collection of the debts is that of plaintiff's witness 48 in which he gives general evidence that the debts were collected by defendant 1 within two or three years after the zamindar's death. In respect of one debt it was said to be in the year 1890 and in respect of others not even this information was given. It is impossible to say when exactly the debts were collected. It may be on that evidence they were collected in 1890 or 1891. If the collection was after the compromise with defendant 6 in May 1890, she was doing so under the right which was vested in her being transferred to her from defendant 6 by reason of the compromise. That razinamah is Ex. 38 and is printed at p. 231 of the Privy Council book. Under para. 6 it is stated;

> "all other Pannai etc., lands, and buildings and moveables which belonged or were in the enjoyment of the deceased Kumaraja Pandiya Avergal and are situate either in the said zamindari or in other places shall be held and enjoyed by defendant 1, her heirs, with all rights and privileges and with the power of alienation by way of gift, mortgage, sale, etc., free from any subsequent claim by the plaintiff and his heirs."

The word 'moveables' includes the outstandings due to the zamindar. If she made the collection of the outstandings after this compromise under the rights given to her under this para. 6, it may be said that without our expressing any final opinion she was collecting them as absolutely entitled to them and not in the claims of a widow's estate and, therefore, as representing her daughter and daughter's son. There is no further material than what is already mentioned to show in what capacity she acted. Unless the facts are very clear we cannot apply the principle established by the decisions cited by Mr. Sitarama Rao to the facts of this particular case. We, therefore, come to the conclusion that the decree of the plaintiff for outstandings cannot be executed against the half share of the jewels forming the separate estate which have now descended to defendant 3. He can execute the decree against all other jewels.

This conclusion makes it necessary that an enquiry should be held as to what jewels in the box belong to the separate estate and what jewels fall into other categories. It cannot be said that zamindar of Saptur is estopped from raising the question now. He did not object to the attachment because the attachment sought was only of the jewels belonging to the zamindarni. Not objecting to a prohibitory order of that kind cannot be held to amount to an implied admission that all the jewels in the box belong to the zamindarni nor to an implied decision by the Court to that effect. What the Collector thought has no bearing on the matter. He was then discriminating between Bodinaickanoor and Saptur. We, therefore, think that an enquiry is necessary. In C. M. A. No. 64 we call upon the Subordinate Judge to take such evidence as is offered by both sides on the nature of the jewels and submit a finding to this Court within two months after the re-opening of the High Court that is 18th September. In C. M. A. No. 63 the only point raised

is that the attachment is invalid. The appellant has nothing to do with the irregularity of the attachment. He did not care to object to it, as the attachment was only of the jewels of the zamindarni. He cannot now attack the validity of the attachment. C. M. A. No. 63 is therefore dismissed with costs.

After receiving findings from the Subordinate Judge of Dindigal, the following judgment was delivered].

Ramesam, J. — The Subordidate Judge has now returned a finding that item 7 only belonged to the estate of the zamindar, and that the other items in dispute (besides those conceded in the Court below) belong to the zamindarni. The appelants have have filed objections to the finding.

It has been contended before us that the burden of proof was wrongly thrown on the appellant by the Subordinate Judge. On the other hand, the learned advocate for the respondent contends that, as the appellant is a reversioner claiming properties as belonging to the last male owner, it is for him to show that they form part of the estate of the last male owner. So far as the latter contention is concerned, I may observe that we are not here dealing with a case of a reversioner claiming against alienees from a widow or a daughter. But in the case before us, the respondent as a drecee-holder against the widow seeks to execute his decree against items she never asserted to be hers but which he claims to be hers. Therefore, there is certainly some burden of proof on the execution creditor but at the same time, the reversioner also should show that they from part of the zamindar's estate. The truth is we have got here a case of two rival claimants to property in the hands of a stake-holder and there is a equal burden upon both. We must decide the case with reference to other consideration.

Now, as regards items 6, 19 to 22 and 86, the appellant was not even able to assert that they belonged to the zamindar's separate estate nor did connect them with any of the items in the C schedule.

With reference to items 27 to 30 the respondent's witness does not know whether they belong to the zamindarni or not. On the other hand, the appellant's witness stated that they belonged to the zamindar. Though these items were not mentioned in the C schedule, we must hold that they are not part of the stridhanam of the zamindarni and are liable to be proceeded against in execution by the respondent.

As to the items discussed in para. 7 of the judgment of the Subordinate Judge, we must agree with his conclusion on the ground that they are not mentioned in C schedule.

Item 18 is a jewel set with rubies and item 16 is a jewel set with diamonds and rubies. Now item 136 of the C schedule was a packet of loose rubies and the High Court found that it belonged to the main estate and not to Kamalu Ammal. Even if it is admitted that she was in the habit of purchasing precious stones, one must presume that the old rubies were used for a new jewel, unless the contrary is shown. On this matter, the burden is on the respondent who wants to proceed against the jewels of the zamindarni to displace the possibility of her having used the old rubies. We, therefore, find that item 18 and the rubies in item 16 belonged to the zamindar's estate.

As to item 62, the appellant's witness states that they are made out of the diamonds taken from items 71 and 72 of C schedule. Item 71 consisted of two big and four small diamond buttons. Item 72 was a watch set with diamonds, pearls and rubies with a chain set with diamonds. The respondent's witness states that a watch chain was given as a persent by Kamalu Ammal to her son-in-law at the time of his marriage. His evidence was believed by the Subordinate Judge but, even, accepting his evidence, the diamond buttons and the diamonds in watch might have been used for making the jewel, Item 62. We, therefore, allow this item also in favour of the appellant.

The appellant does not press his objections relating to items 1, 3 and 78 and the finding of the Subordinate Judge is accepted with regard to them.

As regards items 34 and 35, the appellant's evidence is that they were made partly out of the rubies in item 131 of the C schedule and the rubies of another addigai. But the value of item 131 of the C schedule was only Rs. 200. We allow, therefore, items 34 and 35

in favour of the appellant only to the extent of the rubies worth Rs. 200.

The appellant's case is that items 43, 45 and 46 were made from the pearls in items 40, 42, 124 and 135 in C schedule. Of this, Nos. 40 and 42 were held by the High Court to belong to the zamindarni and the others to the estate. Now, the respondent has not pressed his claim to proceed against items 43 and 45 in the Court below. We must, therefore, take that item 46 was made from the pearls in items 40 and 42 and therefore, the finding of the lower Court as regards items 46 is confirmed.

As regards item 64, we agree with the Subordinate Judge.

As regards the diamonds in Item 16, the appellant's witness connects them with items 71 and 72 of the C schedule. The remarks made above with regard to item 62 apply to this item also. We, therefore, find this item in favour of the appellant.

The result is that in addition to item 7 found by the Subordinate Judge to belong to the zamindar and items 11, 33, 43, 45, 90, 109, 119 and 122 conceded by the respondent in the lower Court, we now find items 16, 18, 27 to 30, 62 and Rs. 200 worth of rubies in Nos. 34 and 35 in favour of the appellant. The respondent will be entitled to proceed in execution of his decree against all the items found to belong to the zamindar and only a half share in the above items but not against the other half, which belongs to the appellant. Each party will bear his own costs throughout.

Odgers, J.—I agree and have nothing to add.

P.R.S./V.S. *Appeal allowed.*

A. I. R. 1930 Madras 349 (1)

KUMARASWAMI SASTRI, J.

(*Nagari*) *Subbanna*—Plaintiff—Appellant.

v.

(*Karapakula*) *Naranayya* and *others*—Defendants—Respondents.

Second Appeal No. 1813 of 1926, Decided on 10th December 1929, from decree of Dist. Judge, Anantapur, in Appeal Suit No. 99 of 1925.

Limitation Act, Art. 29—For wrongful seizure person must be in possession—No right to possession—Wrongful seizure is not possible.

There can be wrongful seizure only where the property is in possession of the person. No doubt constructive possession also will do, but when there is no right to possession, there can be no wrongful seizure and Art. 29 has no application : 38 *All.* 676, *Rel. on.*; 4 *M. L. T.* 271, *Dist.*

B. Sitarama Rao—for Appellant.

B. Somayya—for Respondents.

Judgment.—I think Art. 29, Lim. Act is not applicable. The deed of hypothecation does not give the appellant any right to be in possession of the cattle attached. The seizure cannot be said to be wrongful as all that the appellant is entitled to is to have the sale subject to his hypothecation. *Niadar Singh* v. *Ganga Dai* (1), is in point. As pointed out there can only be a wrongful seizure when the property was in the possession of the person. It may be that constructive possession will do. But when there is no right to possession there can be no wrongful seizure. *Damaraju Narasimha Row* v. *Gangaram* (2), was a case of possession. I set aside the decree of the District Judge and remand the appeal for disposal on the merits. Costs will abide and follow the result. Court-fees will be refunded.

P.R.S./V.S. *Appeal remanded.*

(1) [1916] 33 All. 676=35 I. C. 86=14 A.L.J. 728.

(2) [1903] 4 M. L. T. 271.

A. I. R. 1930 Madras 349 (2)

WALLACE, J.

(*Kocherlakota*) *Subba Rao*—Plaintiff—Appellant.

v.

Secy. of State—Defendant—Respondent.

Second Appeal No. 202 of 1926, Decided on 30th October 1929, from decree of Sub-Judge, Masulipatam, in Appeal Suit No. 20 of 1925.

(a) Madras Hereditary Village Officers Act (1895), S. 23, Proviso—Second appeal lies only on dismissal order of District Collector.

The object of the proviso clearly is that it is only against orders of dismissal that the Board will entartain a second appeal, that is, there must be an order of dismissal by the District Collector. Where, therefore, there is no such order passed by the District Collector no second appeal lies to the Board. [P 350 C 2]

(b) Madras Heriditary Village Officers Act (1895), S. 23—Mention of appellate

powers only does not carry revisional powers.

The mere mention of appellate powers in a statute which is silent as regards revisional powers does not carry with it any revisional powers: 10 *Bom.* 480 and 28 *All.* 551, *Rel. on.*: *A. I. R.* 1922 *Mad.* 337, *Ref.* [P 351 C 1]

(c) Madras Hereditary Village Officers Act (1895), S. 23—Revenue Board has no inherent power.

The Revenue Board has no inherent power outside the Acts and Regulations to interfere with and enhance the order of suspension passed by the District Collector. [P 352 C 1]

(d) Specific Relief Act, S. 42—S. 42 is not exhaustive — Declaratory suit by karnam to set aside order passed by Revenue Board is maintainable—Madras Hereditary Village Officers Act (1895), S. 23.

Section 42 is not exhaustive, and hence a suit brought by a karnam to set aside an order of the Revenue Board, passed under Madras Hereditary Village Officers Act, S. 23, on the ground that it is ultra vires, is maintainable as a declaratory suit: 22 *Mad.* 270 (*P.C.*), *Rel. on.*; *A. I. R.* 1916 *P. C.* 78, *Expl.*; 39 *Mad.* 803; 43 *Mad.* 410; 39 *Mad.* 80; *A.I.R.* 1922 *Mad.* 290; 39 *M. L. J.* 319 and 43 *Mad.* 4, *Ref.* [P 352 C 1]

T. R. Venkatarama Sastriar and *A. Satyanarayana*—for Appellant.

Government Pleader—for Respondent.

Judgment.—The original suit out of which this second appeal arose was a suit against the Secretary of State to declare that an order of the Board of Revenue dated 8th July 1922 is invalid and for consequential relief. The original Court decreed for the plaintiff, the appellate Court reversed that decree and the plaintiff appeals.

The plaintiff was a karnam of the ryotwari village of Voonagatla. On 4th October 1921 the Revenue Divisional Officer, Ellore, dismissed him. He appealed to the District Collector who modified the order into one of suspension for one year. He preferred a second appeal to the Board of Revenue, the result of which was that the Board on 8th July 1922 restored the order of the Revenue Divisional Officer dismissing him. The plaintiff maintains that that order is ultra vires, and invalid. The above proceedings were taken under Act 3 of 1895. The original dismissal was under S. 7 and the appeals were under S. 23.

It is quite clear, I think, that no second appeal lay in this case. The only case in which a second appeal lies to the Board of Revenue in a matter of dismissal of a village officer is given in the proviso to S. 23 (1), and that is a case where there has been a dismissal under S. 7. That that dismissal must be by the order directly appealed against is clear. It cannot be reasonably contended that a second appeal lies to the Board in all cases where the original order by the Revenue Divisional Officer was a dismissal. The result of such a contention would be that, in cases where the Revenue Divisional Officer has dismissed and the District Collector has modified the dismissal into a fine, a second appeal would lie to the Board, but where the Revenue Divisional Officer suspends and the District Collector confirms, no appeal would lie to the Board. The object of the proviso clearly is that it is only against orders of dismissal that the Board will entertain a second appeal, that is, there must be an order of dismissal by the District Collector. There was in the present case no such order and, therefore, no second appeal lay to the Board. This is in fact the view of the Board itself in the Board's resolutions exhibited as Exs. D and E, and I may note that this position was accepted by the Government Pleader in the lower appellate Court. Therefore, the Board had no jurisdiction to entertain a second appeal. The proper order would have been to have dismissed the appeal summarily.

The learned Government Pleader, however, contends that the order was passed in the exercise of powers of revision possessed by the Board. He claims that the Board could have acted and, therefore, must be presumed to have acted either in the exercise of revisional powers under S. 23, or in the exercise of inherent executive powers outside the scope of Act 3 of 1895. As to the powers of revision under S. 23 the statute itself does not confer on the Board any power of revision. But it is argued that as the Board is constituted the superior appellate authority it follows that it has a general power of revision. Reliance is placed on a sentence quoted from the ruling in *In re, Chinnayya Gounder* (1) which states the well known proposition that appellate jurisdiction includes the power to interfere in revision. But in order that that proposition may apply a revisional

(1) A. I. R. 1922 Mad. 337.

power must have been conferred by the statute on the tribunal. If revisional power has been conferred, then it is exercisable over all tribunals against whose orders an appeal is provided. I am not referred to any authority which lays down that, where a statute confers a right of appeal and is silent about a right of revision, it has conferred a right of revision apparently unlimited in extent and absolute in authority, so that, for, example, as in this case the mere conferment of a right of appeal on the Board ipso facto confers on it a right to enhance the sentence of a lower tribunal without notice to the party, affected. Such a contention is tant-amount to saying that, where a statute provides a right of appeal and also provides a power of revision, the latter provision is not an enabling provision but it is restricting provision limiting the unlimited powers of revision otherwise possessed by the tribunal. It would mean, for example, that, if the Criminal Procedure Code had not defined the right of the High Court to interfere in revision the High Court would nevertheless have power to reverse an acquittal without notice to the party concerned and without there being any appeal presented against the acquittal. I am clear that this contention is unsound and that the mere mention of appellate powers in a statute which is silent as regards revisional powers does not carry with it any revisional powers. Reference may be made to the Full Bench case in *Khoji Shivji* v. *Hasham Guntam* (2) where it was held that, where an order in council provides for appellate powers and is silent about revisional powers, no revisional powers are conferred, and to *Salig Ram* v. *Ramji Lal* (3), where it was held that, if the revisional power has to be derived from statute, it must have been conferred directly by the statute. I am not, therefore, prepared to accept this argument; so that, if the Board had any power of revision in the present case, that power will have to be derived outside Act 3 of 1895. It remains to consider whether there is any such power.

For this position the learned Government Pleader has called in aid the general history of the powers of the Board of Revenue. An early regulation now partly in force, Regn. 1 of 1803, is relied upon. It is argued that Ss. 5 and 33 give the general power claimed. The lower appellate Court bases its decision upon S. 5, but of these two sections S. 33 is the one which deals with punishment, and it enacts that the Board shall punish neglect at their discretion, according to the powers vested in them for that purpose. So that regulation takes us no further. We have to see what powers are vested in the Board. That appears from later regulations, first of all Regn. 2 of 1806, S. 7 (3), applying eo nomine to karnams, laying down that the Board of Revenue has power to dismiss them.

Then by Ss.7 and 8, Regn.6 of1831 the power over karnams in ryatwari tracts hitherto exercised by the Board of Revenue was transferred to Collectors, subject to the approval of the Board. S. 7 (3), Regn. 2 of 1806 was repealed by Act 2 of 1869. I do not appreciate the learned Government Pleader's suggestion that this section was repealed merely because it was at that time too well known to require retention on the statute book. Such an argument might be put forward in the case of any repealed Act and has no substance. Obviously the Act which repeals another and the Act repealed cannot both be in force at the same time. Clearly the authority which had power to legislate on the punishment of karnans had the same power to delegate its powers of punishing karnams and intended by the repealing Act 2 of 1869 that the power exercised under Regn. 2 of 1806 should be delegated no longer to the Board but to the Collector. So that between 1806 and the present Act 3 of 1895 the authority to whom was delegated the power to punish karnams was set out in Reg. 6 of 1831. That itself was definitely repealed by Act 3 of 1895, whereby the legislating authority in whom, ultimately, this power vested, laid down definitely which officer or officers were to exercise the power of dismissing karnams and the manner in which that power could be exercised. In all this history I see no room for the contention that the Board of Revenue possesses some powers outside this legislation. It

(2) [1896] 20 Bom. 480 (F.B.).
(3) [1903] 28 All. 554=3 A. L. J. 394=(1903) A.W.N. 103.

has all along derived what power it possessed from legislating authority, and not being itself the sovereign. Such a theory really implies that although the statute says by S. 23 that a dismissal of an appeal to the District Collector in a case where the order on appeal is not one of dismissal shall be final, yet that order is not final because the Board possesses undefined and unrestricted inherent powers to interfere with it. It may be noted that the Board of Revenue in its order in the present case did not purport to act under any such inherent powers, but purported to be disposing of an appeal presented under S. 23, Act 3 of 1895. I am not therefore prepared to support the learned Government Pleader in his argument that the Board has an inherent power outside the Acts and Regulations to interfere with and enhance the order of suspension passed by the District Collector.

The only other point to consider is contention of the Government Pleader that the suit is not maintainable because it does not fall within S. 42, Specific Relief Act. Both the lower Courts have agreed in holding that the suit is maintainable. It is clear of course, that the plaintiff's suit must in the nature of the case be purely a declaratory one. He is not challenging the authority of the Collector's order of suspension and therefore he could not sue for reinstatement or for the emoluments of the office. The cause of action is the passing of the order of the Board of Revenue without jurisdiction. It must be conceded that the plaintiff is not suing as a person entitled to any legal character or to any right as to any property; so that if S. 42 is exhaustive of declaratory suits the suit will not lie. The ruling of the Privy Council in *Robert Fisher* v. *Secretary of State* (4), at p. 282 is authority for the proposition that the section is not exhaustive. That was a case similar to the present in which it was sought to set aside an order of Government on the ground that it was ultra vires. That ruling has been frequently relied upon in this Court : see *Ramachandra Rao* v. *Secretary of State* (5), *Veeramachaneni Ramaswamy* v. *S. Pitchayya* (6), *Ramakrishna Pattar* v. *Narayana Pattar* (7), *Narasimhacharlu* v. *Pitchayya* (8) and *Lakshminarasimha* v. *Ramalinga Pillai* (9) The High Court of Calcutta has taken an opposite view in *Deokali Koer* v. *Kedar Nath* (10), though the decision of the case did not rest upon that ground. The learned Government Pleader relies upon a later Privy Council case in *Sheoparsan Singh* v. *Ramnandan Prasad Narayan Singh* (11). That, however, has been interpreted by a Bench of this Court in *Surayya* v. *Subbamma* (12), to be a decision on a finding of fact that the plaintiff had not the legal character of a reversioner, and therefore that the suit specifically brought under S. 42 was not maintainable under that section. It cannot be held that this Court has yet adopted the view that S. 42 is exhaustive or that the Privy Council case in *Sheoparsan Singh* v. *Ramnandan Prasad* (11) has overruled the Privy Council case in *Robert Fisher* v. *Secretary of State* (4), and, sitting here as a single Judge, I consider I am bound to follow the interpretation of *Sheoparsan Singh* v. *Ramnandan* (11), given in *Surayya* v. *Subbamma* (12) and the Privy Council ruling in *Robert Fisher* v. *Secretary of State* (4). I am not therefore prepared to hold that the lower Courts erred in law in holding that the suit was maintainable. I must therefore allow the appeal and restore the decision of the District Munsif with costs against Government here and in the lower appellate Court. The memorandum of cross-objections by Government as regards costs in the lower appellate Court is dismissed with costs. Three months time for payment of costs.

P.R.S./V.S. *Appeal allowed.*

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(4) [1899] 22 Mad. 270=26 I. A. 16=7 Sar. 459 (P.C.).
(5) [1916] 39 Mad. 808=31 I. C. 310.
(6) [1920] 43 Mad. 410=38 M. L. J. 226=58 I. C. 585=(1920) M. W. N. 393.
(7) [1914] 39 Mad. 80=27 M. L J. 634=26 I. C. 883=(1914) M. W. N. 912.
(8) A. I. R. 1922 Mad. 290.
(9) [1920] 39 M. L. J. 319=12 M. L. W. 202=59 I. C. 245=(1920) M. W. N. 519.
(10) [1912] 39 Cal. 704=15 I. C. 427=16 C. W. N. 838.
(11) A. I. R. 1916 P. C. 78=43 Cal. 694=43 I. A. 91 (P.C.).
(12) [1920] 43 Mad. 4=37 M. L. J. 405=53 I. C. 498=(1919) M. W. N. 580.

A. I. R. 1930 Madras 353

WALLACE, J.

Duvoor Venkatarama Reddi and *others*—Plaintiffs—Appellants.

v.

Gomatam Doddachariar and *others*—Defendants—Respondents.

Second Appeal No. 1884 of 1926, Decided on 9th October 1929, from decree of Sub-Judge, Chittoor, in Appeal Suit No. 48 of 1925.

Limitation Act, Art. 181—Redemption suit—Application for final decree within three years from decree in second appeal from preliminary decree held to be within time—Civil P. C., O. 34, R. 8.

A mortgagor applied for a final decree in a redemption suit. The preliminary decree was obtained on 29th June 1918 ; the application for final decree was made on 22nd October 1923. The preliminary decree, however, was taken up in first and second appeals which were respectively disposed of on 29th November 1919 and 8th February 1922. The judgment of the second appeal after notice to respondent was "no question of law. The second appeal is dismissed with costs."

Held : that the decision of the High Court was a decision after hearing the merits of the case, and its decree, therefore, superseded the decree of the lower appellate Court ; and that the application for final decree was within time being within three years of the High Court's decree under Art. 181 : 18 *Mad.* 214 ; 22 *Mad.* 293 ; *A. I. R.* 1921 *Mad.* 414 and 39 *Cal.* 925, *Rel. on. A. I. R.* 1926 *P. C.* 93 and *A.I.R.* 1927 *P. C.* 25, *Ref. A. I. R.* 1918 *P. C.* 151 and *A. I. R.* 1928 *Cal.* 646, *Dist.* [P 354 C 1]

C. V. Harihara Aiyar—for Appellants.

S. A. Seshadri—for Respondents.

Judgment.—The point for decision in his appeal is one of limitation. The plaintiff applied for a final decree in a redemption suit. The preliminary decree was obtained on 29th June 1918, the application for final decree was made on 22nd October 1923, more than three years after the preliminary decree. The preliminary decree, however, was taken upon first appeal and second appeal. The first appeal was disposed of on 29th November 1919 and the second appeal on 8th February 1922. The application is therefore beyond three years of the first appeal decree and within three years of the second appeal decree. The original Court has held that it was in time, the lower appellate Court that it was not and the plaintiff appeals.

The article applicable is Art. 181 and the terminus a quo is the date when the right to apply accrued. The plaintiff's contention is that the preliminary decree now is the High Court's decree in second appeal and that his right to apply accrued only on the date of that. The respondent contends that as the High Court decree merely dismissed the second appeal the right to apply accrued on the date of the first appeal decree. All that we know about the High Court proceedings is its judgment which runs, "No question of law. The second appeal is dismissed with costs." The fact that it was dismissed with costs indicates that the second appeal was admitted and notice given to the other side, and that the other side appeared and was ready to argue the case if called upon.

It is contended by the respondent that, if the High Court had gone into the merits of the appeal and dismissed it, the right to apply would accrue only on the date of the High Court decree. But it is contended that the High Court could not have gone into the merits because it merely says "no question of law," and that as it has held that there was no question of law it held in effect that the second appeal was not competent, since a second appeal can only be maintained on a question of law. But the fact that the appeal was admitted as an arguable appeal indicates to my mind that it was entertained as competent. The competency of an appeal does not depend on the final decision in the appeal. If the High Court does not dismiss it in limine but thinks there is an arguable question of law, then the appeal is competent, and it is because it is competent that notice is given to the other side and the appeal posted for hearing both sides. The decision of the High Court was therefore a decision after hearing the merits of the case discussed on both sides, and its decree therefore superseded the decree of the lower appellate Court.

The same result is arrived at from another point of view. It may be that, when an appeal is summarily dismissed as time barred or because of default of appearance or want of prosecution or some similar reason, the proper order is one of dismissal pure and simple, and that such an order or decree, whichever it be, would not supersede the decree of the lower appellate Court. This is a question the answer to which either way will raise difficulties which I need

not consider here ; for I am clear that, when notice has been given and the appeal argued, the decree of dismissal, even if the word "dismissed" is used, is really a decree of confirmations if, indeed, considering that cost is awarded in addition to the lower appellate Court's decree, one may not even say it is a decree of modification. The rules applicable are Rr. 30 to 32, O. 41, and the proper decree in such a case is one confirming, varying or reversing the decree appealed from; and in such a case there is and must be a new decree containing the costs ordered by the High Court. The old decree has been confirmed and superadded to or modified ; it does not really matter by which term we describe it. The High Court decree does supercede the decree appealed from and becomes final preliminary decree, if such a phrase be permitted.

The general principle laid down by the Privy Council in *Javad Hussain* v. *Gendan Singh* (1) and *Fitzholmes* v. *Bank of Upper India* (2) is not altered because the High Court has only limited powers in hearing a second appeal. The principle applies to an appeal which has been heard in the sonse of having been admitted and the other side given notice to appear and argue. That principle has been affirmed in this Court from the Full Bench case in in *Pichu Vayyanagar* v. *Seshayyangar* (3) onwards. see : *Munuswami Naidu* v. *Munuswami Reddi* (4) and *Venkatayya* v. *Satharaju* (5) see : also *Kailash Chandra Bose* v. *Giriji Sundari Debi* (6). The respondent relied on the Privy Council case in *Juscurn Baid* v. *Pirthichandlal Choudhury* (7) but there the question was not whether the appeal decree has superseded the original decree but when was a particular sale reversed, as has been explained by this Court in 44 *Mad.* 714 (5). A similar case is relied on in *Hari Mohan* v. *Parameshwar Shah*, *A. I. R.* 1928 *Cal.* 646 (*S. B.*) where again the question was not one of limitation, but when a particular right to restitution accrued. I am not shown any authority which lays down that, when the High Court has admitted and heard an appeal argued, its decree, even though it be a decree of dismissal, does not supersede the decree appealed from. I hold that the District Munsiff's order is right. I allow this appeal and reverse the Subordinate Judge's decree with costs here and in the lower appellate Court.

P.R.S./V.S. *Appeal allowed.*

(1) A. I. R. 1926 P. C. 93=6 Pat. 24=53 I. A. 197 (P.C.).
(2) A. I. R., 1927 P. C. 25=8 Lah. 253=54 I.A. 52 (P.C.).
(3) [1895] 18 Mad. 214=5 M. L. J. 39.
(4) [1899] 22 Mad. 293.
(5) A. I. R. 1921 Mad. 414=44 Mad. 714.
(6) [1912] 39 Cal. 925=14 I. C. 299=16 C. W. N. 658.
(7) A. I. R. 1918 P. C. 151=46 Cal. 670=46 I. A. 52 (P.C.).

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* A. I. R. 1930 Madras 354

RAMESAM AND CORNISH, JJ.

Dost Mohamed— Creditor 1 — Appellant.

v.

V. Browne and *another*—Respondents.

Original Side Appeal No. 118 of 1928, Decided on 24th October 1929, from judgment of Kumaraswami Sastri, J., D/- 28th August 1928, in Appln. No. 589 of 1928.

*** Presidency Towns Insolvency Act, S. 11 (b) — Debtor living in Nellore District — House in original civil jurisdiction occupied by his mother and sister — Contribution by debtor of money for rent to sister — House in original civil jurisdiction is not "dwelling of debtor" within S. 11 (b).**

The debtor was an engine driver in the employement of the M. S. M Ry. Co. and for the four years immediately preceding the presentation of his insolvency petition he had been engaged in the work of engine driver in Nellore District, where he ordinarily resided during that period. The debtor had a house within the ordinary original civil jurisdiction. But it appeared from evidence that this house was the dwelling house of his mother, his sisters and their children, whom he contributed money for the rent with the object of helping them.

Held : that his providing money to enable his mother and sisters to live in this house could not make it his establishment or his dwelling house and, therefore, the house could not be regarded as the debtor's dwelling house within the meaning of S. 11 (b) : *In re, Hexquard*, (1890) 24 *Q. B. D.* 71, *Dist.* [P 355 C 1,2]

L. S. Veeraraghava Iyer and *V. Varadaraja Mudaliar*—for Appellant.

T. V. Srinivasan and *Official Assignee of Madras*—for Respondents.

Cornish, J. — This appeal raised a question of the High Court's jurisdiction in insolvency. The debtor, V. Browne was adjudicated insolvent upon his own petition by this Court on 25th July 1928. In his petition he described himself as residing at No. 10, Old Jail Road, Royapuram, Madras. The appel-

dant, who is the principal creditor of the debtor, as soon as he heard of the adjudication moved the Court to annul it, his allegation being that the High Court had no jurisdiction to adjudicate the debtor an insolvent. The question depends upon S. 11 (b), Presidency Towns Insolvency Act which requires as a condition to the exercise of the High Court's jurisdiction that the debtor, within a year before the date of the presentation of the insolvency petition, has ordinarily resided or had a dwelling house within the limits of the ordinary original civil jurisdiction of the High Court.

The debtor is an engine driver in the employment of the M. S. M. Ry. Co. and for the four years immediately preceding the presentation of his insolvency petition he has been engaged in the work of engine driver at Donakonda, Nellore District. It is clear from his evidence that Donakonda is the place where he has ordinarily resided with his wife during that period. Kumaraswami Sastri, J., has accordingly held that the debtor has not ordinarily resided within the limits of the High Court's jurisdiction as required by S. 11 (b) of the Act. But the learned Judge was of opinion that the debtor had a dwelling house, namely the house at No. 10, Old Jail Road, within the jurisdiction and that the Court had consequently power to adjudicate him an insolvent. With all respect we are unable to agree with this view. It has been held that a portion of a house may be the dwelling house of the person who has the exclusive occupation of that portion, and that it is not essential that a person having a dwelling house should have dwelt in it for any particular period; *In re, Hexquard* (1). In that case Lord Esher referring to S. 6, Bankruptcy Act 1883, which corresponds to S. 11 (b), Presidency Towns Insolvency Act, said:

"It is quite clear that the time during which the debtor has 'ordinarily resided' or has 'had a dwelling house' need not be the whole year before the presentation of the petition; it is to be "within a year" before the presentation of the petition. If within the year the debtor has had a dwelling house in England, no time is limited during which he must have dwelt in it, If he is not a mere passing or casual visitor he has got such a hold on this country as to make him liable to the English Bankruptcy Law."

But in the case before us the debtor is not the lessee or the tenant of the house in Old Jail Road or of any portion of it. It appears from his evidence that this house is the dwelling house of his mother, his sisters and their children. He paid the rent, but not directly to the landlord, and it does not appear that he had undertaken any liability to the landlord for the rent. He sent it to his sister, and there can be no doubt that he contributed the money for the rent with the object of helping his mother and sisters.On his own evidence it appears that he did not get any receipts for the rent and that all he was concerned in getting were the money order receipts for the money sent by him to his sister. It is true that in a sense he was, as he states in his evidence, maintaining an establishment in Madras but we fail to see how his providing money to enable his mother and sisters to live in this house can make it his establishment or his dwelling house, and it makes no difference that, on the infrequent occasions (only twice in 1927) when the debtor came to Madras from Donakonda to visit his mother and sisters, he stayed in the house. On the facts of this case we do not think that the house can be regarded as the debtor's dwelling house. The order of adjudication was, therefore, without jurisdiction, and must be set aside. The appeal is allowed with costs Pleader's fee Rs. 75.

P.R.S./V.S. *Appeal allowed.*

(1) [1890] 24 Q. B. D. 71

A. I. R. 1930 Madras 355

KUMARASWAMI SASTRI AND WALSH, JJ.

Shum Shu Bibi—Defendant 1—Appellant.

v.

Muhammad Rashid Ali Khan and *others*—Respondents.

Letters Patent Appeal No. 36 of 1926, Decided on 25th October 1929, from order of Phillips, J., D/- 12th August 1925, in Second Appeal No. 650 of 1924.

Civil P. C., O. 41, R. 10 — Noncompliance with O. 41, R. 10, entails dismissal.

An order directing a certain amount to be paid into Court on an application for security for costs is an order under O. 41, R. 10, the non-compliance with which entails the dismissal of the appeal. [P 356 C 1]

P. Somasundaram—for Appellant.

Government Pleader and *B. Satyanarayana*—for Respondents.

Judgment.—We think that an order directing a certain amount to be paid into Court on an application for security for costs is an order under O. 41, R. 10, Sch. 1, Civil P. C., the non-compliance with which will entail the dismissal of the appeal. In this case the amount was not paid into Court within the time ordered, and Phillips, J., dismissed the second appeal. We see no grounds for interference. This Letters Patent appeal is dismissed with costs of respondents 1 to 4.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 356 (1)

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

A. N. B. Ramalinga Ayyar —Appellant.

v.

N. M. Rayalu Ayyar Nagasami Ayyar Firm—Respondents.

Appeal No. 390 of 1929, Decided on 18th November 1929, from order of 1st Addl. Sub-Judge, Madura, D/- 16th September 1929, in E. A. No. 484 of 1929.

Provincial Insolvency Act (1920), S. 78, Proviso—Creditor seeking to execute decree obtained after adjudication—Official Receiver joined as party to suit— Debt is proved and Proviso to S. 78 does not apply.

Where a decree that the creditor seeks to execute is obtained subsequent to the insolvent's adjudication and it is obtained not only against the insolvent but also against the Official Receiver who was impleaded as a party, although the Act provides a formal mode of proving a debt which has not been adopted by the creditor, yet the debt is proved and the proviso to S. 78 does not apply. [P 356 C 2]

C. S. Venkatachariar—for Appellant.

K. Venguswami Iyer —for Respondents.

Judgment.—The question raised by the appeal relates to the construction of the proviso to S. 78, Provl. Ins. Act, (Act 5 of 1920). That section enacts that where an order of adjudication has been annulled, in computing limitation in respect of an execution application, the period from the date of the order of adjudication to the date of the order of annulment, shall be excluded. This rule is subject to the proviso that it does not apply to a debt provable but not proved.

The decree that the respondent seeks to execute was obtained subsequent to the appellant's adjudication. It was obtained not only against the appellant, but also against the Official Receiver, who was impleaded as a party. It is the latter that under the rules has to admit or reject proof of debts. In this case, he was himself added as a defendant and the decree was passed in his presence. Although the Act provides a formal mode of proving a debt, which has not been here adopted, we are prepared to hold, having regard to the facts adverted to, that the debt has been proved and that the proviso in question does not apply. We do not in this case wish to lay down any general rule as regards the meaning of the word 'proved' occurring in the other sections of the Act. The appeal fails and is dismissed, but we make no order as to costs, as the respondent has taken the point now raised for the first time in appeal.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 356 (2)

ANANTAKRISHNA AYYAR, J.

Dakshinamoorthi Pathan—Plaintiff—Appellant.

v.

Krishnasami Kadavaran and *others*—Defendants—Respondents.

Second Appeal No. 530 of 1926, Decided on 16th October 1929, from decree of Sub-Judge, Tanjore, in Appeal No. 38 of 1925.

Limitation Act, Art. 181 — Appeal on preliminary mortgage decree —Limitation for final decree runs from date of appellate decree.

Where there has been an appeal from a preliminary mortgage decree, the period of three years within which, under Art. 181, an application for a final decree must be made runs from the date of the decree of the appellate Court and not from the expiry of the time for payment fixed by the preliminary decree. [P 360 C 2]
(*Case law discussed.*)

K. P. Ramakrishna Iyer—for Appellant.

A. Raghunatha Rao —.for Respondents.

Judgment.—The plaintiff's application for the passing of a final decree for the sale of the hypotheca in pursuance of the preliminary decree passed in his favour on 1st February 1918 fixing the time for payment as 1st August 1918. though allowed by the District Munsif, was disallowed by the learned Subordinate Judge of Tanjore on the ground that the petition was barred by limita-

tion under Art. 181, Limitation Act. The plaintiff has preferred this second appeal.

Original Suit No. 47 of 1917 was a suit instituted by the plaintiff to recover money due on two hypothecation bonds, dated 30th November 1898, and 7th November 1914, respectively, the first bond comprising plaint items 1 to 3, while the second comprised plaint items 4 and 5. The mortgagor was defendant 1 and his son defendant 2 and defendant 3 claimed title, as auction purchaser, to items 4 and 5, while defendant 4 was a private alienee of items 1 to 3. The preliminary decree passed by the First Court is dated 1st February 1918, and the time fixed for payment was 1st August 1918. An appeal preferred by defendant 3 making defendant 4 also as a party respondent along with the plaintiff and defendants 1 and 2 was allowed in his favour on 14th February 1919, and the interest of defendant 3, if any, in items 4 and 5 was declared not liable for the mortgage amount. The second appeal preferred by the plaintiff was dismissed on 31st March 1921 ; the plaintiff's present petition for the passing of a final decree was filed on 25th March 1924, i. e., within three years from the date of the High Court's decree, but beyond 3 years after the preliminary decree passed by the first Court on 1st February 1918, and also beyond 3 years from the date fixed for payment (1st August 1918). In these circumstances the legal representative of defendant 4 raised objection to the passing of a final decree on the ground that the application was barred by limitation.

The first Court overruled the contention and held that the period of limitation for the petition for passing the final decree was to be calculated from the date of the High Court's decree 31st March 1921. The District Munsif accordingly passed a final decree for the sale of the hypotheca. Defendant 4's legal representative preferred an appeal and the lower appellate Court held that the starting point of limitation was not the date of the High Court's decree, but the date fixed for payment in the preliminary decree passed by the District Munsif. Ths learned Subordinate Judge was of opinion that the decree must in effect be treated as a compound decree,' one passed in respect of the mortgage Ex. A for the amount due thereon, and the other in respect of mortgage Ex. B for the amount due thereon, the amounts due under each mortgage being separately decreed and the properties covered by mortgage being separate. He held that the appeal and the second appeal relating to mortgage under Ex. B only could not affect the starting point of limitation in respect of the portion of the decree regarding the mortgage under Ex. A, though written in one paper he held that the decrees were really two, and that the plaintiff ought to have applied for the passing of the final decree in respect of the properties covered by Ex. A within 3 years from the date fixed for payment (1st August 1918), and not having done so the plaintiff's right was barred. He relied on the decision reported in *Christiana Benslawn* v. *Banarashi Proshad* (1), and observed that the decree in the present case was a ' compound decree ', being an incorporation of two decrees, and as the appeal preferred by defendant 3 did not imperil the decree passed on the 1st mortgage Ex. A the period of limitation for the present application started from the date fixed in the praliminary decree.

It is therefore material to set out the terms of the preliminary decree passed on 1st February 1918, by the District Munsif, and the decree passed by the appellate Court on defendant 3's appeal 125 of 1918 dated 14th February 1919 ; hereunder are set out the above two decrees.

Extract from the Munsif's decree :

" It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the 1st day of August 1918, is Rs. 418-4-3, and that the principal sum of Rs. 227-0-0 (Rs. 82 principal for the first bond Ex. A and Rs. 145 principal for the second bond, Ex. B) shall carry interest at the rate of six per cent per annum until realization, and it is decreed as follows :

" That if the defendants pay into Court the amount so declared due on or before the said 1st day of August 1918, the plaintiff shall deliver up to the defendants or to such person as they appoint all documents in his possession or power relating to the mortgaged property and shall if so required transfer the property to the defendants free from the mortgages from all incumbrances created by the plaintiff or any person claiming under him. That if such payment is not made on or before the said 1st August 1918, the mortgaged property or a suffi-

(1) [1915] 19 C. W. N. 287=22 I. C. 685.

cient part thereof shall be sold subject to the following directions, namely, that plaint items 1 to 3 shall alone be sold for the recovery of the amount due under Ex. A with subsequent interest and proportionate costs calculated up to 1st August 1923 viz., Rs. 148-2-10 and plaint items 4 and 5 alone shall be sold for the recovery of the amount due under Ex. B with subsequent interest and proportionate costs calculated up to 1st August 1918 viz., Rs. 270-1-5 and that the proceeds of the sale after defraying thereout the expenses of the sale be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs and that the balance, if any, be paid to the defendants, personal remedy against defendant 1 and the family properties of defendants 1 and 2 is not barred."

Extract from the appellate Court decree :

"This Court doth, allowing the appeal and in modification of the decree of the lower Court order and decree that the interest of defendant 3 (appellant) if any, in items 4 and 5 of the plaint mentioned properties (described hereunder) be and hereby is not liable for the amount due to the plaintiff (respondent 1) under his second hypothecation bond.

This Court doth further order and decree that the plaintiff (respondent 1) do pay to the appellant (defendant 3) Rs 6-0-0 for his costs in the lower Court and Rs. 42-0-0 for his costs in this appeal."

The article applicable to an application for the passing of a final decree is Art. 181, Lim. Act ; the period is three years, and time begins to run "when the right to apply accrues." It has now been held by all the High Courts in India and also by the Privy Council, that when there is an appeal from a preliminary decree, time will run for an application for a final decree only from the date of the decree of the final Court of appeal preferred against the preliminary decree. See the decisions of the Full Bench of the Allahabad High Court in the case reported in *Gajadhar Singh* v. *Kishan Jiwan Lal* (2), also *Nizam Uddin Shah* v. *Bohra Bhim Sen* (3), *Venkayya* v. *Sathiraju* (4), *Subbarayulu Naidu* v. *Sundararaja Nayudu* (5), *Mahabir Prasad* v. *Kanhaiyalal* (6), *Uma Charan* v. *Nibaran Chandra* (7), *Jowad Hussain* v. *Gendan Singh* (8) and *Fitzholmes* v. *Bank of Upper India* (9). This position is clear and finally settled. But it is argued that the above cases were not cases where what has been called in in these proceedings a "compound decree" had been passed, which, it is argued should be taken to be two separate decrees, and it is urged that in such cases the circumstances that an appeal was preferred against one of the "compound decrees" should not be taken to extend the period of limitation applicable to an application for passing a final decree. The reply urged to this argument was that similar questions have been considered by Courts in connexion with the applicability of Art. 182, Lim. Act, and that in such cases Courts have held that in cases where a decree gave different reliefs against different defendants, and appeals were preferred only in respect of a portion of the decree against some defendant or relating to some reliefs only, that the period of limitation for executing any portion of the decree would begin to run only from the date of the final decree passed on appeal. The decision of the Full Bench of the Madras High Court in the case reported in *Kristnamachariar* v. *Mangammal* (10), was relied on. Reliance was also placed on the decision of Sir John Willis, C. J. and Oldfield, J., in the case reported in *Venkayya* v. *Sathiraju* (4). The decision in *Venkayya* v. *Sathiraju* (4) was under Art. 181, Lim. Act, and the learned Judges held that :

"an application for a final decree is governed by Art. 181 of the Act and the starting point in cases where there has been an appeal from the preliminary decree is the date of the appellate decree whether the latter confirmed or varied the preliminary decree."

Their Lordships observed :

"It would be strange if a different rule were applicable under Art. 181 as regards applications for a decree absolute where the preliminary decree is under appeal, an application so much resembling an application for execution that, under the repealed chapter of the Transfer of Property Act, it was held by this Court to be one."

The learned advocate for the respondent relied on the decision of the Calcutta High Court in the case reported in *Christiana Benshaw* v. *Benarashi Proshad Chowdhury* (1). The learned Judge Coxe, J., observed :

(2) [1917] 39 All. 641=42 I. C. 93=15 A.L.J. 734.
(3) [1918] 40 All. 203=43 I. C. 870=16 A.L.J. 85.
(4) A. I. R. 1921 Mad. 414=44 Mad. 714.
(5) [1918] 35 M. L. J. 507=48 I. C. 185.
(6) A. I. R. 1924 All. 99.
(7) A. I. R. 1923 Cal. 389.
(8) A. I. R. 1926 P. C. 93=6 Pat. 24=53 I. A. 197 (P.C.).
(9) A. I. R. 1927 P. C. 25=8 Lah. 253=54 I. A. 52 (P.C.).
(10) [1903] 26 Mad. 91 (F.B.).

"it seems to me that the present case shows the wisdom of adhering to the view taken in *Har Proshad Roy* v. *Enayat Hossain* (11), that in dealing with the question of limitation in these cases we should see whether the original decree was really one decree or an incorporation of several decrees. and whether the appeal against it imperilled the whole decree or not. Evidently the words "where there has been an appeal" in Art, 182, Cl. 2, Lim. Act, mean, "where there has been an appeal against the decree or order for the execution of which an application is made."

With reference to this, the first observation I have to make is that the learned Judges there were considering a case under Art. 182, Lim. Act, and were of the opinion that unless the decree of the appellate Court imperilled also the portion of the decree not appealed against, limitation for execution of the unappealed portion will begin te run from the date of the original decree, and not from the date of the final appellate decree. This view is against the decision of the Full Bench of this High Court in the case reported in *Krishnamachariar* v. *Mangammal* (10). In fact a similar view expounded in *Muthu* v. *Chellappa* (12), was overruled by the Full Bench in the case reported in *Krishnamachariar* v. *Mangammal* (10). In the Judgment of Benson, J., it is observed :

"There is no indication is that Art. (179), Old Lim. Act corresponding to 182 of the present Act that the legislature intended the Courts to consider how far each part of an original decree was "imperilled" by an appeal and to vary the period of limitation accordingly."

Both the learned Chief Justice and Bhashyam Ayyangar, J., were also of opinion that there was no basis for "the theory of imperilment." Therefore the decision in *Christiana Benshaw* v. *Benarshi Proshad* (1). based under Art. 182, Lim. Act could not be treated as law in this Presidency. Further, the law as contained in the above passage in *Christiana Benshaw* v. *Benarshi Prosad* (1), has been expressly dissented from in Calcutta in the recent case reported in *Abdul Alim* v. *Abdul Hafiz* (13). In *Abdul Alim* v. *Abdul Hafiz* (13), the learned Judges decided that upon the true construction of the terms of Art. 182 (2), Lim. Act, the limitation runs from the date of the final decree of the appellate Court where there has been an appeal, irrespective of the question whether the appeal relates to the whole decree or not and they expressly dissented from the view taken in *Christiana Benshaw* v. *Benarshi Prosad* (1). I may also mention that in *Ari Chettiar* v. *Theerthamalai Chetty* (14). Sadasiva Iyer and Morce, JJ. observed with reference to *Christina Benshaw* v. *Benarashi Proshad* (1). that :

"it would not be supposed that we agree with that decision."

Again, "there could be only one final decree in a suit"—(sic) per Bashyam Ayyanger, J. in the case reported in *Kristnamachariar* v. *Mangammal* (10), at p. 96. This was the view of the Privy Council also as is seen from the case reported in *Jowad Hussain* v. *Gendan Singh* (8), at p. 28 (*of* 6 *Pat.*) their Lordships quoted the following sentence from the Judgment of Banerjee, J., in the case reported in *Gajadhar Singh* v. *Kishan Jiwan Lal* (2) :

"it seems to me that this rule contemplates the passing of only one final decree in a suit for sale upon a mortgage."

Again, the definition of the word "decree" in S. 2, Civil P. C. has to be kept in view. Under the Civil Procedure Code certain causes of action could be combined in one suit. When that is done the suit should be taken to propely comprise all the reliefs claimed therein. The Court may in proper cases direct that several causes of action may be tried in separate suits and may confine the plaint to one cause of action if it thought that the circumstances of the case required the same. But when the Court proceeded to overrule the plea of the defendants about misjoinder of causes of action, as it did in the present case, the circumstances that the causes of action were different loses its importance. One often finds a single mortgage comprising various items of properties in which various defendants are interested. The Court has got discretion to allow particular items to be sold in a particular order ; it may also declare what portion of the amount decreed should be realised from what particular items ; in the same way, in an ordinary suit to recover money against different defendants, the Court may exonerate some defendants, limit the liability of some other defendants to a portion of the amount decreed, or define and limit the liability of each defendant to par-

(11) 2 C. L. R. 471.
(12) [1889] 12 Mad. 479.
(13) A. I. R. 1927 Cal. 89=53 Cal. 901.
(14) [1916] 3 M. L. W. 521=34 I. C. 791.

ticular portions of the amounts decreed. In such cases the theory of "compound decree" would surely be inapplicable. The principle of the Full Bench decision in the case reported in *Kristnamachariar* v. *Mangammal* (10), and the construction placed on Art. 182 (old Art. 179), Lim. Act by the Full Bench of Madras in the above case, and by the Full Bench of the Calcutta High Court in the case reported in *Gopal Chunder Manna* v. *Gosain Das Kalay* (15), are also against the view contended for by the respondents. In fact the decision in *Dewan Abdul Alim* v. *Abdul Hakam* (13), related to a case where the plaintiffs sued to recover properties described In Schs. 1, 2, and 3 and 4 of the plaint. He got a decree only in respect of properties in Sch. 4. His appeal to the High Court and to the Privy Council claiming the other schedule properties failed ; more than 3 years after the date of the 1st Court's decree but within 3 years of the decree of the final appellate Court, the plaintiff-decree-holder-applied for execution of the decree with reference to the properties in Sch. 4, decreed to him by the 1st Court and against which there were no appeals or questions thereafter. The Calcutta High Court held that the plaintiff's application was not barred by limitation. The principle of the decision of the Madras High Court in the case reported in *Krishnamachariar* v. *Mangammal* (10), and *Subramanya Chettiar* v. *Alagappa Chettiar* (16), is also the same. This principle has been accepted as sound by the Privy Council also.

Article 179 of the old Lim. Act was split into the the present Arts. 181 and 182 of the present Act. See the observations in *Venkayya* v. *Sathiraju* (4), at p. 716 (of 44 *Mad.*) and *Somar Singh* v. *Mt. Premdei* (17), (at p. 336 of 3 *Pat.*). The principles regarding the starting point of limitation in Art. 182 and in Art. 181 are generally the same. The decision under Art. 182 clearly support the contention of the appellant. The Privy Council has decided that the starting point of limitation for an application for a final decree—(order absolute under the T. P. Act) is from the date of the final decree. Passing of two final decrees in same suit is not contemplated by Civil Procedure Code. Though all periods of limitation are more or less arbitrary, it is of the highest importance that they should be laid down with clearness and certainty, and subtle distinctions not warranted by the language of the legislature should not be introduced by the Courts, as observed by Benson, J., at p. 94 of the Full Bench decision in *Krishnamachariar* v. *Managammal* (10). See also the observation of the learned Chief Justice at p. 92 to the effect that the rule of law laid down by the Full Bench :

"though not altogether scientific is simple, certain and intelligible."

The definition of the word "decree" in the Civil Procedure Code favours the appellant's contention, that as against defendants 1 and 2, the decree now in question is a single decree, though with reference to properties, the liability of particular items have been defined.

I am therefore uuable to follow the reasoning of the learned Subordinate Judge, either that the decree in question is "a compound decree", or that there should be "several decrees absolute in this case", or that the starting point of limitation for an application for a decree absolute is different with reference to different portions of the reliefs decreed in this case.

The rulings of the Privy Council in the cases reported in *Jowad Hussain* v. *Gendan Singh* (8) and *Fitzholmes* v. *Bank of Upper India* (9), are specific, namely :

"where there has been an appeal from a preliminary mortgage decree the period of three years within which, under the Lim. Act, Art. 181, an application for a final decree must be made runs from the date of the decree of the appellate Court and not from the expiry of the time for payment fixed by the preliminary decree."

In the present case, such an application has been made within three years from the date of the decree of the appellate Court and is therefore in time. I therefore reverse the decree of the lower appellate Court and restore that of the 1st Court with costs here and in the lower appellate Court.

P.R.S./V.S. *Appeal allowed.*

(15) [1898] 25 Cal. 594=2 C.W.N. 556 (F.B.).
(16) [1907] 30 Mad. 268=2 M.L.T. 189.
(17) A. I. R. 1925 Pat. 40=3 Pat. 327.

A. I. R. 1930 Madras 361

ANANTAKRISHNA AYYAR, J.

(*Manna*) *Vazhmuni Mudali*—Defendant 1—Appellant.

v.

Nathumuni Mudali and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 467 of 1928, Decided on 18th September 1929, from decree of Dist. Judge, North Arcot, in Appeal Suit No. 151 of 1926.

(a) Contract Act, Ss. 23 and 239—Partnership is prima facie legal unless involving something illegal, which illegality must be sufficiently proved by party alleging it.

A partnership is prima facie legal, unless it is proved that the object of the same was illegal or that the object of the partnership necessarily involved something illegal or contrary to public policy, and so while it is the duty of the Court not to render its aid to the enforcement of transactions which are illegal, it is at the same time incumbent that the illegality should be sufficiently proved and the facts constituting illegality were established. [P 363 C 1]

(b) Madras Abkari Act (1 of 1886), S. 56—Partnership formed prior to taking license to trade in toddy—No evidence that business was not begun before taking license—Partnership does not involve transfer and held not illegal.

N, *M*, and another entered into partnership by each contributing an equal share of money. The business was started, the license being taken in the name of *M*. There was no evidence to show that at the time the partnership was formed, *M* had not begun the trade in toddy and had no stock which he made the joint property of all the three.

Held: that the partnership did not involve a transfer and was not prima facie illegal under the Abkari Act: *A.I.R.* 1926 *Mad.* 772 and 35 *Mad.* 582, *Ref.* [P 363 C 2]

(c) Practice — Appeal — Evidence — Trial protracted and many opportunities offered to party to produce evidence—If party fails to produce, evidence cannot be admitted in second appeal.

Where in a protracted proceeding in lower Courts a party is offered plenty of opportunity to prove his case by adducing evidence, and the party does not produce the evidence then available, it is not permissible to that party to have the same evidence admitted in second appeal. [P 362 C 2]

A. Viswanatha Iyer and *A. Ramaswami Iyer*—for Appellant.

A. C. Sampath Iyengar and *T. R. Srinivasan*—for Respondents.

Judgment.—The plaintiff instituted on 14th February 1921 a suit for taking of partnership accounts between him and defendants 1 and 2 and for the recovery of the amount to be found due to him on the taking of the accounts.

he only defence was that the partnership ended in a loss and that there was nothing due to the appellants. A decree for Rs. 570 was passed in favour of the plaintiff on 9th April 1923 by the District Munsiff. The present defendant 1 preferred an appeal. On 19th February 1925, the learned Subordinate Judge reversed that decree and remanded the suit to the District Munsiff for a fresh trial, on the ground that the trial by the District Munsiff was irregular as no preliminary decree seemed to have been passed as should have been done in the case of partnership suits. While remanding the suit the learned Subordinate Judge suggested that the Court of first instance might at the re-trial consider a new ground pressed before the lower appellate Court by the defendant, viz., that the partnership was illegal. At the re-trial, defendant 1 put in an additional written statement on 31st July 1925 that the partnership in question was illegal, and opposed to public policy. The plaintiff then applied to have his plaint amended by alleging that he would be entitled to a decree for the money advanced by him in case the Court should hold that the partnership was illegal as was contended by the defendant. That amendment was allowed by the District Munsiff by his order dated 8th October 1925. Defendant 1 filed a further additional written statement on 20th October 1925 to the amended plaint. On 21st December 1925 the then District Munsiff, while finding all the issues raised in the case in favour of the plaintiff, dismissed the plaintiff's suit. His finding on issue 5 was that the contract of partnership was illegal and opposed to public policy. On plaintiff's appeal the learned District Judge on 6th December 1927 reversed the decision of the District Munsiff and passed a preliminary decree in favour of the plaintiff for the taking of accounts in the light of the findings of the District Munsiff on the other issues which were not disputed before the District Judge. Defendant 1 has accordingly preferred the present S. A. No. 467 of 1928 against the decision of the District Judge.

The main contention urged by the learned advocate for the appellant is that the agreement of partnership is illegal and that the suit was rightly dismissed by the District Munsiff. De-

fendant 1 held a license to sell toddy in a shop. According to him, he took the plaintiff as a partner in respect of the toddy business and that such agreement of partnership is prohibited by the Madras Abkari Act (1 of 1886). The license under which defendant 1 had the privilege of selling toddy has not been produced by defendant 1. The defendant's case was that the license was taken away by the plaintiff. This is what the learned District Judge said on this point.

"On one simple point I think the contention of defendant 1 must fail. He has not produced the license under which he had the privilege of selling the toddy. His explanation is the easily made one that the license has been taken away by the plaintiff. Even if he had not the original license, he could quite easily have got a copy of it from the Collector or have produced at any rate a copy of the license which was in force in 1918-1919, the year of the partnership. At the re-trial all that defendant 1 produced was a license of the year 1921-1922. The learned District Munsiff refused to receive it. That license was taken back from the lower Court by the vakil for defendant 1, and in the course of the argument before me no form of license was produced, the defendant relying on the notification in the Fort St. George Gazette of the conditions of sale of Abkari privileges for the year 1918-1919. After the argument had concluded, I waited . . . . . The vakil for defendant then produced a license granted to a third party. But it was granted for 1919-1920, and not 1918-1919. I do not think that I should presume, in favour of a man who is making a case of the kind made by defendant 1, that the license for 1918-1919 was in identically the same terms as the license for the year 1919-1920. . . It must be taken then that there is no proof of the terms of the license which defendant 1 held."

After referring to certain decisions, the learned District Judge observed as follows:

"Following these decisions, I hold that, since the license relating to the year 1918-1919 of the partnership has not been produced, there are no grounds for saying that the contract of partnership was illegal."

After discussing the terms of the partnership between the parties and after observing that there was no deed of partnership to evidence the agreement of partnership, the lower appellate Court in para. 5 of its judgment observed as follows:

"It seems to me that there are no sufficient grounds for holding that the agreement between defendant 1 and the other two (plaintiff and defendant 2) was contrary to law. As His Lordship, the Chief Justice said in *O. S A. No.* 72 *of* 1925 a man who, like defendant 1, sets up a case in which he attempts to take advantage of his own wrong, must prove his case to the hilt. I am clear that the respondent has not proved his case."

The appellant has produced before me a license granted to a third person for the year 1918-1919, and has sought to have the same admitted in evidence. I, however, do not think that at this stage, and in second appeal, I should allow him to do so. The plaint was filed on 14th February 1921, and the additional written statement in which he took this new plea was filed by him on 31st July 1925. The appeal was pending before the lower appellate Court from 22nd June 1926 till 6th December 1927. The learned District Judge remarks that even after the arguments were heard on 21st September 1927 and judgment reserved to get a copy of the High Court judgment in *O. S. A. No.* 72 *of* 1925, defendant 1's vakil produced only a license granted to a third party for the year 1919-1920 and not any license granted for 1918-1919. Defendant 1 had plenty of opportunities to prove his case, and, I do not think that I should in the circumstances allow defendant 1 to produce in second appeal additional evidence, even if there be no other legal objections in his way of doing so.

It goes without saying that the production of the license granted to defendant 1 is essential to enable the Court to properly adjudicate on the question of illegality of the partnership raised by defendant 1. In *Natla Bapiraju* v. *Achuta Rajaju* (1), Miller and Krishnaswami Ayyar, JJ., with reference to a similar argument observed as follows:

"The Subordinate Judge sustained this objection and dismissed the suit. The license is not on record and it is impossible for us to say that the partnership contravenes any condition therein set forth."

In *O. S. A. No.* 72 *of* 1925, the late learned Chief Justice and Ramesam, J., observed as follows:

"The license which was granted is not forthcoming. Is is impossible to say why it was not produced. Had he produced the same, we would have been in a position to say, as we are not now, what exactly were the restrictions imposed upon his enjoyment of the license. The onus of establishing the illegality of the contract obviously lay heavily on defendant 1, and I am content to dispose of this case on the ground that this burden he never discharged in the Court below in spite of the latitude given to him."

See also *Appadurai Mudali* v.

(1) [1910] 20 M.L.J. 337=5 I.C. 456=(1910) M.W.N. 549.

Murugappa Mudali (2), Odgers and Madhavan Nair, JJ. No doubt in matters contrary to public policy, Courts should not lend ther aid in favour of persons who seek their aid to carry out something which is illegal and contrary to public policy: but there could be no doubt that Courts should in the first instance be satisfied that what a party is seeking to carry out is clearly against what has been declared to be against public policy. As observed by Lord Halsbury in *Connolly* v. *Consumer's Cordage Co.* (3):

"their Lordships entertain no doubt that it is the right and duty of the Court, at any stage of the cause, to consider, and, if it is sufficiently proved, to act upon an illegality which might turn out to be fatal to the claims of either of the parties to the litigation."

The Lord Chancellor added, that:

"their Lordships did not doubt that the learned Judges who tried the case in the Court below had a right, and that it was their duty, if they thought the facts were established, to take care that the process of the Court should not be used for the purpose of establishing a claim that ought not to be permitted to be enforced in a Court of Justice."

Lindley, L. J., observed in *Scott* v. *Brown* (4):

"It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proved the illegality, the Court ought not to assist him."

While the duty of the Court is not to render its aid to the enforcement of transactions which are illegal, it is at the same time, incumbent that the illegality should be "sufficiently proved" (in the words of Lord Halsbury), and that the "facts were established" (in the words of Lord Chancellor). A partnership is prima facie legal, unless it is proved that the object of the same was illegal, or that the object of the partnership necessarily involved something illegal or contrary to public policy. (S. 23, Contract Act). The defendant who alleged the illegality has not succeeded in establishing the necessary facts which would enable the Court to come to that conclusion. Defendant 1 not having produced the necessary materials before the Court, I am unable to say that the learned District Judge was wrong in his decision on this point.

On the second contention raised by the learned advocate for the appellant, I propose to say only a very few words. It could not be said that every partnership relating to abkari business involves a transfer. As observed by Benson and Sundara Iyer, JJ., in the case reported in *Padmanabham* v. *Badrinath Sarda* (5) at p. 586:

"it is no doubt true that every contract of partnership is not necessarily a transfer; but it is equally clear that such a contract may in the circumstances in many cases involve a transfer. Thus if two persons agree to start a business in partnership and to contribute capital therefor, there is no transfer involved in the transaction; but if one person carrying on a trade and possessing stock and capital, admits another into partnership with himself, making the stock and the capitals, the joint property of both, it is impossible to contend that there is not a transfer in such a case."

The learned District Judge considers this question in para. 5 of his judgment. He says:

"there is no deed of partnership and one has to gather what the terms were from the oral evidence of the parties. As I understand the evidence, the case is not one of the respondent, having a going toddy trade and taking the other two (plaintiff and defendant 2) into partnership. So far as I can gather, each of the three parties contributed an equal share of money and the business was started, the license being taken in the name of defendant 1. It seems to be clear that at the time the partnership was formed he had not begun the trade in toddy and had no stock which he made the joint property of all the three. . . . . ."

Therefore in that view also the learned District Judge was, I think, right in overruling the contention of defendant 1, as the partnership in the particular case did not involve a transfer. In *Appadurai Mudali* v. *Murugappa Mudaly* (2) Odgers and Madhavan Nair, JJ., decided:

"where it was alleged that a partnership between defendants 1, 2 and 3 in the matter of an abkari business was illegal and opposed to public policy because the abkari license stood only in the names of defendants 2 and 3, instead of three persons, but the license itself was not produced, ... that, in the absence of evideuce to show that it was a condition of the license that all the names of licensees or persons concerned in that particular trade or business by way of partnership etc must appear on the face of the license, the partnership could not be held to be illegal; and that there was nothing prima facie illegal in such a partnership under the Abkari Act."

Defendant 1 is no doubt entitled to take objection that the partnership entered into by him with the plaintiff and defendant 2 was illegal and contrary to public policy; but he should have pro-

(2) A.I.R. 1926 Mad. 772.
(3) [1904] 89 L. T. 347.
(4) [1892] 2 Q. B. 724=61 L. J. Q. B. 738=57 J. P. 213=41 W. R. 116=67 L. T. 782.
(5) [1912] 35 Mad. 582=21 M. L. J. 425=10 I. C. 126=(1911) 1 M. W. N. 371.

duced proper materials before the Court to enable the Court to properly adjudicate on such pleas. He not having done so in the present case, the lower appellate Court was right in passing a preliminary decree in favour of the plaintiff and directing the usual accounts to be taken. I do not propose that this litigation, begun on 14th February 1921 should further be prolonged by allowing defendant 1 at this stage to adduce additional evidence.

In this view, I do not propose to discuss the various decisions cited before me by the learned advocates on either side in the second appeal, viz: *Marudamuthu Pillai* v. *Rangasami Moopan* (6); *Thithi Pakurudasu* v. *Bheemudu* (7); *Namasivaya Gurukkal* v. *Subramania Ayyar* (8); *Gangadhara Sah* v. *Swaminatha Mudali* (9); *Brahmayya* v. *Ramiah* (10); of this Court *Karsan* v. *Gatlu Shivaji* (11); *Nazaratti Syad Imam* v. *Babamiya Dureyatimsha* (12); *Champsey Dossa* v. *Gordhandoss Kessowji* (13); of the Bombay High Court; *Jnanendra Nath* v. *Chandi Charan Saha* (14) and *Behari Lall* v. *Jagodish Chunder* (15) of the Calcutta High Court, as I consider that the case before me could be disposed of on the grounds already mentioned by me.

The result is that the second appeal is dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

(6) [1901] 24 Mad. 401.
(7) [1903] 26 Mad. 430.
(8) [1916] 34 I. C. 927.
(9) A. I. R. 1926 Mad. 218.
(10) [1920] 43 Mad. 141=38 M. L. J. 123=54 I. C. 45=10 M. L. W. 476.
(11) [1913] 37 Bom. 320=19 I. C. 442=15 Bom. L. R. 227.
(12) [1916] 40 Bom. 64=30 I. C. 913=17 Bom. L. R. 701.
(13) [1917] 19 Bom. L. R. 381=40 I. C. 805.
(14) [1915] 29 I. C. 480.
(15) [1904] 31 Cal. 798=8 C. W. N. 635.

A. I. R. 1930 Madras 364

COUTTS-TROTTER, C. J., AND PANDALAI, J.

S. L. Ramaswamy Chetty and *another* —Defendants—Appellants.

v.

M. S. A. P. L. Palaniappa Chettiar—Plaintiff—Respondent.

Appeal No. 8 of 1928, Decided on 22nd April 1929, against Judgment of Beasley, J,, D/-30th November 1927.

(a) Contract Act, S. 161—Pledgee's default in producing pledged property which must either be with him or has been improperly disposed of—Court is competent to draw presumption as regards its value.

If a pledgee who must either have the pledged property in his possession or must have improperly disposed of it makes default in producing it which should be in his possession, the Court has to come to a conclusion about its value on the best materials available and the pledgee cannot complain if the presumption is drawn against him on the principle of *Armorie* v. *Delamirie*, (1722) 1 *Strange* 504. [P 368 C 2]

(b) Acquiescence — Defence of acquiescence explained and enunciated.

Before any one can acquiesce in another's act he must know what that act is. No one can acquiesce in a fraud till he knows that there has been a fraud or in a violation of his right till he knows that his rights have been violated and in what way. Persons cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them. But it is not necessary that the plaintiff should have known the exact relief to which he was entitled; it is enough that he knew the facts constituting his title to relief. The ground for admitting the defence of acquiescence or laches according to the doctrine of the English Courts of Equity is that a Plaintiff in equity is bound to prosecute his claim without undue delay. Where however there is, as in India, a statutory time limit to all conceivable kinds of action, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable. Besides, even if in such cases the defence of laches were admissible the defendants would have to show that they had suffered a change of position by reason of the plaintiff's laches in which it would not be reasonable to allow him to assert his right: 21 *All.* 496, (*P.C.*) *Ref.* [P 369 C 1,2]

(c) Contract Act, S. 176—Rights of pledgor and pledgee explained.

A pledgor cannot compel the pledgee to exercise the power of sale as a means of discharging or satisfying the decree. His only rights are (1) in case the pledgee exercises the power, to insist that it should be honestly and properly done and the sale proceeds applied to the debt; (2) in case the pledgee does not exercise the power, to redeem the pledge on payment of the debt or so much of it as remains otherwise unpaid, and (3) in case the sale is improperly exercised, to get damages caused thereby. [P 370 C 1]

(d) Contract Act, S. 176—Pledgee selling pledged property without pledgor's authority—Pledgee is guilty of unauthorized conversion—Pledgor is entitled to recover damages—Suit to recover such damages is either governed by Art. 145 or Art. 115—Art. 36 has no application—Limitation Act, Arts. 145, 115 and 36.

Where a pledgee having power to sell for default, takes over in effect, as if upon a sale the pledged property to himself without the pledgor's authority, or giving credit for their full value to him the pledgee is guilty of an unauthorised conversion and the pledgor is entitled to have his property back or its full

value but only on payment of debt. A suit brought by the pledgor under the above circumstances within three years from the date of the alleged sale is well within time whether the suit be regarded as one for redemption governed by Art. 145 or as one for damages for breach of contract governed by Art. 115. Art. 36 has no application to such a suit : 19 *Cal.* 322½ (*P.C.*) *Rel. on.* [P 371 C 2]

(e) Contract Act, S. 177—Absence of tender of money before suit for redemption, where pledgee is ready to deliver property, need not entail dismissal of suit—But if pledgee declares before suit his inability to return pledged property, tender of money is unnecessary.

If a pledgor brings a suit for redemption without first tendering the money to the pledgee, and it turns out that the suit was unnecessary because the pledgee was always ready and willing to deliver up the property pledged without suit if the debt had been paid, the plaintiff will no doubt be made to pay the costs of the defendant, but his suit cannot be dismissed. But if it turns out that in the circumstances which preceded the suit, it would have been perfectly useless to tender the money to the pledgee as for instance where the pledgee declares in advance his inability to return the pledged property, in such a case if the pledgee was at fault in putting it beyond his power to return the goods the pledgor cannot be defeated on account of his not going through a useless ceremoney of tender. [P 370 2 ; P 371 C 1]

K. Raja Iyer and *V. Ramaswami Iyer* —for Appellants.

G. Ramakrishna Iyer and *K. P. Mahadeva Iyer*—for Respondent.

Pandalai, J.—The defendants appeal from a decree declaring that the respondent (plaintiff) is entitled to redeem eleven jewels pledged by him with the appellants, ordering the appellants to produce the same in Court on or before 30th January 1928 and in default to pay the respondent the price thereof i. e., Rs. 11,000, with interest thereon, less Rs. 11,712-9-0 being the amount due to the appellants under the decree in O. S. No. 110 of 1921 or a net amount of Rs. 627-9-8 and also ordering the appellants to pay the respondent his costs of suit. All the parties are Nattukottai Chet ties and appellant 1 is appellant 2's brother's son.

On 3rd November 1918 at Karaikudi in the Ramnad District the respondent borrowed from the appellants who are jointly carrying on a money lending business in India and the F. M. S., the sum of Rs. 6,000 at 12 per cent interest and pledged with them the jewels mentioned in the schedule to the decree. The debt being unpaid appellant 1 as agent on behalf of appellant 2 and during the latter's absence in the F. M. S. brought a suit for its recovery on 3rd November 1921 in the Court of the Subordinate Judge of Sivaganga O.S. No. 110 of 1921. In the plaint it was stated by way of remark that 2 jewels worth in all Rs. 2,700 were pledged for the debt. This was only by way of remark ; the jewels were not produced in Court and the suit was framed as for the recovery of the debt, reserving to the plaintiff the right to sell the jewels without the intervention of the Court, a course which the creditor could take under S. 176, Contract Act. It is now admitted that this statement was incorrect because at least 10 jewels were pledged. It is alleged by the appellants that the mistake arose as the jewels were in an iron safe the key of which was with appellant 2 at Ipoh in the F.M.S., and appellant 1 who had to file the suit before it became barred did not know the number and value of the pledged jewels. However this may be, in March 1922 the respondent applied to the Court to direct the production of the jewels urging that the statement in the plaint as to the number and value of the jewels was incorrect. To this request, instead of stating what is now urged as the truth appellant 1 stated in a counter affidavit that the defendant's (present respondent's) allegations were all false and that he had no right to have the pledged jewels produced nor could his objections as to their value or number be heard as no relief was sought in the suit about the said jewels. On 27th November 1922 the Court made the following order:

" The pledged jewel does not form the subject matter of the suit. Plaintiff does not seek to enforce the pledge in the suit. No issue raises the question of the pledge. This application does not lie and is accordingly dismissed. "

The decree in the suit was passed on 8th December 1922 by which time appellant had returned from Ipoh to India.

The dispute in this case is about a private sale of the pledged jewels which the appellants alleged they effected on 25th January 1923 for Rs. 5350 and about the true value of the jewels. The pespondent in paras. 7, 8 and 9 of the plaint alleged that the appellant's suppression of the truth about the jewels in the plaint in the Sivaganga suit was wilful and fraudulent, that in pursuance thereof they set up the alleged sale of

25th January 1923 in order to appropriate his property really worth Rs. 15,100 for a gross undervalue, and that no sale in fact took place, the so-called sale being a 'bogus transaction' or a sham and fictitious one.

The appellants pleaded that the erroneous statement in the plaint in the former suit was an innocent one, due to a bona fide mistake on the part of appellant as to what the pledged jewels were as they were in a safe the key of which was with appellant 2 then at Ipoh, that after arrival of appellant 2 in India, due notice of the sale was given to the respondent and that as the debt was not paid, all the ten pledged jewels were properly and in fact sold and fetched Rs. 5,350. They pleaded further that credit was given for this amount in several applications for execution in the Sivaganga Court, that no objection was taken by the appellant at the time but that he on the contrary made several payments towards the balance of the decree amount and that therefore the respondent must be held to have affirmed and acquiesced in the sale and is not entitled now to question it. They also pleaded limitation and that the suit as framed was not maintainable. 8 Issues were framed. Issue 1 raised the question of the number and value of the jewels. Issues 2, 4 and 5 raised the question of the factum and validity of the sale and its binding character on the respondent. Issue 3 raised the question of respondents' acquiescence, issue 6 that of the maintainability of the suit, issue 7 that of limitation, and issue 8 is the general issue as to appropriate relief.

The learned Judge who tried the case delivered a careful judgment dealing exhaustively with the matters in dispute and it is not necessary for us, as we generally agree with his conclusions, to go as minutely as he has done into the evidence with which he has dealt.

The learned Judge held that the appellants had foisted a sale on the respondent whereas in fact there was no sale at all. As to the jewels themselves though at the time of pleadings the appellants denied the existence of one small item worth Rs. 300 out of the items 11, no importance seems to have been attached at the trial to this question and nothing has been urged in the appeal before us about it and we must hold with the learned Judge that all 11 jewels mentioned in the decree were pledged. About their value, the learned Judge held that they were worth Rs. 11,000. On the question of limitation he held that on his finding that the jewels were not sold the suit was really one for redemption for which a period of 30 years is provided, and that even regarded as one for damages it was governed by Art. 95 as the appellants had been guilty of a gross fraud and the relief was one claimed on the ground of fraud. The respondent's acquiescence and the maintainability of the suit are not separately dealt with by the learned Judge probably because much insistence was not made on them before him but from several passages in his judgment dealing with the respondent's conduct and its effect it is clear that he considered that the respondent had not acquiesced in the appellants' pretence that the jewels had been sold when they were not. He says

"it is inconceivable that the plaintiff (respondent) did not question the sale in Court though it is quite clear that no executing Court would go into such a matter, and that is what the plaintiff says the Judge refused to do. All that the plaintiff could say was that there was no sale but this was not a sale in execution and so the Court would not enquire into that sale."

As to maintainability of the suit the Judge says:

"There having been no sale, the plaintiff is entitled to redeem the jewels by payment of a certain amouut."

Before us the learned advocate for the appellants has argued (1) that the learned Judge's finding as to the factum of sale is incorrect (2) that his finding as to the value of the jewels is incorrect (3) that in any view the respondent must be held to have affirmed and acquiesced in the sale and cannot now disaffirm or repudiate it (4) that the suit is not maintainable as the respondent did not tender the money due nor was he willing and ready to pay it and (5) that the suit is barred by limitation.

We propose to deal with these contentions seriatim.

As to the sale itself after fully considering the evidence we agree with the Judge's finding that there was no sale at all on 25th January 1923 as alleged by the appellants. We need refer only to some of the striking features of this

part of the case which support that finding. The sale is alleged to have been held at Karaikudi in the appellant's house on 25th January 1923, in pursuance to the notice Ex. B dated 16th January 1923, by which the respondent was required to pay the decree debt in one week from that day in default of which the 10 jewels mentioned therein would be sold. The respondent's answer to this was Ex. B-1, dated 26th January 1923, in which he pointed out the discrepancy between the plaint in which only two jewels were mentioned and the notice in which 10 jewels were mentioned and stated that neither the 10 jewelsa dmitted nor those still omitted should be sold as he (respondent) intended to take criminal proceedings. The parties being residents of the same village these letters must have reached the other party the same or the next day.

It is curious that the sale is dated 25th January which gives the appellants the opportunity of saying that they had already sold the jewels before receipt of the respondent's reply. If any sale actually took place on 25th January, it is curious that the appellants on receipt of Ex. B-1 did not take the trouble to inform the respondent that the sale had already been held or what the amount realised was. In fact they gave no information at all to the respondent but followed up the notice by an execution petition Ex. I in which for the first time they alleged that the jewels had been sold on 25th January for Rs. 5350. At the sale besides the appellants and their witness and the supposed purchasers, (two mysterious Madura merchants) four persons, Kuppusami Chetty, Kumarappa Chetty, Arunachalam Chetty, and a goldsmith Ponnaya Asari, all natives of Karaikudi, are said to have been present. Of the above nine persons except the appellants' only witness their paid servant, between whom and the respondent there is personal enmity on account of a decree obtained against him by the respondent, not a single person has been called. The last named four persons are said to have come there to value the jewels and yet not one of them has signed the undated list now produced which is alleged to be in the handwriting of appellant 2 and to have been made at the time of the sale. Most extraordinary of all, the alleged purchasers who are said to be two Madura merchants, have remained to this day unidentified, the appellants' witness not being able to say who or what their names are even at the trial. As if this were not enough, it is admitted that these mysterious persons, who came to buy valuable jewels did not bring any money nor was any money paid but it is said they were allowed to take away the jewels on the guarantee of Kuppusami Chetty. As there is absolutely nothing but the word of the appellant's witness, the respondent's enemy, to support the theory of guarantee we find it difficult to believe that shrewd businessmen like the appellants allowed unknown persons to take away Rs. 5,350 worth of jewels without a scrap of writing either from themselves or from someone else.

From all the evidence we are convinced that these Madura merchants are pure inventions and that no one took away the jewels on 25th January 1923 as admittedly no money was paid. Needless to say that the appellants have not produced their accounts of that day and it is admitted that there is no such entry anywhere in the appellants' books. This is not all. The appellants produced a ledger book and relied on certain entries there dated 16th July 1923 nearly six months later. The corresponding day book is not produced. The story to be gathered from these entries and the evidence of the appellants' witness is that Kumarappa Chetty had on 25th January 1923 taken the gold worth Rs. 1,200 from one of the neck ornaments which was melted, that for six months no part of the Rs. 5,350 for which the Madura merchants were responsible was paid by themselves or their guaranter or Kumarappa Chetty, that on 16th July 1923 the Madura merchants paid the appellants Rs. 3,640, that at once this Rs. 3,640 was lent to Kumarappa Chetty that, therefore, he was on that day debited with the Rs. 1,200 in one account and with Rs. 3,640 in a new account opened for that purpose and that for the balance of Rs. 510 another new account was opened in the name of the unknown Madura merchants. That these entries are fabrications is seen from the fact that in the body of the entries the date

in jhai to which the transaction is referred is left blank.

The net result of these ingenious manipulations is that even on 16th July when these entries are supposed to have been made for some reason, not one pie in the shape of cash reached the hands of the appellants out of Rs. 5,350 for which they are supposed to have parted with the respondent's jewels; because Rs. 4,840 was outstanding against Kumarappa Chetty and Rs. 510 against the Madura merchants. The alleged payment of Rs. 3,640 by the Madura merchants and the loan of it at once to Kumarappa Chetty is a transparent paper device. It follows that the Madura merchants could not have got the great bulk of the jewels at any time and this confirms the belief that they are mere myths. The respondent suggests the reason why these ledger entries were brought into existence as of 16th July 1923. On 4th March 1923 he had applied to the Sivaganga Court for sanction to prosecute the appellants for falsely stating in the plaint that only two jewels were pledged whereas it was admitted in the appellants' notice that there were at least items 10. As the learned Judge observes this was an instance of litigants in this country rushing to the criminal Court with little or no justification at all. But while this charge was pending against the appellants, they would think it necessary to arm themselves with proof of their bona fides. That petition was disposed of by the Sivaganga Court by dismissing it, on 28th July 1924 and the suggestion is that the ledger entries of 16th July 1923 now relied on were really fabricated in answer to the threat of prosecution. Whether this be so or not, we have no doubt that they were paper entries made with the object of supporting a false story first set up in the execution petition Ex. 1 dated 7th February 1923. For these and other reasons more fully stated by the learned Judge we come without hesitation to the conclusion that there was no sale of the respondents' jewels at all on 25th January 1923 and that the statement to the contrary made by the appellants in the execution petitions in O. S. No. 110 of 1921 and in this case is untrue. It never was the case of the appellants that they sold the jewels at any other time or to any one else.

Coming next to the value of the jewels, in view of the finding that the appellants have not sold the jewels, or given any other satisfactory explanation about their disposal, they must either have them in their possession or must have improperly disposed of them. In either case, on the appellants' default to produce the jewels which should be in their possession, the Court has to come to a conclusion about their value on the best materials available and the appellants cannot complain if the presumption is drawn against them on the principle of *Armorie* v. *Delamirie* (1). The learned Judge had some material before him, viz., the fact that item 1, (a packet a diamonds) which the appellants themselves valued at Rs. 1,500 in the plaint in O. S. No. 110 of 1921 is put down at Rs. 800 in the memorandum Ex. D1, now put forward as the basis on which the total price was fixed at Rs. 5,350. This showed that the real price was somewhere near twice the figure at which the appellants pretended to have sold them. On this and on the evidence of the respondent and the fact that the loan advanced was Rs. 6,000 which with interest came to Rs. 8,160 the learned Judge thought it fair to fix the price of the entire lot of pledged jewels at Rs. 11,000. We find nothing wrong in this method and can only add that if we had to make a valuation for ourselves we would in the circumstances have to adopt the same method and arrive at the same figure.

The only other contention that involves any question of fact is that the respondent affirmed and acquiesced in the appellant's allegation of sale and cannot now be permitted to question the sale. It is urged that the principle that no one can approbate and reprobate the same transaction applies. But in our opinion the facts proved do not raise any inference of acquiescence at all by the respondent of the fraud—for in fact such it was—which the appellants attempted. Before any one can acquiesce in another's act he must know what that act is. No one can acquiesce in a fraud till he knows that there has been a fraud or in a violation of his right till he knows that his rights have

(1) [1722] 1 Strange 504.

been violated and in what way. The basis of the argument in the respondent's so-called acquiescence is the fact that the appellants alleged in certain execution petitions that the jewels had been sold for Rs. 5,350 and applied for execution for the balance and that the respondent when arrested on those petitions paid Rs. 200, Rs. 1,000, and Rs. 300 respectively in cash an later attempted unsuccessfully to set off a sum of Rs. 1019 towards that balance.

These petitions are, Ex. 1 (7th February 1923), E. P. 137 of 1923, Ex. 1 (a) (8th April 1923), E. P. 265 of 1923, (Ex. 1 (b) 16th January 1924) E. P. 12 of 1924; Ex. 1 (c) (18th February 1924), E. P. 35 of 1924 and Ex. 1 (d) (6th August 1924); E. P. 112 of 1924.

The payments by the respondent were made on arrest in pursuance of the first three of the above applications. The unsuccsssful application to set off towards the decree Rs. 1,019 alleged to be due to the respondent on some other account is Ex. 1 (e) dated 23rd August 1924 and it was dismissed. The utmost that follows from these facts is that the respondent did not resist those execution proceedings on the ground of the fraud which has now come to light probably because he did not know the appellants were setting up a sale which in fact had not taken place. Assuming that the respondent could have put forward that case in execution and that the executing Court could have given him relief on it about which we will state our opinion presently it is still incumbent on the appellants if they rely on any acquiescence in their conduct by the respondent to show that he knew the facts. Not only is there no such proof but in the nature of the appellant's contention that there was an actual sale, there could be no proof that the respondent knew that there was no sale. Authority for this is abundant and it is only necessary to refer to the passage in Halsbury, Laws of England Vol. 13, at p. 169 summarizing the law that :

"as regards knowledge, persons cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them. But it is not necessary that the plaintiff should have known the exct relief to which he was entitled, it is enough that he knew the facts constituting his tltle to relief."

The appellants' contention must, therefore, fail on the ground that he did not know that the sale alleged by the appellants was a myth. But there are other and equally fatal grounds. The ground for admitting the defence of acquiescence or laches according to the doctrine of the English Courts of Equity is that a plaintiff in equity is bound to prosecute his claim without undue delay. Where, however, there is, as in India, a statutory time limit to all conceivable kinds of action, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable. Besides, even if in such cases the defence of laches were admissible the defendants (appellants in this case) would have to show that they had suffered a change of position by reason of respondent's laches in which it would not be reasonable to allow him to assert his right. We fail to see what change of position the appellants have suffered except that they have succeeded in making away with part of the respondent's property by giving him credit for only about half its value ; in other words, they have enriched themselves at respondent's expense. It is not only not unreasonable but eminently just that this wrong should be redressed. We are not aware of the defence of laches and acquiescence being employed to defeat a money claim like the present : cf. *Ben Ram* v. *Kundal Lal* (2) a case of equitable estoppel.

The appellants' advocate urged as a branch of his argument on acquiescence, what is really a distinct point, that the respondent's present suit is incompetent by reason of S. 47, Civil P. C., because the question raised is one relating to the execution, discharge or satisfaction of the decree in O. S. No. 110 of 1921. This point does not appear to have been distinctly raised in the lower Court and has not been distinctly taken in the grounds of appeal to this Court. The passage in the lower Court's judgment has already been extracted above where the learned Judge in dealing with the respondent's alleged acquiescence observed that the executing Court could not and would not go into the question whether there had been a proper sale of the jewels as the sale was not a judicial one. No-

(2) [1899] 21 All. 496=26 I. A. 58=7 Sar 523 (P.C.).

authority has been cited to us to show that this view is incorrect. The case cited *Motilal Hirabhai* v. *Bai Mani* (3) was one in which the pledgor having obtained a decree for redemption of certain shares sought in execution to show that certain new shares allotted by the company to the pledgees as holders of the old shares should also be delivered up as accretions to the pledged shares on payment of the debt. It was held that the question whether the new shares were accretions liable to be redeemed with the pledged shares was one which fell properly under S. 47, Civil P. C.

The suit O. S. 110 of 1921 was brought by appellant 2 as creditor merely for recovery of the debt retaining the goods pledged as a collateral security and he purported after the decree to exercise his right of sale without intervention of the Court as he was entitled to do. The present respondent's application, to have the jewels produced in Court was resisted by the appellants and the Court upheld that refusal by the order dated 27th May 1922 already quoted at the beginning of this judgment. We fail to see how in the above circumstances the respondent could have again agitated in execution the question of the factum or validity of the sale out of Court of the jewels as to which rightly or wrongly the Court had held that they did not form the subject matter of the suit and that the question of their pledge was not in issue. The respondent could not compel the appellants to exercise the power of sale as a means of discharging or satisfying the decree. His only rights were (1) in case the appellants exercised the power, to insist that it should be honestly and properly done and the sale proceeds applied to the debt (2) in case the appellants did not exercise the power, to redeem the pledges on payment of the debt or so much of it as remained otherwise unpaid and (3) in case the sale was improperly exercised, to get damages caused thereby. The 2nd of the above alternatives is what has happened. Having regard to the nature of tho former suit, the execution proceedings therein could not at respondent's instance have been converted into an enquiry whether there had been any sale at all or if there had been one whether it was properly held. If such an enquiry had been held and it was found as has been found in this case, that the appellants are liable to pay the respondent the difference between the full value of the jewels and the debt, there was no means of enforcing the payment of such difference in execution of the decree and the respondent would even then have had to bring a fresh suit for that sum. That is in substance what he has done and this suit cannot therefore be defeated by resort to S. 47.

The next objection urged on behalf of the appellants, is that the suit is not maintainable as the respondent did not tender the money due nor was he willing and ready to pay it. For this his learned advocate cited the Privy Council decision in *Neckram Dobay* v. *Bank of Bengal* (4), and the English decisions cited in argument in that case *Halliday* v. *Holgate* (5), *Donal* v. *Sucking* (6) and *Johnson* v. *Stear* (7). It is sufficient to deal with the decision of the Privy Council which was given after consideration of the other cases. The decision was that where a pledgee having power to sell for default takes over as if upon a sale to himself the property pledged without the authority of the pledgor but crediting its value in account with him, this act though an unauthorized conversion does not put an end to the contract of pledge so as to entitle the pledgor to have the property back without payment. Applying that to the present case what follows is that the pledgee having in effect taken over as if upon a sale the pledged jewels to himself without giving credit fot their full value to the pledgor has been guilty of an unauthorized conversion and the pledgor is therefore entitled to have his property back or its full value but only on payment of the debt, This is exactly what the learned Judge has ordered. He

(3) A. I. R. 1925 P. C. 86=49 Bom. 233=52 I. A. 137 (P. C.).

(4) [1892] 19 Cal. 322=19 I. A. 60=6 Sar. 164 (P. C.).

(5) [1869] 3 Ex. 299=37 L. J. Ex. 174=17 W. R. 13=18 L. T. 656.

(6) [1867] 1 Q. B. 585=7 B. & S. 783=35 L. J. Q. B. 232=14 L. T. 772=15 W. R. 13 12 Jur. (n. s.) 795.

(7) [1864] 15 C. B. (N. S.) 330=12 W. R. 347=33 L. J. C. P. 130=9 L. T. 538=10 Jur. (n. s.) 99.

having found the jewels to be worth Rs. 11,000 and having given the appellants the opportunity to produce them if they could has ordered them, in case of default to pay the respondent the differenee between that value and the balance of the decree amount and no objection has been taken to the figures. The decision cited therefore, far from showing that decree appealed from is erroneous, supports it. But it was suggested that the non-maintainability of the suit was due to the respondent's not having tendered or his not having been ready and willing to pay the amount due before the suit, which it seems is an essential condition of bringing a suit for redemption. This is a misapprehension. If a pledgor brings a suit for redemption without first tendering the money to the pledgee and it turns out that the suit was unnecessary because the pledgee was always ready and willing to deliver up the property pledged without suit if the debt had been paid, the plaintiff will no doubt be made to pay the costs of the defendant but his suit cannot be dismissed. But if it turns out that in the circumstances which preceded the suit, it would have been perfectly useless to tender the money to the pledgee as for instance where the pledgee declares in advance his inability to return the pledged property, in such a case if the pledgee was at fault in putting it beyond his power to return the goods the pledgor cannot be defeated on account of his not going through a useless ceremony of tender. S. 51, Contract Act makes the matter clear when it declares that neither party to reciprocal promises need perform his promise unless the other party is ready and willing to perform his promise. Illus. (a) to this section is the ordinary case of buying and sellings goods when neither the buyer need pay the price nor the seller deliver the goods unless the other party is ready and willing to perform his part. In this case, the appellants having so long ago as 7th February 1923, the date of their first execution petition declared that they had sold the jewels and thus put it beyond their power to be ready and willing to return them the respondent was not required to tender the debt to them. This contention also must be rejected.

The last point urgod is that the suit is barred by limitation. The appellant's argument is that the suit is one for damages for tort governed by Art. 36, Lim Act and should have been brought within two years of the wrong conversion complained of. The learned Judge has held that in the nature of the finding that the goods were not sold the suit is one for redemption governed by Art. 145, Lim. Act which allows 30 years from the date of the deposit or pawn. We think that Art. 36 has no application to the suit as it is for wrongs independent of contract and that this case arises outof a contract ot pledge though technically the appellants' act amounted according to the authorities to conversion. But as held by the Privy Council in *Nekram Dobay* v. *Bank of Bengal* (4), above referred to that conduct was not inconsistent with the condition of the contract as to have the effect of putting an end to the contract so as to enable the pledgor to avoid the contract under S. 153, Contract Act. If the contract is thus till subsisting whether the suit be regarded as one for redemption governed by Art. 145, or as one for damages for breach of contract governed by Art. 115, the suit which was brought on 19th January 1926, before the expiry of 3 years from 25th January 1923 the date of the alleged sale, is well within time and is not barred, In this view it is not necessary to consider whether the suit was one for relief on the ground of fraud governed by Art. 95. The appeal fails and is dismissed with costs. The memo. of objections is also dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 371

CURGENVEN, J.

Velu Panikkan, In re—Appellant.

Appeal No. 355 of 1928, and Civil Revn. Petn. No. 1249 of 1928, Decided on 3rd October 1928, against order of Principal Sub-Judge, Ramnad, D/- 21st February 1928.

Transfer of Property Act, Ss. 39 and 40—Subsequent purchaser without notice cannot affect either mortgagee's right to relinquish part of security or legal effect of such relinquishment.

When a mortgagee voluntarily releases part of security, he can recover whole debt from the

remainder and even a subsequent purchaser without notice cannot affect either the mortgagee's right to relinquish part of the security or the legal effect of such relinquishment, whatever remedies he may possess, and be able to enforce against his vendors: 31 *Mad.* 333 and 4 *M. L. W.* 327, *not Foll.* : 40 *Mad.* 968, *Rel. on.* [P 372 C 1]

S. Narayana Iyengar—for Appellant.

Judgment.—The civil miscellaneous appeal is against a remand order passed in appeal under O. 41, R. 23, Civil P C., requiring the trial Court to record a finding on issue 4, which dealt with the liability of the eastern portion of the property for the mortgage debt. When the case went back to the District Munsif the mortgagee gave up this portion of the hypotheca and contented himself with asking for the sale of the western portion, the subject of the present appellant petitioner's purchase. The civil revision petition is against the District Munsif's finding that the mortgagee was competent to take this course, with the result that the western portion becomes solely liable for the debt. The District Munsif cited the Full Bench case *Perumal Pillai* v. *Raman Chetti* (1), which lays down that when a mortgagee voluntarily releases part of the mortgage security, he can recover the whole of the debt from the remainder. I do not think that the circumstance that the appellant petitioner alleges himself to be a subsequent purchaser without notice can affect either the mortgagee's right so as to relinquish part of the security or the legal effect of such relinquishment, whatever remedies he may possess, and be able to enforce against his vendors. It may be noted that the Full Bench case expressly dissented from *Ponnasami Mudaliar* v. *Srinivasa Naicken* (2), which held that a mortgagee cannot relinquish to the prejudice of subsequent alienees ; and the expression of a similar opinion in *Arunachalam Chetty* v. *Murugappa Chetty* (3), must be taken to be also overruled. The result is that the District Munsif's decision, in my view, is correct and the civil revision petition is dismissed. The civil miscellaneous appeal is also dismissed, because owing to the exoneration of the portion of property referred to, the propriety of the appellate Court's order can no longer be in question.

P.R.S./S.N. *Appeal dismissed.*

(1) [1917] 40 Mad. 968=33 M.L J. 211=6 M. L.W. 450=42 I.C. 352=(1917) M.W.N. 752 (F.B.).
(2) [1908] 31 Mad. 333.
(3) [1916] 4 M.L.W. 327=36 I.C. 516=20 M. L.T. 233.

A. I. R. 1930 Madras 372

KUMARASWAMI SASTRI AND RAMESAM, JJ.

K. Swaminatha Aiyar—Defendant 1—Appellant,

v.

Jambukeswaraswami Temple and *others*—Plaintiffs—Respondents.

Appeal Suit No. 37 of 1923, D/- 26th April 1928, against decree of Sub-Judge, Trichinopoly, in O. S. No. 79 of 1920.

(a) Trusts Act, S. 52—Trustee can neither buy trust property nor sell any of his property to trust.

A trustee cannot buy the properties of the trust himself and he cannot sell any of his properties to the trust either, the mischief in both the cases being the likelihood of a conflict between his interest and his duties as a trustee. The law does not go into the question of whether the transaction is beneficial or not. *Wright* v. *Morgan*, (1926) *A. C.*, 788, *A. I R.* 1922 *P. C.* 235, *Ref.* [P 374 C 2]

(b) Religious Endowment—Dedication of properties to kattalai in temple—Provision in trust deed made as to alienation only with a view to repurchase more profitable property—Trustee alienating property to vendee who had notice of trust deed—Suit by succeeding trustee to set aside alienation—Alienation set aside as being invalid — Vendee held entitled to reimbursement of consideration paid for sale—Contract Act, S. 65.

K, dedicated certain properties to a kattalai in temple whereby he constituted himself as the first trustee and provisions for the succeeding trustee were made in the deed ; one of such provisions was "Neither myself nor the managing members of the charity who shall be conducting the charity shall have any right to alienate the same in any manner. Should any such alienation be made it shall not be valid. But myself and those that succeed me as managing members shall have the right to sell the same only if other properties of value equivalent to these charity properties are available and if the income out of such other properties is likely to exceed that of this property ; and to buy with the sale proceeds such other properties for the above charity." Of his successors one alienated, without any necessity, some of the trust properties to a third person who had notice of the trust and the terms of the trust deed, and later on executed a sale deed thereby conveying his private property to himself as a trustee. A suit by the succeeding trustee was brohght to set aside the alienation.

Held : that it was for the alienee to show that the conditions which were required in the deed of trust to validate the transaction existed, for a mere representation and a bona fide belief in the existence of the necessity did not validate the same. [P 374 C 1]

Held further : that the alienation of the trust properties with a view to purchase his own prperty was invalid and not binding on the trust.

Held also : that on the alienation being set-aside the alienee was entitled to be reimbursed with the amount paid as consideration for sale.

[P 374 C 1]

T. R. Ramachandra Ayyar and *S. Ramaswami Dikshit*—for Appellant.

A. Krishnaswami Ayyar, *M. Patanjali Sastri*, *K. R. Rangaswami Ayyangar* and *K. P. Ramakrishna Ayyar*—for Respondents.

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by plaintiffs 1 and 2 who are the trustees of Sree Jambukeswaraswami temple against the defendants for possession of the properties mentioned in the Sch. A which according to the plaintiffs were dedicated by one Karupanna Pillai towards a kattalai known as the Dadhyodana kattalai under a deed Ex. C, dated 4th July 1891. The deed Ex, C was executed by Karupanna Pillai whereby he constituted himself as the first trustee, made provisions for the succeeding trustees, gave the properties mentioned in the deed towards this kattalai and gave also the particulars as to the expenses that are to be incurred. The material portions so far as it concerns this appeal are in paras.4, 5 and 7 of the deed. Para. 4 runs as follows :

" Subsequent to my death, my son Subrahmania Pillai and Muthuswami Pillai son of Subramania Pillai of Tiruvannavanallur and (3) Devaraya Pillai son of Muthiah Pillai of Omandur, Musiri Taluk—these three shall either unanimously, or a majority of them, enjoy the properties as managing members and shall, out of the income thereof, conduct the charity permanently in the manner before mentioned."

Paragraph 5 runs as follows :

" Neither myself nor the managing members of the charity who shall be conducting the charity shall have any right to alienate the same in any manner such as hypothecation, othi, sale, gift, etc. Should any such alienation be made, it shall not be valid. But myself and those that succeed me as managing members shall have the right to sell the same only if other properties of value equivalent to these charity properties are available and if the income out of such other properties is likely to exceed that of these properties ; and to buy with the sale proceeds, such other properties for the above charity."

Paragraph 7 runs as follows :

" Some of my relations have asked me for a site to construct a choultry to conduct feeding there and I have also promised to so give. In the event of their asking for such site the ground in the spot in item 1 below, to the east of the north to the south bazars in the eastern side of the trunk road shall be handed over. After my death, the managing member of the choultry, after it is built shall also join in the management and conduct of the present charity with the managers that succeed me. Should the managers above referred to, neglect the management, the supervisor of the devasthanam should also join in the management and conduct it either unanimously with them, or by a majority."

The case for the plaintiffs is that Devaraya Pillai who was the last surviving trustee alienated the lands in the Sch. A properties which were comprised in the trust deed, Ex. C, without any necessity, that he purported out of the consideration for this sale deed to purchase lands in Sch. D which belonged to him. In other words the trustee sold to the trust the lands belonging to him purporting to do so under the powers conferred under Cl. 5 Ex. C, that such a sale is invalid and not binding on the trust, that defendants 35 to 37 who are the sons of the deceased Devaraya Pillai objected to the sale on the ground that their father had no power to sell the properties which were joint family properties, that the other defendants are in possession of these properties, the items in the plaint and that the plaintiffs are entitled to get back the properties with mesne profits.

The Subordinate Judge passed a decree in favour of the plaintiffs. Some of the defendants have not appealed. The only defendant who has appealed is defendant 1. Out of items 1 to 32, the subject matter of this suit, defendant 1 purchased items 1 to 24 and we are concerned only with these items as none of the other defendants have preferred an appeal. Items 2, 13 and 14 have been given to defendant 10, so that, we are not concerned with those items. The sale deeds under which defendant 1 claims are Exs. 7, 10 and 9 (supplemental sale deed by Devaraya Pillai to defendant 1). Ex. 7, is a sale deed by Devaraya Pillai to defendant 1 of items 1 to 18 and 26 for Rs. 2,400. Ex. 10 is another sale deed by Devaraya Pillai to defendant 1 of items 19 to 23 for Rs. 250. It appears that suits were filed for the recovery of possession of these items by defendant 1 but objection was taken that the whole money was not paid because the purchaser had executed a mortgage Ex. 8 for a portion of the

consideration. The suit for possession was dismissed by the Subordinate Judge and in order to assure his title Ex. 9 was executed by Devaraya Pillai which purports to be a confirmation of the previous sale deeds. Ex. 3 is a sale deed of the said Devaraya Pillai to himself as manager of the trust and Ex. 14 is a sale deed by Devaraya Pillai to the suit trust, of the properties comprised in Sch. D and this sale deed is dated 30th December 1917.

The first question that arises for our consideration is whether the sale deeds of the Sch. A properties are valid. There can be little doubt that the properties comprised in the Sch. A are trust properties and that defendant 1 was aware that the trustee was dealing with the said trust properties. He had notice of the trust and the terms of the trust deed. Under Cl. 5 it is stated distinctly that alienations shall be void and the only exception made is in the case where other lands which fetch larger income are to be purchased out of the sale proceeds of the land dedicated. There can be little doubt that on the evidence on record the title to the Sch. D properties is not free from doubt. The Subordinate Judge holds that it has not been shown that there was any justifying necessity as would enable the father to sell the joint family properties. But apart from that defendant 1 has to show that the conditions which are required by the deed of trust to validate the transaction exist. This is not simply a case where a mere representation is sufficient and a bona fide belief in the representation would validate the sale, there being no duty on the part of the purchaser to see to the application of the money. The case here goes much further. It is not contemplated that the trustee can sell the property without any negotiations for the purchase of the other properties and keep the money with him, nor is it contemplated that he can invest the moneys realised by the sale of the trust properties for some time and then utilize the same for the purchase of new properties. The author of the trust clearly wanted to prevent any money being lost or otherwise utilised in the interval and practically wanted both the transactions of selling and purchasing to be of a simultaneous nature. It is clear from the finding of the Subordinate Judge which is also supported by the evidence that these conditions were not fulfilled. The trustee instead of getting the money from the purchaser allowed him to mortgage to him every property sold and it is not a thing which is contemplated by the trust deed. Again we find that the trustee instead of purchasing other properties has conveyed his own properties to himself and the law is clear that a trustee cannot do so. He cannot buy the properties of the trust himself and he cannot sell any of his properties to the trust, the mischief in both the cases being the likelihood of a conflict between his interest and his duties as a trustee. The law does not go into the question of whether the transaction is beneficial or not. We may refer in this connexion to *Wright* v. *Morgan* (1), and *Peary Mohan Mukerjee* v. *Manohar Mukerjee* (2) and also Godfrey, on Trust p. 324, 4th Edition. For these reasons we are of opinion that the sale by the trustee to defendant 1 of trust properties is invalid and we confirm the decree of the Subordinate Judge as regards the items comprised in the Sch. A.

The next question for consideration is whether defendant 1 if he has paid the whole or any portion of the consideration for the sale to him is entitled to any relief. On this part of the case we are clearly of opinion that if we set aside the sale and if the purchase money or any portion thereof has been paid by defendant 1, he is entitled to get back the same from the trustee and he being dead he can recover the same from his legal representatives defendants 35 to 37. On this part of the case the vakil for defendants 35 to 37 says that he had no opportunity to show that consideration was not paid by defendant 1. We have got on one side the statements made by the deceased trustee who seems to have all along supported defendant 1 that the whole money was paid and on the other hand it is stated by the vakil for the defendants 35 to 37 defendants that the consideration was not paid or at least a portion of the consideration was paid on the date of Ex. 9 and we think that a finding is

(1) [1926] A. C. 788.
(2) A. I. R. 1922 P.C. 235=48 Cal. 1019 = 48 I. A. 258 (P.C.).

necessary on this point to adjudicate the amount which defendant 1 is to get back. It is argued by the vakil for defendants 35 to 37 that defendant 1 is entitled to no remedy in this suit but we do not see any reason to hold that a separate suit is necessary. All the parties are before us and if we set aside the sale by the trustee to defendant 1 we fail to see why we should not give effective relief to the other party by making the trustee who sold the properties reimburse defendant 1 with any money which may be proved to have been paid as consideration for the sale.

A legal objection is taken by Mr. Ramachandrier to the maintainability of the suit. His argument is that the trustees of the Jambukeswaraswami temple have no right to file a suit as the conditions under the deed of trust which entitle them to claim as trustees have not been fulfiled. His argument is that the trustees of the choultry are also trustees of the Jambukeswaram temple and that the latter should act with the former trustees and could not file a suit independently of the trustees of the choultry. There is no evidence that the trustees of the choultry took any part in the management of the trust. For the past 13 years we find nothing done by the trustees of the choultry and there is nothing to find that they accepted this trust and before we can hold that they have got any interest in the temple trust it should be proved that the trustees of the choultry accepted the temple trust. The mere statement in the trust deed, that the future trustees to come into existence should also have rights of management would not make them trustees. Further there is this difficulty. No such plea was raised and no issue was framed on that point and if such an issue was raised the trustees of the temple would have joined them as defendants in the case if they would not join as plaintiffs. We do not think that the objection raised at this late stage is valid. Moreover, the trustees of the Jambukeswaram temple are really interested in seeing that the trust properties are properly managed and the kattalai regularly performed and we do not see why they should not sue to recover trust properties as trustees of the Jambukeswaram temple which is the beneficiary.

Plaintiff 3 was brought on record on his application to cure any defect which may arise as regards non-joinder of parties should it be found that plaintiffs 1 and 2 are not legally entitled to maintain the suit. The trust not being hereditary, plaintiff 3 can come in only when there are no trustees to represent the trust. The finding of the Subordinate Judge is, and we agree with him that plaintiffs 1 and 2 are competent to file the suit and there is no reason why we should declare plaintiff 3 also a trustee and give him any relief in this suit. We say nothing in this suit as regards his right to be declared a trustee. All we say is that there is no reason to give him a joint decree with the plaintiffs. If he likes he can file a separate suit to have his rights as trustee established.

With reference to the memorandum of objections filed we think that plaintiffs 1 and 2 are entitled to mesne profits on the properties which are found to be in possession of defendant 1 till the date of possession and not merely till the date of the decree as ordered by the Subordinate Judge. As regards the rate we do not think there is any ground to increase the rate allowed by the Subordinate Judge. This disposes of all the points in the case.

We direct the principal Subordinate Judge of Trichinopoly to submit a finding as to the amount which defendant 1 paid towards the consideration for the sale deeds executed by the trustee Devaraya Pillai in his favour. The parties are at liberty to adduce further evidence. The finding will be submitted within one month from the reopening of the Trichinopoly Court. Time for objections seven days.

The memorandum of objections filed by plaintiff 3 is dismissed without costs.

No orders are necessary on the C. M. P. Nos. 3598 of 1923 and 3767 of 1924 and they are dismissed.

In compliance with the order contained in the above judgment, the Subordinate Judge of Trichinopoly submitted the following :

Finding

Issue :—

"What is the amount which defendant 1 paid towards the consideration for the sale deeds executed by the trustee Devaraya Pillai in his favour ?"

* * * * * *

My finding on the issue is accordingly to the effect that the sales in question have consideration to the extent of Rs. 650 only.

This appeal and the memorandum of objections coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following judgment :

Kumaraswami Sastri, J. — We accept the finding of the Subordinate Judge and find that Rs. 650 was the consideration which was paid in respect of the sales in favour of defendant 1. Defendant 1 will be entitled to a decree for this amount against defendants 35 to 37 to the extent of the family properties in their possession and the assets of their father in their possession. In other respects we confirm the decision of the lower Court and the appellants will pay the costs of the plaintiffs-respondents 1 to 3 and each party will bear his own costs as regards the other reliefs sought.

P.R.S./V.S. *Decree modified.*

** A. I. R. 1930 Madras 376
Full Bench

KUMARASWAMY SASTRI, CURGENVEN AND WALSH, JJ.

In re, Sri Sree Raja Velugotti Sri Govind Krishnayachandrulu Varu Bahadur, Maharajah of Venkatagiri.

Civil Misc. Petn. No. 2016 of 1929, Decided on 22nd October 1929.

** **Civil P. C., O. 41 R. 1—Madras High Court, Appellate Side Rules, R. 31—Several appeals in cases disposed by one judgment cannot be consolidated — Court-fees Act S. 6 :** 109 *I. C.* 651=*A. I. R.* 1928 *Mad.* 468, *Overruled.*

Court has no inherent jurisdiction to consolidate appeals in cases disposed of by single judgment of the lower Court so as to enable the appellant to pay court-fee on the value of the consolidated appeals and file one vakalat : **109 I.C. 651=A. I. R. 1928 Mad. 468, Overruled.** 29 *Cal.* 140 and 34 *M. L. J.* 279, *Dist.*

[P 378 C 2 ; P 381 C 1]

Advocate General and *Venkatasubbaiyah*—for Petitioner.

Government Pleader — for the Crown.

Order of Reference to a Bench.

Walsh, J. — The plaintiff filed 118 suits against 118 sets of tenants for recovery of arrears of rent under S. 77, Estates Land Act. The suits were dismissed and he filed 118 appeals from these decrees. The appeals were also dismissed. He now seeks to prefer second appeals to the High Court from the decrees of the lower appellate Court and has put in this application under S. 151, Civil P. C., to consolidate them so that he may file,

(1) a single memorandum of appeal,

(2) a single vakalatnama, and

(3) only one court-fee on the aggregate value of the 118 second appeals.

The questions that arise are should he be allowed to consolidate the appeals and if so, how many memoranda of appeals, how many vakalatnamas and what sum as court-fees must he pay.

The power of consolidation is an inherent power of the Court and there is no special section or rule relating to it but it must, of course, be exercised in accordance with the provisions of law.

In the present case, the petitioner did not file any application in the Court of first instance or in the appellate to consolidate the suits or appeals. Obviously he could not do so in the trial Court. The defendants were all different and the causes of action entirely distinct. I may perhaps mention that in para. 2 of the lower appellate Court's judgment the word "consolidate" is clearly not used in the sense in which we are now considering it. It appears that the appellant himself raised as an objection before the lower appellate Court that he was prejudiced in the trial Court by the "consolidation" of the suits. What was clearly meant was 'the joint trial of the suits' which is a different thing. The suits obviously could not be and were not consolidated in the Court of first instance. Still it is to be noted that he made even their joint trial a grievance while he now asks to consolidate the second appeals.

I am unable to see how in a case like the present the appeals can be consolidated without offending against O. 1, R. 3, Civil P. C. The matter involves a considerable question of revenue but unfortunately as the learned Advocate General appears for the appellant he cannot be called to represent the Government. However, in several of the cases cited the objections raised by Government have been considered. They are materially the same in all the cases and as I do not think the petitioner has made out a case for consolidation of the appeals, I do not consider it necessary

to call on some one other than the Advocate General to represent the Government. The petitioner quotes *Kashi Prosad Singh* v. *Secy. of State* (1) and *Vengu Naiau* v. *Deputy Collector of Madura Division* (2) but his chief reliance is on a recent case reported *Perumal Nadar, In re* (3) in which consolidation was allowed by Devadoss, J. The latter is the only case wich I think is really on all fours with the present. *Kashi Prasad Singh* v. *Secy. of State* (1), was concerned with a land acquisition and the parties were the same in all the cases. The plots of land were contiguous to each other. There were different tenants but they were not parties to the appeal. The appeals were allowed to be consolidated. *Vengu Naidu* v. *Deputy Collector of Madura Division* (2) was also a case of land acquisition. Though several plots of land were acquired from the appellants only one notice was served on them under S. 12 (2) and they made only one reference to the Collector to refer their objection to award. There was therefore, in the words of the learned Judge "only one award the correctness of which had to be determined by the District Court." Here there was clearly one cause of action between the same parties. That case bears no resemblance to the present.

Turning now to *Perumal Nadar, In re* (3), I have no doubt that it is on all fours with the present case ; for it was also a request to consolidate appeals arising out of rent suits against different tenants. The learned Judge quotes *In the matter of the "Falls of Ettrick* (4). This case was also referred to in *Vengu Naidu* v. *The Deputy Collector of Madura Division* (2). It was a case of one steamer being salvaged by two tugs but not simultaneously. Three separate salvage claims were brought. What was held there was that the claims should not be consolidated against the will of the promovents and they were in fact not consolidated. There is a note at the end of the case that the Court of admiralty has reverted to the old practice of allowing appeals to be consolidated when it may appear convenient to do so without regard to the consent of the parties.

This case has little bearing on the matter before me. The learned Judge then quotes *Vengu Naidu* v. *Deputy Collector of Madura Division* (2) in which as I have pointed out there was only one cause of action and the parties were the same. He devotes most of the judgment to discussing whether if consolidation is allowed one vakalatnama is sufficient but the only discussion that I can find as to the ground on which the consolidation is allowed is the following sentences.

"In these two batches the trials were only two and there were only two judgments. The appeals arise out of rent suits and the questions at issue are common to all the tenants. The landlord is only one person."

With due respect I find myself unable to agree with my learned brother that these facts enable the appeals to be consolidated. The causes of action and the parties are entirely different. If the appeals can be consolidated why could not the original suits have been ? Yet that would have clearly contravened O. 1, R. 3, Civil P. C.

I find that the same learned Judge Phillips, J., who allowed the consolidation in *Vengu Naidu* v. *Deputy Collector of Madura Division* (2), refused it in S. R. Nos. 24378, 24380 of 1927 and 828 of 1928. These were two partition suits and in my opinion much stronger cases for allowing consolidation than the present. Devadoss, J. quotes *C. M. No.* 1336 of 1925 in which Wallace, J., ordered consolidation of appeals. I have sent for that Civil Miscellaneous Petition. The appeals appear to have been concerned with the bringing of the holding of a number of ryots to sale and as far as I can gather the appeals were preferred by the tenants. They pleaded that the sums for w ich the sales were held were very small such as Rs. 1,1½ etc. and that separate second appeals would involve enormous expense. No notice was sent to the Government though the revenue involved was considerable and no reason for allowing consolidation is given in the order.

With great respect to my learned brother Wallace, J., if the considerations urged by the tenants are applicable to the consolidation of appeals I fail to see why they are not applicable to the

(1) [1902] 29 Cal. 140.
(2) [1918] 34 M. L. J. 279=45 I. C. 468.
(3) A. I. R. 1928 Mad. 463.
(4) [1895] 22 Cal. 511.

consolidation of suits for petty sums of rent in the first instance.

It is quite clear to my mind that no Court could allow a landlord to bring a consolidated rent suit against a number of tenants holding separately merely because the rent demanded from each was small and because a common question was involved in all the suits, nor can I see how such tenants can bring a consolidated appeal if the suits go against them. After all they can always file a test appeal ; if it succeeds they will get their costs when they win the other appeals. I have only been able to find one other order of consolidation passed by Jackson, J., in *C.M.P.* 905 *of* 1929. This was a land acquisition case and so far as I can gather the parties were the same and the only question involved was the apportionment of the compensation awarded. It is probable that this case resembled one or other of the two other land acquisition cases referred to above. The order was passed without notice to Government and no reasons for it are assigned but prima facie it is not a parallel case to the present. I am much influenced by the fact that though the filing of large batches of suits against tenants and the disposal of them by a common judgment and by a common first and second appellate judgment are very common I have been able to find no case except *Perumal Nadir, In re* (3) where consolidation of appeals in such cases was allowed by the High Court.

C. M. P. 905 of 1925 referred to above may be a parallel instance but there consolidation was allowed without notice to the Government and no reasons for the order are given.

The following cases in other Courts where consolidation was allowed appear to me to bear out that the parties and causes of action must be the same if consolidation is to be allowed : *Latchman Sahu* v. *Abdul Karim* (5). A common declaration was asked in a single suit against a number of tenants. Even there it was held that a court-fee should have been paid in respect of each of the sets of tenants. *Abdullah* v. *Badrulislam* (6). This dealt with an appeal to the King in Council (O. 45). The parties were the same and the question at issue the same but there were two judgments. Held that though the valuation in one suit was below Rs. 1,000 the appeals might be consolidated under O. 45 (4) so as to get a judgment covering the decrees in both suits.

Moosa Soleman Salehji v. *Secy. of State*, *A. I. R.* 1929 *Cal.* 135. Held that where the matter for consideration was the same and the parties the same, the appeals might be consolidated but even the court-fees must be paid separately for each.

I am unable therefore, to accede to the request to consolidate the appeals and that being so the question of a single vakalatnama and a single court-fee on the aggregate value of all the suits does not arise, though on the latter point see *Moosa Soleman Salehji* v. *Secy. of State*, *A. I. R.* 1929 *Cal.* 135, just quoted. Having regard to the importance of this matter and that I differ from my learned brother Devadoss, J., I would refer the matter to a Bench of two Judges.

Order of Reference.

This petition raises the important question as to the consolidation of second appeals so as to enable one court-fee on the consolidated value being paid and also one vakalat being filed. The matter first came before one of us (Pakenham Walsh, J.) and his order referring the matter to a Bench refers to all the authorities on the subject and the difficulty which my learned brother finds in consolidation. We think the question is one of considerable importance and arises frequently and in view of the conflict of authority and the fact that it is necessary to have an authoritative decision of a Full Bench on the question, we refer the following question for decision.

"Whether the Court has inherent jurisdiction to consolidate appeals in cases disposed of by a single judgment of the lower Court so as to enable the appellant to pay court-fee on the value of the consalidated appeals and file only one vakalat."

Opinion.

Kumaraswami Sastri, J. — The Maharajah of Venkatagiri who is the petitioner filed separate suits against his tenants for rent on the ground that they raised a second crop. The tenants defended the suits on the ground that they did not raise a second crop and that the suit was barred by limitation. The suits were tried together and the wit

(5) [1918] 4 Pat. L. J. 229=51 I. C. 767.
(6) A. I. R. 1926 All. 127=48 All. 233.

nesses examined were treated as witnesses in all the suits. There was one judgment but separate decrees were passed. Separate appeals have been filed in the High Court. The present application is to consolidate the appeals so filed for the purpose of (1) treating the court-fee payble as the court-fee on the entire value of the suits and (2) filing only one vakalat in all the suits, and the question is whether such consolidation is permissible.

As to the inherent power of the Court to consolidate suits or appeals, there can be no question *Vengu Naidu* v. *Deputy Collector of Madura Division* (2), *Narayan Vithal Samant* v. *Janki bai* (7), *Kalichand Dutt* v. *Manoda Bala Dass* (8), *Dharamdas* v. *Dharamdas* (9) and *Kashi Prosad Singh* v. *Secy. of State* (1). But the point which we have to determine is whether a consolidation can be effected which will conflict with the specific provisions of the Court-fees Act, and the Civil Procedure Code as to the filing of appeals against the decrees of of the lower Courts.

Consolidation of suits or appeals may be for various purposes and the main object of a consolidation is to prevent unnecessary delay in the disposal of suits or appeals and also to prevent unnecessary costs being incurred *Martin* v. *Martin & Co.* (10) and *The Creteforest* (11). The costs saved are costs as between party and party and cannot mean stamp duty payable to the Crown under specific enactments.

Section 4, Court-fees Act enacts that no document of any kind specified in Sch. 1 or Sch. 2 to the Act as chargeable with fees shall be filed, exhibited or recorded in, or shall be received by, any of the High Courts in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence or in the exercise of its jurisdiction as a Court of reference or revision, unless in respect of such document there be paid a fee of amount not less than that indicated by either of the above schedules as the proper fee for such document.

Section 6 contains a similar provision as regards court-fee payable in respect of suits or appeals in the Subordinate Courts.

Where therefore there is nothing either in the Code or in any other enactment to prevent this course from being adopted, Courts have power to consolidate but I do not think that such power can be extended in a manner to conflict with the provisions of any enactment like the Court-fees Act or the express provisions of the Civil Procedure Code as regards the filing of appeals.

It seems to me that consolidation can only be asked when there are suits or appeals properly instituted and on the file. Where the legislature lays down certain requirements necessary to be satisfied before it can be seized of the suit or appeal e. g., a plaint or memorandum of appeal on a proper stamp it is difficult to see how an order can be passed consolidating suits or appeals for the purpose of getting over the stamp duty payable.

There are two classes of case in which consolidation can be ordered. One relates to cases where although one suit could have been filed against several defendants in the lower Court, the party has not chosen to do so but has filed separate suits, and the other relates to cases where although one suit could not have been filed, the questions for determination are the same and it will save costs and expenses to consolidate the suits either in the lower Court or in appeal. In the former case the provisions of S. 17, Court-fees Act are imperative because in the case of a suit embracing two or more distinct subjects, the plaint or memorandum of appeal should be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing each of such subjects would be liable under the Act, In cases where one suit could not have been filed, it is difficult to see how the aggregate value of the subject matter in all the suits can be treated as the amount on which court-fee has to be paid. In cases which do not fall under S. 17, there is no question of treating the aggregate value of the various suits or appeals as one for the purpose of court-fee, as the provisions of

(7) [1915] 39 Bom. 604=30 I.C. 560=17 Bom. L. R. 665.
(8) [1912] 17 C. W. N. 526=15 I. C. 897=16 C. L. J. 591.
(9) [1917] 40 I. C. 182.
(10) [1897] 1 Q. B. 429=66 L. J. Q. B. 241=45 W. R. 260=76 L. T. 44.
(11) [1920] P. 111=89 L. J. P. 136=36 T. L.R. 367=123 L. T. 591.

the Court-fees Act are specific and state that each of such suits should bear the court-fee prescribed by the schedules to the Act.

Reference has been made to *Kashi Prosad Singh* v. *Secy. of State* (1). It was a case under the Land Acquisition Act and it was held that as the parties were the same in all the cases and the plots of land were contiguous to one another and formed part of an estate, although in the occupation of different tenants who were not parties to the appeals, the appeals should be consolidated and the court-fee paid upon the value of the consolidated appeals under S. 17, Court-fees Act subject to the maximum of Rs. 3,000. The maximum of Rs. 3,000 has, however, now been omitted and court-fee has to be paid ad valorem without any maximum so that consolidation cannot in any view affect the court-fee.

In *Vengu Naidu* v. *Deputy Collector of Madura Division* (2) there was an application to consolidate several appeals filed from the awards passed by the District Judge of Madura on reference made to him by the Land Acquisition Officer. The District Judge treated all the references as 47 separate petitions and passed a separate award on each of them although they were all tried together and disposed of in one judgment. Phillips, J., held that the power of consolidation was inherent in the Court although no express power was conferred by the Code and followed *Enayetoollah* v. *Radha Churn Roy* (12), *Kashi Prosad Singh* v. *Secy. of State* (1), *Fink* v. *Secy. of State for India* (13), *In re, Dorabji Cursetji Shroff* (14) and *In the matter of the Falls of Ettrick* (4). The learned Judge considered the objection that consolidation would affect the revenue and says the fact that only one notice was sent under S. 12 and one objection filed under S. 18 prima facie indicated that there was only one award the correctness of which had to be determined by the District Court. He was of opinion that the fact that the award contained several items did not make any difference.

I do not think that Land Acquisition cases afford any safe guide as the considerations which exist in such cases and which the learned Judge points out are absent in ordinary suits and it is doubtful whether having regard to the amendment of the Land Acquisition Act in 1921 (S. 26, Cl. (2) of the Act), the same consideration can now exist.

I may also point out that the same learned Judge refused consolidation in S. R. No. 829 of 1928 (Civil Miscellaneous Petition). There were two suits filed for partition in the District Munsif's Court and second appeals were filed. An application was put in that the second appeals should be consolidated on the ground that the two suits must be deemed to be one suit and consolidated for purposes of appeal. The learned Judge refused consolidation on the ground that the suits did not relate to the same subject matter.

I now come to the question of consolidation for the purpose of filing one vakalat in all the appeals.

Order 41, R. 1, Civil P. C., provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader.

Rule 3 provides that if the memorandum is not drawn up in the manner prescribed it may be rejected or be returned for the purpose of being amended.

So, before there could be a valid presentation of an appeal, the memorundum must be signed by the appellant or his pleader. If a pleader is employed, Act 10, Sch. 2, Court-fees. Act prescribes the fee to be paid on the vakalat.

Having regard to the provisions of the Civil Procedure Code and Court-fees Act, there can be little doubt that every appeal presented if not signed by the party should be signed by a pleader who has authority to act and such authority has to be stamped under the provisions of the Court-fees Act.

Rule 31, Appellate Side Rules also provides that where a person is a party to two or more connected suits he shall execute a separate vakalatnama in each notwithstanding he may retain the same pleader in all the suits.

In *In re, Perumal Nadar* (3), the question as to consolidation arose as regards vakalats. There were several second appeals filed. An application was made to consolidate 38 second appeals into one batch and 52 into another batch for the purpose of filing one

(12) 15 W. R. 395.
(13) [1907] 34 Cal. 599.
(14) [1908] 10 Bom. L. R. 675.

vakalatnama in each of the batches. The Government pleader contended that separate vakalatnamas ought to be filed. Devadoss, J., held that one vakalatnama in each batch need be filed. The learned Judge was of opinion that the very object of consolidation is to save the party unnecessary expenses and the Court unnecessary trouble that where the Court allows consolidation it allows the parties to the appeals to treat the consolidated appeals as one and that Art. 10, Sch. 2, Court-fees Act does not stand in the way of consolidation.

Dealing with the argument based on O. 41, R. 1, which requires a separate memorandum of appeal, the learned Judge was of opinion that it does not follow that because a separate memorandum ought to be filed in each case the engagement of the pleader should be separate. He, however, held that the production of one vakalatnama in different cases does not at all obviate the necessity of producing the decree in each case though the Court may dispense with the production of copies of judgments in each case.

With all respect I am unable to agree with the conclusion. It is difficult to see how the requisites of the Civil Procedure Code and the Court-fees Act the compliance with which is a condition precedent to the Court being seised of the appeals can be got over by an order of consolidation. Again R. 31, Appellate Side Rules which are framed under statutory power expressly requires seperate vakalatnamas.

I would answer the reference in the negative.

Curgenven, J.—I agree.

Walsh, J.—This matter came in the first instance before me and in my referring order I considered the cases quoted in support of consolidation and specially the judgment of Devadoss, J., reported in *In re, Perumal Nadar* (3). It was because I doubted the correctness of that decision that I made the reference which has finally come before a Bench of three Judges. I have given in my order of reference my reasons for doubting that decision and for distinguishing it from the salvage case and the land acquisition cases quoted in support of it. I entirely agree with the reasons given by my learned brother Sir Kumaraswami Sastri, J., and have nothing to add.

Deficient court-fee should be paid in one month. Separate vakalat will be filed in one month.

P.R.S./R.K. *Answer in negative.*

✲ A. I. R. 1930 Madras 381
Full Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

In re Vaithilinga Pandara Sannadhi Avergal—Petitioner.

Civil Misc. Petn. Nos. 1194 and 1259 of 1929 Decided on 1st November 1929.

✲ Court Fees Act, S. 20—Madras High Court, Appellate Rules, R. 61—Several revisions from one judgment against common respondents cannot be consolidated for purposes of vakalat and process fee—Civil P. C., S. 115—Practice.

Court has no inherent jurisdiction to consolidate Civil Revision Petitions in cases which have been disposed of by a single judgment of the lower Court so as to enable the party to file one vakalat in the petitions and pay one process fee for the common respondents: *A.I.R.* 1930 *Mad.* 376, *Rel. on.* [P 381 C 2, P 382 C 2]

K. Bhashyam Aiyangar and *K. Sundaralingam*—for Petitioners.

The Govt. Pleader—for the Crown.

Order of Reference

Kumaraswami Sastri and Walsh, JJ.—These petitions are for consolidating Civil Revision Petitions and the question here also is whether the Court has power to consolidate so as to entitle a party to file only one vakalat and pay only one process fee so far as the common respondents are concerned. For the reasons given in *In re, Govinda Krishnayachandrulu* (1), we refer this question also to a Full Bench as to whether the Court has inherent jurisdiction to consolidate Civil Revision Petitions in cases which have been disposed of by a single judgment of the lower Court so as to enable the party to file one vakalat in the petitions and pay one process fee for the common respondents.

Opinion

Curgenven, J.—The question referred to us is whether the Court has inherent jurisdiction to consolidate Civil Revision Petitions in cases which have been disposed of by a single judgment of the lower Court so as to enable the party to file one vakalat in the petitions and to pay one process fee for the com-

(1) A. I. R. 1930 Mad. 376 (F.B.).

mon respondents. In *In re, Govinda Krishnayachandrulu* (1), we have held generally that this Court has no power to consolidate appeals in such a manner as to conflict with the provisions of any statutory enactment, and specifically that it cannot so consolidate as to permit a single vakalat to be filed in a number of appeals or a single Court-fee calculated upon the aggregate value of the appeals, to be paid. This decision of course applies equally to the case of Civil Revision Petitions and it accordingly settles the question with regard to vakalats.

There remains the question of process fees, whether, when one person figures as respondent in a number of cases, a single process can be issued to him, to embrance all the cases, upon payment of a single fee. We have to see whether such a course would trangress any provision of law. Section 20, Court-fees Act empowers the High Court to make rules regulating the fees chargeable for serving and executing processes issued by it in its appellate jurisdiction which comprises also its revisional jurisdiction. R. 2 (1), O. 41-A provides that a memorandum of appeal shall be accompanied by the prescribed fees for the service of notice of appeal, and appellate side R. 41 makes a similar provision in the case of Civil Revision Petitions. The rules for the service of notices form the subject of Chap. 7 Appellate Side Rules R. 61, fixing the fees chargeable. The schedule to that rule prescribes a fee of Re. 1 for each summons or notice "to a single respondent or witness." This is a rule framed under S. 20, Court-fees Act and has the force of law. Unless therefore we can construe the words "single respondent" as embracing any one person, though he may be a respondent in a number of cases, permission to consolidate would involve permission to pay a single fee where the rule prescribes a separate fee in each case. We do not think that such a construction would be correct. The rule, in our view, makes no provision for the circumstance, accidental from the point of view of procedure, that the respondent in one case may be the same individual as the respondent in another, but requires that each respondent be treated independently of the other. Accordingly it would conflict with the rule to allow process to issue in two or more cases on payment of a single process fee and, as we have held in *In re, Govinda Krishnayachandrulu* (1), we have no power to relax the terms of an enactment or statutory rule for the purpose of consolidation. A similar application to consolidate was refused by a Bench of the Calcutta High Court in *In the matter of the Application of H. C. Studd* (2), Rampini, J., basing his refusal upon the inability of the Court to relax a statutory rule.

We accordingly answer the question referred to us in the negative. We would add that there appears to be no objection to issue a single consolidated process with the several causes entered in it, provided that the amount of process fees for the issue of process in each case is paid. We give the petitioners one month from this date to file duly stamped vakalats and pay process fees.

Kumaraswami Sastri, J.—I agree.

Walsh, J.—I agree.

P.R.S./R.K. *Reference answered.*

(2) [1899] 26 Cal. 124=3 C. W. N. 82.

** A. I. R. 1930 Madras 382
Full Bench

KUMARSWAMI SASTRI, CURGENVEN, AND WALSH, JJ.

(*Thirumulu*) *Subbu Chetti*—Defendant 3—Appellant.

v.

Arunachalam Chettiar — Plaintiff — Respondent.

Second Appeal No. 159 of 1926, Decided on 13th November 1929, against decree of Sub-Judge, Dindigul, in Appeal Suit No. 99 of 1923.

**** Specific Relief Act, S. 23 — Transferee stipulating to pay vendor's debts — Vendor's creditor cannot sue transferee — Contract.**

Where all that appears is that a person transfers property to another and stipulates for the payment of money by purchaser to a third person a suit to enforce that stipulation by the third party will not lie: (*Case law considered*). [P 389 C 1]

B. Satyanarayana—for Appellant.

K. Rajay Ayyar and *V. Ramaswami Ayyar*—for Respondent.

Opinion

Kumaraswami Sastri, J.—The facts leading to this reference are these:

Defendant 1 executed a sale deed, dated 21st December 1922 in favour of

defendant 3 for Rs. 3,500 and he directed the vendee to pay the plaintiff Rs. 1,200 which he defendant 1, owed the plaintiff. The plaintiff sued to recover the sum of Rs. 1,574-10-3 the balance which was due on a promissory note executed by defendant 1 and 2 dated 25th June 1921. He made defendant 3 a party on the ground that he was a vendee from defendant 1 under an obligation to pay the debt due by defendant 1 to the plaintiff.

The sale deed has been filed Ex. D in the case. It purports to be for Rs. 3,500. After reciting that the vendee had undertaken to pay Rs. 1,500 due to one Viswanatham Chetti and another sum of Rs. 500 due to the same creditor the material portion continues as follows :

" Whereas you have consented to pay on my behalf to P. L. M. Palaniappa Chettiar firm carrying on money lending business at Thenkarai, Periyakulam Town, the amount due by me to him and obtain a receipt, I am in receipt of Rs. 1,200. "

Then it proceeds to state the other creditors who were to be paid and the consideration is said to have been received in that manner.

Defendant 3 pleaded that there was no privity between him and the plaintiff and that there was no cause of action.

The District Munsiff dismissed the suit against defendant 3 and passed a decree against defendants 1 and 2.

On appeal the Subordinate Judge reversed the judgment of the District Munsiff and remanded the case for trial.

On appeal against this order of remand the High Court set aside the order of remand and directed the Subordinate Judge to dispose of the case in the light of the observations made by the High Court. One of the questions which the High Court wanted the Sub-Judge to decide was whether defendant 3 undertook orally to pay the money to the plaintiff and pointed out that if the oral agreement was proved the plaintiff would be entitled to a decree against defendant 3 but if it was not proved then the question whether the principle in *Tweddle* v. *Atkinson* (1), would apply would have to be considered.

The Subordinate Judge found on the evidence that the oral agreement was not proved and the defendant 3 did not apart from the obligation under Ex. A orally agree to pay the sum to the plaintiff. He however held following the decisions in *Itti Panku Menon* v. *Dharman Achan* (2), *Debnarain Dutt* v. *Ram Sadhan* (3), and *Singarayya* v. *Subbayya* (4) that the principle in *Tweddle* v. *Atkinson* (1) did not apply and passed a decree against defendant 3 also.

Against that judgment this second appeal was filed which came on before Wallace and Sundaram Chetty, JJ. and they were of opinion that in view of the conflict of decisions on the point of law it was desirable to have the decision of a Full Bench on the question.

On the findings of facts of the Courts below the only question for decision is whether a contract between *A* and *B* to pay *C* who is creditor of *A* would without more entitle *C* to sue *B*. We have already set out the sale deed and we think that on the terms of the sale deed there is no trust express or implied created and that the sale deed merely constitutes the vendee the agent of the vendor to pay some of his creditors.

The law in England is that the mere payment of money by *A* to *B* with a direction to pay it to *C* in cases where *B* is not *C's* agent is revocable and confers no right of action. A distinction has been drawn between cases where the defendant has constituted himself the agent of plaintiff to pay him a particular sum of money received from a third person and cases where there is no such agency or trust express or implied.

A similar view has been taken in India in *Raghunathachariar* v. *Shadagopachariar* (5). There it was held that where *A* transferred his property to *B* in consideration of *B* agreeing to pay certain sums to third perrons, *A* was himself entitled to sue *B* for the recovery of those sums as if they were due to him in crse of *B's* failure to pay the creditors within a reasonable time. The learned Judges have referred to all

(1) [1861] 1 B. & S. 393=9 W. R. 781=30 L. J. Q. B. 265=4 L. T. 468=8 Jur. (n. s.) 332.

(2) [1918] 41 Mad. 488=8 M. L. W. 118=43 I. C. 625=(1918) M. W. N. 98.

(3) [1914] 41 Cal. 137=18 C. L. J. 603=20 I. C. 630=17 C. W. N. 1143.

(4) A. I. R. 1924 Mad. 861.

(5) [1913] 36 Mad. 348=2 M. L. J. 983=12 I. C. 353=(1911) 2 M. W. N. 227.

the cases bearing on the point. We may also refer to *Komu Kutt* v. *Kumara Menon* (6).

The question has therefore to be decided on the footing that no trust has been created, that defendant 3 was not plaintiff's agent and that there was no novation or obligation undertaken by defendant 3 to the plaintiff.

The rule of Common Law laid down in *Tweddle* v. *Atkinson* (1) is that a stranger to the consideration cannot sustain an action on the promise made between two persons unless he has in some way intervened in the agreement.

As regards relief given by Courts of Equity, *Gandy* v. *Gandy* (7) gives a right of action to the third person only when the person with whom the contract is made is a trustee express or implied for the third person for whom the benefit is intended. The conditions necessary to be fulfilled before a person, not a party to a contract, can enforce any claim under it in a Court of Equity are laid down in *Gandy* v. *Gandy* (7), in *In Re, Empress Engineering Co.* (8), and in *In Re, Rotherham Alum and Chemical Co.* (9). The observations of Lord Hatherley in *Touche* v. *Metropolitan Railway Warehousing Co.* (10) have been dissented from as stating the rule too widely.

Section 23, Specific Relief Act deals with the persons for whom contracts may be specifically enforced and Cl. (c) of that section enacts that specific performance may be obtained where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family by any person beneficially entitled there under.

There has been great divergence of opinion in Courts in India as to how far a stranger to a consideration can enforce the contract and how far the rule in *Tweddle* v. *Atkinson* (1), is applicable in India. There are decisions which decide that the rule of English Law as laid down in *Tweddle* v. *Atkinson* (1) and *Gandy* v. *Gandy* (7), will apply to cases in India. There are other decisions which are to the effect that the principle in *Tweddle* v. *Atkinson* (1) founded as it is on English Law on the form of action known as assumpsit is not applicable to contracts in India governed by the Contract Act where all the parties are before the Court and the Court can do complete justice between them. There are other decisions which take a middle course and decide that the rule in *Tweddle* v. *Atkinson* (1) is applicable subject to certain specified exceptions which we shall refer to later on.

It is difficult to reconcile the various views and we think the balance of authority is in favour of the view that a stranger to a contract cannot without more sue to enforce it.

In *Jamnadas* v. *Ramautar Pande*,(11), *A* mortgaged certain properties to *B*. He sold the property to *C* and left with him sufficient money out of the consideration to redeem *B*. *B* obtained a decree on his mortgage and as the sale proceeds were insufficient to meet his claim he applied for a personal decree against *C* on the ground that *C* was liable as he retained part of the consideration payable to *A* agreeing to pay it to *B*. It was held by Richards and Griffin, JJ., that *C* did not become liable to *B*. The learned Judges observed.

"It is contended that by retaining in his hands part of the purchase money and expressly or impliedly agreeing to pay the amount to Jamna Das, the respondent became personally liable. In our opinion this contention is not sound. Jamna Das was no party to the contract between Mt. Lakhpati Kuar and Pandit Ramautar Pande. No Indian or English case has been cited to us in which it has been ever held or suggested that the transferee of the equity of redemption in mortgaged property becomes personally liable to the mortgagee."

The case was carried in appeal to the Privy Council and the decision of their Lordships of the Privy Council is reported in *Jamna Das* v. *Ramautar Pande* (12) and the decision of the Allahabad High Court was upheld. Lord Macnaghten observed

"This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage-debt."

(6) [1918] 35 M. L. J. 692=49 I. C. 313=24 M. L. T. 260.
(7) [1885] 30 Ch. D. 57=54 L. J. Ch. 1154=53 L. T. 306=33 W. R. 803.
(8) [1880] 16 Ch. D. 125=29 W. R. 342=43 L. T. 742.
(9) [1884] 25 Ch. D. 103=53 L. J. Ch, 290=32 W. R. 131 50 L. T. 219.
(10) (1871) 6 Ch. A. 671.
(11) [1909] 31 All. 352=2 I.C. 460=6 A.L.J. 427.
(12) [1911] 34 All. 63=13 I.C. 304=39 I. A. 7 (P. C.)

In *Itti Panku Menon* v. *Dharman Achan* (2), the question arose as to a third party's right to sue on a contract. Sir John Wallis, C. J., and Bakewell, J., were of opinion that a jenmi was not entitled to sue on an assignment by a melkanomdar to a kanomdar whereby is between them the kanomdar agreed to pay the rent due by the melkanomdar to the jenmi. The case arose out of a difference of opinion between Abdur Rahim and Phillips, JJ. Phillips, J. held that the jenmi can sue whereas Abdur Rahim, J. differed. Wallis, C. J., observed:

"One of the questions argued before us was whether the plaintiff is entitled to sue on this contract made between defendant 1 and defendant 2. As regards this I agree with Abdur Rahim, J., that he cannot, and that the question is concluded by the recent decision of the Privy Council in *Jamna Das* v. *Ramautar Pande* (12) where Lord Macnaghten in delivering their Lordship's judgment held that a purchaser's contract with his vendor to pay off a mortgage on the property sold could not be enforced by the mortgagee."

Then the learned Chief Justice refers to *Khwaja Muhammad Khan* v. *Husaini Begam* (13) and distinguishes the case on the ground that it was a contract made by a guardian for the benefit of a minor in contemplation of her marriage.

The question has been elaborately considered by Ayling and Tyabji, JJ., in *Iswaram Pillai* v. *S. V. Taragan* (14). That was a case where *A* mortgaged his lands to *B* and part of the consideration was *B's* promise to discharge a debt of *A* to *C*. *C* sued *B* and it was held that *C* who was a stranger to the contract cannot sue *B* for the payment of his debt without joining *A* as a party. The learned Judges deal exhaustively with the cases and lay down the general rule of law to be that a party who is a stranger to a contract cannot sue on the contract. The exceptions which the learned Judges enunciate are (a) the creation of a trust in favour of the plaintiff in respect of the amount sued for; (b) the creation of a charge on immovable property by the promisor or allocation by the promisor of the specific money in suit in favour of the plaintiff; (c) the creation of a settlement on marriage in which the plaintiff may be beneficially entitled as provided by S. 23, Specific Relief Act and (d) estoppel as against the promiser owing to transactions between the plaintiff and the promisor.

This question again arose in C. S. No. 325 of 1926 on the original side of the High Court. Beasley, J., after an exhaustive review of the authorities came to the conclusion that a second mortgagee who retained in his hands sufficient portion of the consideration to discharge the first mortgage and who does not discharge the first mortgage cannot be sued by the first mortgagee on the covenant between the mortgagor and the second mortgagee. This case was carried in appeal (O. S. A. No. 95 of 1927) where Coutts Trotter, C. J. and Walsh, J., upheld the decision of Beasley, J. The learned Judges observed,

"The learned Judge held that as there was no privity between the plaintiff and defendant 3 with regard to the mortgage Ex. (1), the plaintiff could not claim any benefit under it. . . ."

The point of law has been fully discussed by the learned Judge and he has considered all the important authorities. It is not disputed as a general rule of law that only those who are parties to a contract can sue on it. The Privy Council decision in *Jamna Das* v. *Ramautar Pande* (12) and in *Nanku Prasad Singh* v. *Kamta Prasad Singh* (15) are conclusive that the reservation of part of the purchase money to pay a previous mortgagee does not of itself create a trust in favour of that previous mortgagee nor can the prior mortgage make the purchaser personally liable. The case of such a reservation in a mortgage is indistinguishable from its reservation in a sale deed. This decision was given on 1st May this year. In view of this decision of Beasley, J., which was confirmed in appeal we think we may take it as settled law in Madras that a stranger to a contract cannot without more sue to enforce it. It is unnecessary therefore to refer with detail to cases in Madras which took the opposite view. This view was based upon a decision of their Lordships of the Privy Council in *Khwaja Muhammad Khan* v. *Husaini Begam* (13). In that case there was an arrangement made between the defendant and the father of the plaintiff who was then a minor on

(12) [1911] 34 All. 63=13 I. C. 304=39 I. A. 7 (P. C.).
(13) [1910] 32 All. 410=7 I. C. 237=37 I. A. 152 (P. C.).
(14) [1915] 38 Mad. 753=23 I. C. 951=26 M. L. J. 127.
(15) A. I. R. 1923 P. C. 54.

the occasion and in consideration of her marriage with the defendant's son who was also a minor that a certain sum should be paid to the plaintiff for her betel nut expenses, etc., from the date of the marriage. A suit was filed to recover the arrest of allowance and the contention was that the plaintiff being a stranger to the contract could not sue on it, and reliance was placed on *Tweddle* v. *Atkinson* (1). Their Lordships of the Privy Council distinguished the case and said that the rule in *Tweddle* v. *Atkinson* (1) had no application to the circumstances of the case which they were trying in which the agreement specifically charged immovable property for the payment of the allowance and the plaintiff was the only person beneficially entitled under it. Their Lordships pointed out that in India where marriages were arranged during minority and contracts for the benefits of the minors were entered into by parents and guardians, it would cause serious injustice if the strict rule of English law were applied. Their Lordships in dealing with the contention based on the rule laid down in *Tweddle* v. *Atkinson* (1), observed :

"First it is contented, on the authority of *Tweddle* v. *Atkinson* (1), that as plaintiff was no party to the agreement, she cannot take advantage of its provisions. With reference to this, it is enough to say that the case relied upon was an action of assumpsit, and that the rule of Common Law on the basis of which it was dismissed is not, in their Lordships' opinion applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff. She is the only person beneficially entitled under it. In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim. Their Lordships desire to observe that in India and among communities circumstanced as the Mahommedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common Law doctrine was applied to agreements or arrangements entered into in connexion with such contracts."

This case has in some decisions of this Court been taken as laying down the rule that Indians Courts are not bound by the Common Law doctrine laid down in *Tweddle* v. *Atkinson* (1). In *Itti Panku Menon* v. *Dharman Achan* (2), one of us (Kumaraswami Sastri, J.,) took this view while Sir John Wallis, C. J. and Bakewell, J., took the opposite view. He referred to the numerous cases on the subject. The view he was inclined to take was that having regard to the definition of the word contract in the Contract Act and the observations of their Lordships of the Privy Council, the ruling in *Tweddle* v. *Atkinson* (1), has no application and it was open to us to follow the rule laid down in *Dutton* v. *Poole* (16) and earlier cases. We may also refer to *Ramaswami Ayyar* v. *Deivasigamani Pillai* (17).

In *Singarayya* v. *Subbayya* (18) and in *Krishnasami Batter* v. *Gopalakrishna Reddiar* (19), the same view was taken by Jackson, and Devadoss, JJ.

A similar view has taken in *Debnarayan Dutt* v. *Ramsadhan* (3), but it was not followed in *Jiban Krishna Mullik* v. *Nirupama Gupta* (20), and *Krishna Lal Sadhu* v. *Pramila Bala Dasi* (21).

We do not think that in view of the current of authority in Madras which we have referred to and especially the last pronouncement by Beasley, J., confirmed on appeal by Coutts-Trotter, C. J., and Walsh, J., the view which some of our learned brothers took can be followed.

Cases where on a partition a benefit is secured to the female members of the family who would be entitled in law to maintenance or cases of family settlement stand on a different footing.

In *Shuppu Ammal* v. *Subramaniyam* (22), there was a deed of partition whereby provision was made for the plaintiff's maintenance and it was held that although the plaintiff was no party to the document she was entitled to sue. The learned Judges held that a person who was not a party to a document but in whose favour a charge was created by such document was entitled to maintain a suit to enforce its terms, either as the actual beneficiary or as the charge-holder, and referred to *Rukhmabai* v. *Govind* (23), and *Husaini Begam* v. *Khwaja Muhammad Khan* (24).

(16) [1793] 2 Lev. 210.
(17) A. I. R. 1922 Mad. 397.
(18) A. I. R. 1924 Mad. 861.
(19) A. I. R. 1927 Mad. 421.
(20) A. I. R. 1926 Cal. 1009=53 Cal. 922.
(21) A. I. R. 1928 Cal. 518=55 Cal. 1315.
(22) [1910] 33 Mad. 238=4 I. C. 1083=19 M. L. J. 739.
(23) 6 B. L. R. 421.
(24) [1907] 29 All. 151=4 A. L. J. 13=(1907) A. W. N. 3.

In *Sundararaja Ayyangar* v. *Lakshmi Ammal* (25), Oldfield, J., held that a person though not a party to a contract could sue to enforce its terms if it was a settlement by which some provision was made for him as a member of the family, e.g., for maintenance or marriage though the same was not made a charge.

We may also in this connexion refer to *Sudalai* v. *Gomathi* (26), *Arumugha* v. *Chinnammal* (27) and *Rajagopala* v. *Radhayya* (28). Reference has been made by the respondent's advocate to the observations of Coutts-Trotter, C. J., in *Muniswami Naicken* v. *Vedachella Naicken*, *A. I. R.* 1928 *Mad. p.* 23. All that was decided was that the case fell within the rule in *Khwaja Mohammad's* case (13). After referring to that case and to the provisions of Hindu Law he observes :

"All I desire to say is that I think that in view of that the provisions of law in such matters should be applied with greater flexibility than they would be applied in England and that it is quite possible to argue that such a case as this if it occurred in England would be covered by the general principle I have referred to."

Cases of estoppel or of novation obviously stand on a different footing and have nothing to do with the principle laid down in *Tweddle* v. *Atkinson* (1).

We may point out in this connexion that the view taken in *Debnarayan Dutt* v. *Ramsadhan* (3), by Jenkins, C. J., and Mookerji, J., which lays down broadly that the doctrine in *Tweddle* v. *Atkinson* (1) is inapplicable to British Courts in India and that the aim of the mofussil Courts of justice in British India is to do complete justice in one suit according to the general principles of justice, equity and good conscience, has not been followed in later cases. We may refer to *Jiban Krishna Mullik* v. *Nirupama Gupta* (20). In that case a patnidar created a darpatni and the darpatnidar created a sepatni in favour of another person. The sepatnidar was to pay certain sums due both to the patnidar and darpatnidar. The patnidar sued the sepatnidar for the rent due. It was held that he could not sue. Page, J., referred to and discussed the English cases and was of opinion that the rule laid down by Jenkins, C. J., was too wide, and the learned Judge was inclined to support the decision in *Debnarayan Dutt* v. *Ramsadhan* (3), on the ground that it came within the ruling of Cotton, L. J., in *Gandy* v. *Gandy* (7).

In *Krishna Lal Sadhu* v. *Pramila Bala Dasi* (21), it was held that where a life policy was expressed to be for the benefit of the wife of the assured, she was not entitled to sue as no trust was created in her favour and she was a third party to the contract. So far as the decision that no trust was created in her favour was concerned, the learned Judges dissented from the view taken in *Balamba* v. *Krishnayya* (29), and to that extent this case may not be authority binding on us, but the view of Rankin, C. J., and Ghose, J., on the general question of the legal consequences following from that view supports the view taken in the Madras cases which we have already referred to. Ghose, J., at p. 1391 refers to the rule of English Law that if *A* contracts with *B* for a benefit to be given to *C* although that was the object and purpose of the contract, *C* may not sue on that contract unless in certain excepted cases and then refers to the excepted cases. After referring to *Khwaja Muhammad Khan* v. *Husaini Begam* (13) the learned Judge deals with *Debnarayan Dutt* v. *Ramsadhan* (3), and attempts to bring that case within the exceptions laid down in the English cases on the ground of the special facts of that case. The learned Judge,however, agrees with the criticizm passed on that case by Page, J., in *Jiban Krishna Mullick* v. *Nirupama Gupta* (20). Rankin, C. J., took the view that it was wrong on the authority of either *Khwaja Muhammad Khan's* case (13) or *Debnarayan Dutt's* case (3) to suppose that in India persons who were not parties to a contract could be admitted to sue thereon except where there was an obligation in equity amounting to a trust arising out of the contract of in case of communities where marriages were contracted for moneys by parents and guardians. The learned Chief Justice observed :

"But putting aside such cases, I see no reason to think that the law in India contains a

(25) [1915] 38 Mad. 788=24 I. C. 943.
(26) [192] 23 M. L. J. 355=16 I. C. 428=(1912) M. W. N. 908.
(27) [1912] 21 M. L. J. 918=12 I. C. 185=(1911) 2 M. W. N. 524.
(28) [1912] 22 M. L. J. 159=13 I. C. 205=(1912) M. W. N. 39.
(29) [1914] 37 Mad. 483=25 M. L. J. 65=20 I. C. 934=(1913) M. W. N. 697.

series of exceptions to the principle that a contract can only be sued upon as such by a party thereto. A trust may be founded on the contract and is capable of being enforced by a party to the trust in appropriate proceedings as was pointed but in *Pope* v. *Cox* (30). It is another matter altogether to say that a person not a party to a contract may bring a suit upon the contract by reason of near relationship to the promisee. Nearness of relationship is a fact which, like many other facts, cannot be disregarded in determining the question whether or not a trust arises out of or is founded on a contract but it has no other importance. Cases such as the present can be decided and ought to be decided on the settled principles of equity."

In *Cleaver's case* (31) the Court considered whether the policy amounted to a trust for the widow and, having found that it did not, determined the matter by the ordinary law of contract. This, in my judgment, is the only method which can be justified in principle. To hark back to such cases as *Dutton* v. *Poole* (32) and *Bourne* v. *Mason* (33), is in my judgment a clear mistake, and the mistake is not cured by the circumstance that, under the Contract Act, the definition of "consideration" is wider than in English Law.

A similar view was taken in *Shankar Vishvanath* v. *Umabai* (34) where after holding that though the policy of insurance effected by the assured upon his own life was for the benefit of his wife, it did not create any trust in her favour the learned Judges dealt with the question whether she could sue on the contract apart from any trust and observed:

"It was, however, argued that as under S. 2, Cl. (d), Contract Act the consideration might be provided by some other person, the plaintiff could sue on a policy the consideration for which was provided by her husband. There is, however, nothing in the present case to show that the plaintiff was either the promissor or the promisee and therefore a party to the agreement. There is nothing in the Act to show an intention that a person not a party to the contract can sue on it. So far as it goes, S. 2 (i) is an indication to the contrary."

The learned Judges distinguish *Samuel* v. *Ananthanatha* (35), and *Chinnayya Rau* v. *Ramaya* (36) on the ground that there was a contract between the parties in those cases. This decision was referred to with approval in *Rose Fernandez* v. *Joseph Gonsalves* (37).

In *Achuta Ram* v. *Jainandan Tewary* (38) it was held that a person who was not a party or privy to a contract could not maintain an action to secure any benefit conferred on him by it. In that case *A* executed a mortgage in favour of the plaintiff and subsequently sold the property to *B*. In the recital in the sale deed *B* agreed to pay off the mortgage and the plaintiff sued *B*. It was held that the plaintiff cannot avail himself of the stipulation in the sale deed between the mortgagor and the vendee that the vendee was to redeem the mortgage. Bucknill, J. in the course of the judgment refers to *Nanku Prasad Singh* v. *Kamta Prasad Singh* (39) where their Lordships of the Privy Council held that a recital in a sale by *A* to *B* that *B* is to pay off a mortgage would give no cause of action to the mortgagee to sue *B*. The learned Judge quotes the judgment of Lord Atkinson who dismissed the appeal with the following remark

"Their Lordships have considered this case and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption. Their Lordships therefore think that the decree of the High Court was right and that the point made by the appellant failed."

It is argued that where all the parties to a contract are before the Court and complete justice can be done between them, there is nothing to prevent the Court from giving a decree to a person although he is not a party to the contract and that this is one of the exceptions that should be grafted on the rule in *Tweddle* v. *Atkinson* (1) and reliance was placed on the observations of Tyabji, J., in *Iswaram Pillai* v. *Sonni Vaveeru Taragan* (14) at p. 763 where the learned Judge deals with the question as to how far the rule in *Tweddle* v. *Atkinson* (1) can be said to be a rule of procedure. There is nothing in the observations of Tyabji, J, to indicate that the mere presence of parties would make the rule in *Tweddle* v. *Atkinson* (1) inapplicable.

Reliance has also been placed on the judgment of Devadoss, J., in *Singarayya* v. *Subbayya* (18) where the learned

(30) 10 Hare 163.
(31) [1892] 1 Q. B. 147.
(32) 83 E. R. 523.
(33) 86 E. R. 5.
(34) [1913] 37 Bom. 471=19 I.C. 736=15 Bom. L. R. 320.
(35) [1883] 6 Mad. 351.
(36) [1881] 4 Mad. 137.
(37) A. I. R. 1925 Bom. 97=48 Bom. 673.
(38) A. I. R. 1926 Pat. 474=5 Pat. 468.
(39) A. I. R. 1923 P. C. 54.

Judge after referring to *Iswaram Pillai* v. *Sonni Vaveeru Taragan* (14) and the observations of Sir Lawrence Jenkins, C. J., in *Debnarayan Dutt* v. *Ram Sadhan* (3) observed :

" But apart from that where a Court has before it all persons and is in a position to do complete justice to the case, it would be straining the law to hold that the suit should fail on the ground that the defendant did not contract with the plaintiff to pay the amount which he contracted to pay on his behalf."

The learned Judge also refers to the observations of Venkatasubba Rao, J., in *Thiruvadi Ayyangar* v. *Janaki* (40).

With respect it seems to us that if the law is that a person not a party to a contract cannot sue on the contract though a benefit is secured to him and unless the case falls within the exceptions in the cases above referred to the plaintiff has no cause of action it is no answer to say that all the parties are before the Court.

Order 1, R. 3, Civil P. C. is very clear. There should be a right to relief in respect of the transaction set out in the plaint before a party can be added as defendant. The addition of others would not so far as he is concerned alter his rights. We do not think that there is any legal basis for holding that the mere joinder of the original parties to the contract would give the plaintiff a cause of action which does not exist before the suit.

We are of opinion that where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person a suit to enforce that stipulation by the third party will not lie.

P.R.S./R.K. *Reference answered.*

(40) A.I.R. 1921 Mad. 103.

** A. I. R. 1930 Madras 389
Full Bench

BEASLEY, C. J., PANDALAI AND CURGENVEN, JJ.

Palani Goundan—Petitioner.

v.

Official Receiver of Coimbatore and *another*—Respondents.

Civil Revn. Petns. Nos. 1349 and 1350 of 1928, Decided on 12th November 1929, against orders of Dist. Judge, Coimbatore, D/- 4th September 1928.

****(a) Provincial Insolvency Act, S. 27 (2)—Court can extend time for discharge even after expiry of time fixed before annulment order is passed under Provincial Insolvency Act, S. 43:** *A.I.R.* 1928 *Mad.* 265; *A.I.R.* 1926 *Mad.* 942 and *Waller, J., in* 83 *I.C.* 955=*A.I.R.* 1924 *Mad.* 635, *Overruled.*

A Court has jurisdiction to extend the time originally fixed under S. 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43, either under S. 5, Insolvency Act taken with S. 148, Civil P. C., or under S. 27 (2) of the Act: *A.I.R.* 1928 *Pat.* 338; *A.I.R.* 1924 *Cal.* 777; *A.I.R.* 1927 *All.* 418; *A.I.R.* 1930 *Mad.* 278, *Appr*, **A.I.R. 1928 Mad. 265; A.I.R. 1926 Mad. 942; *Waller J., in* 83 I.C. 955=A.I.R. 1924 Mad. 635, Overruled.** [P 390 C 1; P 392 C 1]

***(b) Provincial Insolvency Act, S. 43—Failure to apply does not operate automatic annulment.**

Section 43 of the Act does not operate as an automatic annulment on the failure of the debtor to apply for a discharge: *A.I.R.* 1924 *Cal.* 777, *Foll.* [P 389 C 2]

S. V. Venugopalachari—for Petitioner.

N. S. Srinivasa Ayyar and *G. Jagdesa Ayyar*—for Respondent.

Order of Reference

Ramesam and Jackson, JJ.—The decision relied on by the District Judge while making some observations in favour of the respondent ultimately proceeds on the ground that the proceed- before the learned Judges was a Revision Petition and the learned Judges thought that it was a ground good enough for rejecting the petition. The contention of the respondent is supported by the decisions of the Calcutta, Patna, Lahore and Rangoon High Courts, *Abraham* v. *Sookias*, (1), *Gopal Ram* v. *Magni Ram* (2), *Lakhi* v. *Molar* (3), *K. K. S. A. R. A. Chettiar* v. *Mg. Myat Tha*, *A. I. R.* 1927 *Rang.* 136. The opposite view was taken in this Court by two learned Judges in *Chinnappa Reddy* v. *Thomasu Reddy* (4). It is unnecessary to refer to other decisions in this Court. One matter is clear. As observed by Chatterjea and Panton, JJ., S. 43 of the Act does not operate as an automatic annulment of the failure of the debtor to apply for a discharge. On this point, there is an authority which says that the adjudication shall stand cancelled on the debtor's default. The only question that arises is—whether the Court can extend the time before the order of annulment is passed though after the expiry of the time originally fixed under S. 27. We refer the following question for the decision of a Full Bench:

(1) A.I.R. 1924 Cal. 777=51 Cal. 337.
(2) A.I.R. 1928 Pat. 338=7 Pat. 375.
(3) A.I.R. 1925 Lah. 416.
(4) A.I.R. 1928 Mad. 265=51 Mad. 839.

Whether a Court has jurisdiction to extend the time originally fixed under S. 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43, either under S. 5, Insolvency Act taken with S. 148, Civil P. C., or under S. 27 (2) of the Act itself or otherwise?

Opinion

Beasley, C. J.—The question referred to us is:

"Whether a Court has jurisdiction to extend the time originally fixed under S. 27, Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43, either under S. 5, Insolvency Act taken with S. 148, Civil P. C., or under S. 27 (2) of the Act itself, or otherwise."

This reference is made necessary because of the view taken by Courts other than the Madras High Court in opposition to the balance of opinion in the Madras High Court.

The facts are that the insolvency petition was presented on 5th January 1923 and on this petition there was an order of adjudication on 31st January 1924 and one years' time was granted to the insolvent to apply for his discharge. This time was further extended and the finally extended period expired on 30th June 1927. No further applications for extension of time were made and nothing was done in the insolvency until in 1928 an alienee applied for the annulment of the adjudication. Notice was ordered to the insolvent to show cause against the annulment of the adjudication and then a creditor filed an application to extend the time for the application for discharge.

We have now to consider whether the Court has any jurisdiction to extend the time for an application for discharge having regard to the fact that the time specified by the Court expired on 30th June 1927 and the application for an extension of time was only made in 1928. The first section to be considered is S. 43 (1), Provincial Insolvency Act which reads,

"If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of S. 37 shall apply accordingly."

Waller, J., in *Arunagiri Mudaliar* v. *Kandasami Mudaliar* (5), held that the Judge has no option under S. 43 but to annul the adjudication and that he has no power under S. 27 to extend the period after it has expired. His reason for so holding is that S. 43 is in his view absolutely peremptory in its terms and that the only course open to a Court, on default of the insolvent to apply for his discharge, is to annul the adjudication and that being so no application for extension of the period can lie after it has expired. In the same case Krishnan, J., took the contrary view. In *Chinnappa Reddy* v. *Thomasu Reddy* (4), Kumaraswami Sastri and Wallace, JJ., agreed with Waller, J.'s, view in a judgment which reviewed most of the decided cases upon this point and they held that the word "shall" in its ordinary signification is mandatory and saw no reason why that word in S. 43 should not receive its ordinary interpretation.

Phillips and Madhavan Nair, JJ., followed Waller, J.'s opinion in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (5), In *Venugopalachariar* v. *Chinnulal Sowcar* (6). Venkatasubba Rao and Reilly, JJ,, considered this question in *Jethajj Peraji* v. *Krishnayya* (7). Venkatasubba Rao, J., in the first place, observes that the adjudication does not get automatically annulled under S. 43 (1) on the expiry of the original period. Next he holds that S. 27 (2), Provincial Insolvency Act, whilst saying that the Court may extend the time, does not say in express terms that it may be extended either before or after the expiration of the period originally fixed, and in his view S. 148, Civil P. C., clearly allows the Court to enlarge the time irrespective of the fact that the application is made either before or after the expiry of the period originally specified and for this *Badri Narain* v. *Sheo Koer* (8), is direct authority. He holds, therefore, that it is open to the Insolvency Court under S. 27 (2), Provincial Insolvency Act to extend the time on a proper application to that effect made at any time before the adjudication is annulled under S. 43 (1).

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(5) A.I.R. 1924 Mad. 635.
(6) A.I.R. 1926 Mad. 942=49 Mad. 935.
(7) A.I.R. 1930 Mad. 278=52 Mad. 648.
(8) [1890] 17 Cal. 512=17 I.A. 1=5 Sar. 493 (P.C.).

Reilly J., is inclined to the view that the words "shall be annulled" in S. 43 of the Act are mandatory. In the view of the majority of the Judges of this High Court who have considered this question, the answer to the question referred to us would be in the negative.

But other High Courts, namely, Calcutta, Patna and Lahore, have taken the opposite view. This question was very carefully dealt with by a Full Bench of the Patna High Court in *Gopal Ram* v. *Magni Ram* (2), holding that the Court has power under S. 27 (2), Prov. Ins. Act to extend the time originally fixed by it for the insolvent to make an application for discharge in spite of the fact that the time originally fixed by it may have expired and no application for discharge was made by that time and that the power so conferred by S. 27 (2) can only be curtailed or withdrawn when the Court's power to deal with the question of adjudication has come to an end by reason of its having passed the final order annulling the order of adjudication. It also held that the annulment of adjudication does not, under S. 43 (1) of the Act, come into operation without an express order of the Court to that effect. All the decisions were carefully considered in the judgment of Jwala Prasad J. On p. 381, he says :

"The interpretation sought to be placed upon S. 43 of the Act by Mr. Shambhu Saran could only be accepted if the Court was not required to pass an order of annulment after the failure of the insolvent to make an application within the period specified by the Court. The annulment of adjudication would not ipso facto come into operation without an express order of the Court to that effect under S. 43 of the Act. This is clear from the section itself and it gains support from Cl. (2), S. 37 which says "Notice of every order annulling an adjudication shall be published in Local Official Gazette aud in such other manner as may be prescribed," so that an order annulling an adjudication has to be passed by the Court and so long as that order is not passed the question, as observed above, remains pending before the Court in spite of the expiry of the period fixed by the Court for the insolvent to make an application for his discharge."

It was strongly contended before us that this view of the Patna High Court is wrong and that directly the time has expired for the application for the discharge and the debtor has made default in making such an application, the order of adjudication is ipso facto annulled. But this contention quite overlooks S. 37 (2) of the Act to which Jwalla Prasad J., referred. That, in terms, refers to the order annulling the adjudication. It seems clear that no adjudication can be annulled without an order. If the annulment were automatic on the expiry of the period prescribed by S. 27 (1), the order annulling the adjudication specified in S. 37 (2) would be quite unnecessary. In *Abraham* v. *Sookias* (1), Chatterjee and Panton, JJ., took the same view as was taken afterwards in the case in 7 *Patna*, namely, that the Court has power to extend the time even after the expiry of the period originally fixed and that furthermore the annulment of the adjudication is not automatic. On the latter point *Hari Ram* v. *Sri Kishna Ram* (9) is in agreement with *Gopal Ram* v. *Magni Ram* (2) and *Agraham* v. *Sookias* (1).

In my opinion, the view taken by the Calcutta, Patna and the Allahabad High Courts is the correct one. I think that too much importance has been given in the decided cases in this Court to the question of whether the word "shall" in S. 43 (1) of the Act is to be used in a mandatory sense or not. No doubt it is mandatory and gives the Court no option but to order an annulment of the adjudication, but that does not necessarily imply that the Court cannot grant an extension of time before passing such an order. In my view, all that is intended by that section is that if no one applies for an extension of time or no extension of time is given, the Court must then annul the adjudication. S. 27 (2) of the Act cannot be lost sight of. That gives the Court power to extend the time within which the debtor shall apply for his discharge and S. 43 (1) only compels the Court to annul the order of adjudication, if the debtor does not apply for an order of discharge within the period specified by the Court and, in my view, S. 27 (2) applies as much to cases beyond the extended period as to those within it so long as the application is made before any order of annulment is made by the Court and the words "within the period specified by the Court" in S. 43 (1) mean the period extended by the Court from time to time beyond the original period and up to the date of annulment.

(9) A. I. R. 1927 All. 418=49 All. 201.

I also agree with Venkatasubba Rao, J., in *Jethaji Peraji Firm* v. *Krishnayya* (7), that S. 148, Civil P. C. allows the Court to enlarge the time irrespective of the fact that the application is made after the expiry of the time originally fixed or afterwards extended.

For the above reasons I would answer the question referred to us in the affirmative.

Pandalai, J.—I agree.

Curgenven, J.—I also agree. The question is not, in my view, whether the terms of S. 43 (1) of the Act are mandatory. Granting that the Court is obliged to annul an adjudication if the debtor does not apply for an order of discharge "within the period specified by the Court," it remains to be decided how that expression is to be construed. Sub-S. (1) of S. 27 requires the Court, on making an order of adjudication, to "specify in such order the period within which the debtor shall apply for his discharge," Sub-S. (2) empowers the Court to extend such period. "The period specified by the Court" will clearly comprise not only the period originally specified under sub-S. (1), but any extension granted under sub-S (2). Then the only further question is whether such extension may be sanctioned even after the original period, together with any extension already ordered, has expired. S. 5 of the Act attracts the provisions of the Civil Procedure, Code, and among them the power, conferred by S. 148 of the Code, to grant an extension of time even though the period originally fixed may have expired. It is scarcely necessary to go further than this; but if it were, the Privy Council judgment in *Badri Narain* v. *Sheo Koer* (8), would support the view that power to enlarge a period after its expiry is implicit in such a provision as S. 27 (2). That case was decided under the old Code, which contained nothing corresponding to S. 148, and the point for decision was as to a Court's power retrospectively to enlarge the period for furnishing security under S. 549 (now O. 41, R. 10). The section contained the direcion:

> "if such secutity be not furnished within such time as the Court orders, the Court shall reject the appeal."

Purely upon a construction of the section their Lordships say that :

> "the application to the Court to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that they should do so."

I can discover no reason for construing S. 43 (1), Prov. Ins. Act in any different manner.

P.R.S./R.K. *Reference answered.*

A. I. R. 1930 Madras 392
Full Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

Damodaran—Petitioner.

v.

The Board of Commissioners for Religious Endowments, Madras—Respondents.

Civil Revn. Petns. Nos. 91 and 100 of 1929, Decided on 25th October 1929, from orders of Dist. Judge, South Malabar, D/- 31st August 1928, in O. P. Nos. 81 of 1928 and 163 of 1927, respectively.

Madras Hindu Religious Endowments Act (2 of 1927), S. 84—Application under S. 84 (2) is governed by Madras Court-fees (Amendment) Act 1922, Sch. 2, Art. 17 (1) and not by Arts. 17 (A) and 17 (B) 113 *I. C.* 88= *A. I. R.* 1929 *Mad.* 52, *Orerruled.*

Article 17, Court-fees Act, stands by itself. Arts 17-A and 17-B are separate articles and cannot be read together for the purpose of determining the Court-fee. And hence the Court-fee payable on an application under S. (2), Religious Endowments Act to modify or set aside the decision under S. 84 (1) is the Court-fee leviable under Art. 17 (1), that is Rs. 15 : *A. I. R.* 1929 *Mad.* 834, *Appr.* **113 I.C. 88=A.I. R. 1929 Mad. 52, Overruled.** [P 393 Cl. 2]

Thampan and *P. Govinda Menon*, *C. Unnikanda Menon*, *Chandrasekharan*—for Petitioner.

R. Venkatasubbarao for *P. Venkataramana Rao*—for Respondents.

Opinion :

Kumaraswami Sastri, J. — The point referred to us for decision is what is the proper Court-fee payable in respect of an application filed under S. 84 (2), Madras Hindu Religious Endowments Act, 2 of 1927, to modify or set aside a decision of the Hindu Religious Endowments Board under S. 84 (1) of the Act ? Under Sch. 2 of the said Act, the Court-fee payable on such an application is the fee leviable on a plaint

under Art. 17, Sch. 2, Madras Court-fees Amendment Act of 1922. The Madras Court-fees Amendment Act contains three articles, namely, 17, 17-A and 17-B. The short point for consideration is whether Arts. 17-A and 17-B must be read as parts of Art. 17 or as independent articles.

The view taken by Phillips and Odgers, JJ. in *Godasankara Valia Rajah* v. *Board of Commissioners for Hindu Religious Endowments, Madras* (1) is that Arts. 17-A and 17-B must be read as parts of Art. 17. The learned Judges observe that when the whole article is referred to, it must include its component parts and it cannot be read as meaning Art. 17 alone. The ground of their decision seems to be that Arts. 17-A and 17-B, numbered as they are in the Act following Art. 17 which various subclauses must really be treated as clauses to Art. 17, as otherwise none of the clauses of Art. 17 will cover a case like the present. Strictly speaking, none of the subsections to S. 17-A or S. 17-B covers a case like the present as the application is to set aside an order of the Religious Endowments Board and not for any declaratory decree. This decision has been dissented from by Ramesam and Venkatasubba Rao, JJ. in *Sundara Ayyar* v. *Commissioners, Hindu Religious Endowments Board*, (2). The learned Judges go into the matter in great detail and give their reasons for coming to the opposite conclusion. Ramesam, J. refers to the practice of numbering sections and subsections of enactments and also discusses the way in which new provisions are introduced — where the intention is to add a clause or a subclause and where the intention is to introduce a new section without altering the order or the numbers of the existing section. The learned Judge also deals with the nature of the relief sought and the way in which it is described in Sch. 2, of the Act. He is of opinion that Art. 17 stands by itself, that Arts. 17-A and 17-B are really separate articles and that they cannot be read together for the purpose of determining the Court-fee. Venkatasubba Rao, J. also comes to the same conclusion as to the construction of Art. 17. We think that, in construing an enactment like the Court-fees Act, it is not for us to see what the legislature intended, if the meaning of the article is plain. We agree with the view taken by Ramesam and Venkatasubba Rao, JJ. for the reasons given by them in their judgment. We may also add that the application contemplated in S. 84 (2), Madras Hindu Religious Endowments Act is one to modify or set aside a decision of the Board regarding the application of the Act to the institution over which jurisdiction is claimed. Similarly in S. 76 (2) of the Act the alienation of immovable trust property is the subject of the decision of the Religious Endowments Committee and the application to the Court to modify or cancel an order of the Board or Committee granting or refusing sanction. These applications are analagous to a regular suit filed by an unsuccessful claimant. They are not really suits for any declaratory decrees. The observations of the Privy Council in *Phul Kumari* v. *Ghanshyam Misra* (3) may be considered in dealing with a matter like the present.

We prefer to follow the decision in *Sundara Ayyar's* case (2) and answer the question referred to us that the court-fee payable on an application like the present is the court-fee leviable under Art. 17 (1), that is Rs. 15.

P.R.S./R.K. *Reference answered.*

(1) A. I. R. 1929 Mad. 52.
(2) A. I. R. 1929 Mad. 334=52 Mad. 338.
(3) [1908] 35 Cal. 202=35 I. A. 22=12 C. W. N. 169 (P.C.).

A. I. R. 1930 Madras 393

VENKATASUBBA RAO, J.

Babu—Plaintiff.

v.

Gokuldoss Goverdhandoss and *others*—Defendants.

C. S. No. 622 of 1923, Decided on 30th April 1929.

(a) Contract Act S. 263—After dissolution of partnership surviving partner should wind up partnership business and for that purpose carry on and continue the business.

When in a partnership of two partners one dies and his interest devolves on his minor son it is the duty of the surviving partner to wind up the dissolved partnership and for that purpose, if necessary, he is entitled to carry on and continue the business. He is under a duty to realise the assets, fulfil the existing obligations, pay off the debts and ascertain the extent of the surplus property remaining, that becomes divisible between the partners. The minor son and the surviving partner would be the joint owners of that residue and in what

share they hold it would depend upon the state of account between the partners, inter se.
[P 395 C 1]

(b) Contract Act, S. 262—"Partner's lien" —Extent of, explained.

The right loosely described as "partner's lien," is conditioned by the undoubted power which a surviving partner possesses, to give a valid title to a purchaser in good faith, of any specific property belonging to the firm.
[P 396 C 2]

(c) Contract Act, Ss. 262 and 263—Where act is reasonably believed to be done in furtherance of winding up of partnership, surviving partner after dissolution passes indefeasible title by alienating partnership property—Share of representative of deceased partner is not liable for debts of unsecured creditor of the new firm.

The surviving partner has a right to dispose of the property of the dissolved firm for purposes connected with the winding up of the firm; but if the alienation is not for such a purpose, the purchaser acquires, nevertheless, an indefeasible title, provided there are circumstances justifying a reasonable belief that the act was done in furtherance of the winding up; otherwise, he is not protected. Therefore, under the English law, if the case of a secured creditor does not fall within this rule, his right must give way to the superior claim of the deceased partner's representative. A fortiori the share of the deceased partner is not liable to answer for the sums due to unsecured creditor of the new firm. In this respect the Indian Law does not differ from the English Law. *Bourne* v. *Bourne*, (1906) 1 *Ch.* 113, *Rel. on*; *In re, Langmead's Trusts*, (1855), 52 *E. R.* 509; *West* v. *Skip*, (1749); 1 *Ves Sen* 239; *Skip* v. *Harwood*; (1747) 2 *Swans* 585, *Stocken* v. *Dawson*, (1845) 9 *Beav* 239, *Ref.*
[P 399 C 1, 2]

(d) Contract Act S. 262—After dissolution of partnership relation between surviving and former partner is a fiduciary one.

When a partnership has been dissolved by death, or bankruptcy, or otherwise, the relation existing between the surviving partner and his former partner is a fiduciary relation. *Hugh Stevenson* v. *Aktiengesellschaft*, (1918) *A.C.* 239, *Rel. on*; and *Darby* v. *Darby* (1856) 3 *Drew.* 495, *Ref.*
[P 401 C 1]

(e) Partnership—Right of party dealing with surviving partner explained.

A party dealing with the surviving partner cannot realise upon the latter's apparent authority of surviving partners if that party does not profess to deal with him as such party.
[P 402 C 1]

S. Duraiswami Aiyar and *V. Balaraman*—for Plaintiff.

V. Radhakrishnayya, *K. Rajah Aiyar* *C. P. Ramaswamy Aiyar*, *A. Krishnaswamy Aiyar*, *M. Subbaraya Aiyar* and *S. Jagadeesa Aiyar*—for Defendants.

Judgment.— By my preliminary judgment, dated 2nd May 1928. *Balu* v. *Gokuldas Govardhandoss*, *A. I. R.* 1928, *Mad.* 1064, I declared that the plaintiff was entitled to have an account taken of the affairs of the partnership as on the date of the death of his father, namely, 13th August 1908. After making that declaration, without forthwith referring the case to the Official Referee, I granted an adjournment at the request of defendant 6's counsel, who wanted time to consider his position in regard to his filing an appeal from my judgment. I understand that no appeal has been filed and I am now asked to deal with certain questions of accountability arising between the parties. The plaintiff's right would arise only if it be found that some amount is due to him: but all parties have desired me to first deal with these questions even before the accounts are taken. That means, of course, that the parties believe that the accounts, if gone into, will disclose that a substantial sum is due to the plaintiff. It is on this hypothesis that I am now dealing with the questions raised.

For ready reference, I reproduce a part of the pedigree set forth in my preliminary judgment.

Muralidas, died 24th April 1907, Married Yasodabai or Jessubai or Jessu.

- Putlibai alias Nani or Nanu. Married Laldas.
  - Jayakrishna, died young.
- Krishnadoss Born 16th May 1884. Married Radhabai, 4th defendant.
  - Babu alias Govindas, Born 18th November 1907, Plaintiff.

Govardandas, died 26th September 1909 Married Kammubai, D. 5. Died January 1926.

- Gokuldas, 1st defendant. Born 6th April 1885. Married Gangabai.
- Dwarakadas, 2nd defendant. Born 12th November 1891. Died 14th January 1925. Md. Jamnabai.
  - Ramdas, 3rd defendant. Born 9th August 1914.

I have held that the partnership con-

sisted of Muralidas, Govardhandas, Krishnadas and Gokuldas. Murali died in 1907, Krishnadas, the plaintiff's father, in 1908 and Govardhan in 1909. Gokuldas, defendant 1 became the surviving partner, who, without winding up the affairs of the dissolved firm, continued the business employing its assets. This has given rise to the questions that have now been argued before me.

There can be no doubt as regards the true legal position of Gokuldas as the surviving partner of the firm, The plaintiff was, at his father's death, an infant about nine months old and, when Govardhan died, had not completed his second year. On him devolved the interest of Krishnadas in the partnership. It was the duty of Gokul to have wound up the dissolved partnership and for that purpose, if necessary, he was entitled to carry on and continue the business. He was under a duty to realize the assets, fulfil the existing obligations, pay off the debts and ascertain the extent of the surplus property remaining, that became divisible between the partners. The plaintiff and Gokul would be the joint owners of that residue and in what shares they owned it would depend upon the state of the account between the partners inter se. This is the course clearly indicated by the law and if this course had been followed, rights of third parties would not have come into existence conflicting with the plaintiff's rights and the surplus to the extent of his share would have been at his disposal. But, instead of following this course, Gokul (this is not disputed) continued and carried on the business—not with a view to wind it up and bring it to a speedy close – but conducted the trade as an ordinary trader would, incurring new obligations and entering into fresh transactions. An extensive business was carried on in this way for several years till Gokuldas failed in trade and was adjudged an insolvent in 1924. The assets of the partnership at the death of Krishnadas consisted inter alia of many items of valuable immovable property worth some lakhs and Gokuldas, it is alleged, mortgaged several of them for debts borrowed in the course of the trade which he subseqnently carried on for his own benefit. For the plaintiff it is contended, that he is entitled to proceed against what was at the dissolution, the property of the firm and recover out of it, his share, When that is determined. The contention put forword is that, under the law, the partnership property has first to be applied in discharge of the firm's debts and when that is done and the surplus is ascertained, each of the partners has a right, which cannot be defeated, to receive his share out of the surplus assets.

The plaintiff's position may be thus stated: as the surviving partner Gokul had certain powers, those powers were in a sense plenary, that is to say, he could validly sell or mortgage the properties of the dissolved firm provided (the proviso is important) the acts done were in the course of, or for the winding up of, the partnership. The plaintiff concedes that this rule is qualified to this extent, namely, that if third parties dealt with Gokul in the reasonable belief that a given sale or mortgage was necessary for the proper winding up, the title such third parties acquired would not be defeated, although in point of fact, there was absence of necessity, or the money raised was misapplied. The plaintiff contends that, if, after paying off partnership debts and after making due provision in favour of transactions of the kind mentioned above, there remains a surplus, he is entitled as the representative of the deceased partner, to proceed against that surplus, for recovering in specie, what may be found to be his share. To this, the answer of the Official Assignee is, that what is due to the plaintiff is a debt pure and simple due from Gokul, that the former can recover that debt out of the estate of Gokul, just in the same manner as any other creditor can. In other words, he contends that the plaintiff has no special rights over and above any ordinary creditor of Gokul and that he (the plaintiff) ranking as such creditor, is at liberty, if he chooses, to prove his debt in insolvency and receive a dividend out of the bankrupt's estate. This is the contention put forward on behalf of unsecured creditors by the Official Assignee. Then as regards secured creditors, they maintain that in law, the right of the surviving partner to deal with partnership property is, that of an unqualified owner and what-

ever right the plaintiff may have against Gokul, that right cannot defeat the interest created in the property by the latter in their favour. These are the points on which I am now asked to give my decision. This part of the case has been fully argued by Mr. S. Duraiswami Aiyar for the plaintiff and by Sir C. P. Ramaswami Aiyar, as well as the Advocate-General, for the defence. The contentions seem, in my opinion, to involve points which are fairly simple.

At this point, I must mention that several cases were posted along with this in the Cause List, some of them being suits filed by certain secured creditors of Gokuldas. An application was made to me that they should be impleaded as parties to this action. On that application, I made on 28th February 1929 the following order. (After stating the order, the judgment proceeded.) I shall now proceed to deal with the questions raised. I have set forth fully the nature of the right which the plaintiff claims. It is impossible to accurately describe it in a single statement, but, in text-books and judgments, the expression "partner's lien" is used to describe this right. It must be borne in mind that this is merely a convenient mode of referring to the right and that the word "lien" in this phrase is not used in its ordinary technical sense. To ignore this, must necessarily lead to confusion of thought. Those that use the expression are careful to point out, that an outgoing partner enjoys no such right as a lien, in the strict sense of the term. Lindley (to take an example) is conscious of the fact that the phrase is liable to mislead, for he refers to it as "the right, lien, quasi-lien, or whatever else it may be called." Lindley on Partnership, Edn. 9, p. 438. Similarly Pollock and Mulla, speaking of this right, refer to it as belonging "to the class of equitable not possessory liens" and further add "commonly called 'partnes's lien'." (see commentaries under S. 262, Contract Act.) I refer to this fact at the outset, because much of the criticism levelled against the plaintiff's case has proceeded and wrongly on the footing that what he claims is to enforce a lien, that is, a specific charge upon partnership property.

The law of this subject is thus set forth by Lindley :

> "In other words, each partner may be said to have an equitable lien in the partnership property for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm."
>
> "The lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them and it is, therefore, available against their executors, execution creditors, and trustees in bankruptcy."
>
> "To hold, however, that this lien could be enforced against persons purchasing partnership property would be in effect to prevent any sale of that property without the consent of the whole firm, and would practically stop all partnership trade. Whilst, therefore, a person who purchases a share of a partner takes that share subject to the liens of the other partners, person who bona fide purchases from one partner specific property belonging to the firm acquires a good title to such property, whatever liens the other partners might have had on them prior to their sale."

These passages show, how, the right loosely described as "partner's lien," is conditioned by the undoubted power which a surviving partner possesses, to give a valid title to a purchaser in good faith, of any specific property belonging to the firm. The contentions urged against the plaintiffs are, first that the amount due to him is in the nature of a simple debt and, secondly, that one who purchases from a surviving partner acquires a good title whether the transaction is bona fide or not. In my opinion, both these contentions are clearly untenable. On this point, as I shall show presently, there is no difference between the English and the Indian Law. S. 39, Partnership Act 1890, enacts, that on the dissolution of a partnership, every partner is entitled, first, to have the partnership property applied in payment of the partnership debts and, next, to have the surplus assets, then remaining, applied in payment of what may be due to the partners, on an account being taken. This section in effect prescribes the mode of dealing with the assets of a dissolved firm. The debts due to its creditors must be first paid out; when that is done, the section declares, the outgoing and the surviving partners own the surplus as their property, Each of them, then, is a part-owner of that surplus, the extent of his interest depending on the state of the account between

the partners inter se. It is from this joint ownership that the retiring partner's right springs. But this right is subject to the rule, that a purchaser from the continuing partner in the ordinary course of business, deals with him as absolute owner and not as mere partner, and is, therefore, fully protected. This principle is clearly illustrated in *Bourne* v. *Bourne* (1), affirmed in *Bourne* v. *Bourne* (2). In this case, there were two partners Grove and Bourne. Grove died on 9th May 1901. Bourne carried on the business and deposited on 7th February 1902, title deeds of a property with the Firm's Bankers, Messrs. Berwick & Co. Bourne himself died on 3rd September 1902. The question arose, whether the executors of Grove were bound by this transaction with the Bankers. In each of the judgments, the matter is thus dealt with : Was the act done by the continuing partner in the ordinary course of winding up? In any event, did the third party reasonably believe that the act was necessary for that winding up? In that event, the stranger dealing with the continuing partner acquires an indefeasible title to the property in question. It was contended that the Bankers could not rely upon the mortgage, because they ought have known that, the debt due by the old firm having been paid, the surviving partner had no right to pledge the estate. Vaughan Williams, L. J., answers thus :

"All I can say with reference to that is that as far as the Bankers are concerned this apparently was an ordinary winding up; there were payments in and payments out, and both the payments in and the payments out must be taken to have been made on account of this realization and winding up."

The judgment of Romer, L. J., contains a very clear statement of the law. What is generally described as "partner's lien" is thus explained :

"That lien is not one which affects each particular piece of property belonging to the partnership so as to affect that property in the hands of any person dealing with the surviving partner in good faith."

The next sentence throws further light on this point :

"It is really what one may call a general lien upon the surplus assets, and does not affect each particular property so as to interfere with the right of the surviving partner to deal with the separate properties belonging to the partnership for the purpose of realization and to give a good title to persons dealing in good faith with him in respect of those properties."

The principle, so clearly formulated, the learned Lord Justice applies to the facts of the case. The point to decide is stated in the following sentence :

"Then the only question remaining is this. Was the debt of the bank which the surviving partner gave the charge to secure one that really to the knowledge of the bank was not a partnership debt?"

Then follow a number of reasons given to show that the bank was acting in good faith.

"The account with them was a partnership account. It was continued under the partnership name, and apparently for the purpose of the partnership, and it appears to me impossible to say that it is not or may not be reasonable for a surviving partner to continue the partnership account for the purpose of winding up the estate. To my mind the case is very much as if the only change in the account had been to put the account of the partnership in administration. When you find an account of that kind continued—and here it is only continued for something like nine months before the charge is given—the bankers, it appears to me, are entitled, in the absence of evidence showing the contrary, to assume and to be credited with the belief that the surviving partner is continuing it for the purpose of realization, and that sums paid into that account and sums drawn out of that account in the name of the partnership are paid in and drawn out for the purpose of the partnership. That being so, in this case when the account is finally taken and there is a balance due to the bankers, that, to my mind, is a balance which the bankers are entitled to believe and to assert was, so far as they were concerned, a partnership debt in respect of which they were entitled to have the security given which this surviving partner gave."

This judgment contains a very lucid exposition of the principles governing the subject. The decisive factor in each case is, did the third party act in good faith? In other words, did he reasonably believe that the act was in furtherance of the winding up? The learned trial Judge, Farwell, J. applies the same test:

"So far as I can see there is nothing whatever to put the bank upon any enquiry or to fix them with notice."

that the act was not done in the course of the winding up. Romer, L. J., I may point out, relies as an important element upon the fact, that only a short period, like nine months, had elapsed before the charge was given. To this feature of the case, attention is called in the following passage occurring in the Law of Vendor and Purchaser by Williams.

(1) [1906] 1 Ch. 113.
(2) [1906] 2 Ch. 427=75 L. J. Ch. 779=54 W. R. 559=95 L. T. 131.

"Having regard to this pronouncement, it appears that where the survivor of two partners sells the real estate sufficiently soon after the other partner's death to make it apparent that he is selling to wind up the partnership affairs, he can make a good title to the equitable interest in the land and give a good discharge for the purchase money without the concurrence of the deceased partner's legal representatives."—3rd Edn., Vol. i, pp. 446 and 447.

Another case which is frequently referred to is *In re, Langmead's Trusts* (3). In this case, the executor of a retired partner sought to have an asset of the dissolved firm, assigned by the surviving partner to a third party, applied to payment of partnership debts. The judgment is apt to mislead if the somewhat complicated facts of the case are not carefully followed.

John Clark Langmead and William Langmead were partners. John retired and a deed executed by the partners came into existence on 5th February 1825. It recited :

(1) that the partnership was to stand dissolved,

(2) that William should pay to John £2,000 and John in consideration thereof was to convey to William his interest in the partnership, so that, William was to become the sole owner,

(3) to carry into effect these provisions a deed was to be executed which should contain a covenant on the part of William that he would pay all the debts of the concern and indemnify John in regard to them.

William paid £2,000 to John but did not however, pay all the debts due from the firm.

John died in 1830 and in 1831 William Langmead assigned a certain policy of assurance, part of the assets of the firm, in favour of Walter Boyd. Subsequent to this, several creditors of the firm proved their debts and were paid out of the estate of John. These were debts which, in accordance with the instrument of 6th February 1825, William was bound to pay. The other facts of the case may be ignored.

The question (so far as it is relevant to the present case) was as between the legatee of John Langmead and the representatives of Walter Boyd who had the title to the policy in question ? Sir John Romilly, M. R., decides in favour of Boyd's representatives. True, John was entitled to have the firm's property applied in payment of the firm's debts so long as any debt existed ; but more than six years had elapsed after the dissolution of the firm and Walter Boyd might therefore have reasonably supposed that all the debts of the concern had been either paid or barred by lapse of time. William Boyd took an assignment for value in these circumstances. He therefore got a good title.

The point to observe in this case is, that the only lien or right which John could have claimed was to have the partnership assets applied in payment of the partnership debts. He had no other lien, for as the facts stated show, he had already received from William an amount representing the value of his share in the assets of the firm. The only outstanding right being to have the debts paid up, the Master of the Rolls observes, that in the circumstances of the case the purchaser had valid grounds for supposing that the partnership debts had, during the long period of six years, been either paid off or had been barred and that there were, therefore, at the time no debts due and payable.

There is an observation at bottom of p. 511 (E.R.) which reads thus :

"If that had been the case, a purchaser from William Langmead, even with express notice of that trust, would not have been bound to see to the application of the purchase money."

This is said to favour the contention put forward for the defence. Clearly not. What does this observation mean ? The trust being one to apply the proceeds in payment of debts, a purchaser with express notice of this trust is not bound to see to the application of the purchase-money. This does not mean that if the purchaser knew that the purpose of the trust had already been fulfilled, that is, that the debts had already been fully paid off, he would still be protected.

This went on appeal and the appellate judgment reported in *Langmead's Trusts, In re* (4) throws no light on the question, as the decision turned on the language of the instrument.

It is in *Bourne* v. *Bourne* (1), that the principles are stated with great force and clearness and the law as stated in that case has been adopted in standard works on the subject. The observations in *Langmead's Trusts* (4) being somewhat cryptic are not useful to the same

(3) [1855] 20 Beav. 20=52 E. R. 503.

(4) [1855] 7 De. D. M. & G. 353=3 W. R. 602 =2 Jur. (n. s.) 1058=24 L. J. Ch. 589.

extent as those in the first-mentioned case.

The rule is thus stated in Halsbury's Laws of England.

"This right is available, and may be enforced not only against the partnership assets and the other partners, but also against all persons claiming through them in respect of their interests as partners, for example, assignees, personal representatives, trustees in bankruptcy, or judgment-creditors, except purchasers or pledgees of specific assets of the partnership who might reasonably suppose that all the partnership debts had been paid or barred by lapse of time, or who otherwise deal with the surviving or continuing partner in good faith."

The surviving partner has thus a right to dispose of the properties of the dissolved firm for purposes connected with the winding up of that firm ; but if the alienation was not for such a purpose, the purchaser acquires, nevertheless, an indefeasible title, provided there are circumstances justifying a reasonable belief that the act was done in furtherance of the winding up ; otherwise, he is not protected. Therefore, under the English Law, if the case of a secured creditor does not fall within this rule, his right must give way to the superior claim of the deceased partner's representative. A fortiori, the share of the deceased partner is not liable to answer for the sums due to unsecured creditors of the new firm. This follows from the authorities I have already cited. The same principle is recognized in three other cases which may be cited. In *West* v. *Skip* (5) the retairing partner's rights against the continuing partner are thus described :

"The partners themselves are clearly joint tenants in the stock and all effects. . . . . So, if one partner had died, the debts and effects survived ; but yet the survivor is considered in this Court barely as a trustee for the representatives of the deceased ; upon which footing the account would be taken, and nothing considered as the share of the survivor till afterward ; which is from the continuance of the property in the stock to the representative of the deceased partner, who has a specific lien thereon, although the survivor afterward dies or becomes bankrupt."

In the case supposed, the partnership became dissolved by the death of a partner. What happens if it became dissolved by consent ?

"The property in the stock of the partner so going out is not divested thereby, but he remains equally entitled as joint tenant with the other ; and in a bill for an account, the stock would be subjected for his satisfaction."

(5) [1749] 1 Ves. Sen. 239.

Having dealt with these two cases, the Lord Chancellor proceeds to deal with the rights of the separate creditors of the survivor as against the representatives of the deceased partner.

"Then as between one partner and the separate creditors of the other, the law and these two cases before mentioned say, that they cannot affect the stock any farther than that partner could whose creditors they are."

This case states the principle very clearly. The right of the retiring partner arises from the fact that the partners are joint tenants of the property, each being a part owner. This right prevails not only against the survivor but also against his creditors. In *Skip* v. *Harwood* (6), this right was held to prevail even as against execution creditors of the surviving partner.

The third case is *Stocken* v. *Dawson* (7). The following observations are very pertinent to the case on hand ;

"I make no imputation against Oliver, for I believe he thought he was employing his own property, and not the property of another person. It was a very unfortunate mistake, and nothing but a mistake ; nevertheless we know how frequently it happens, that persons, whose duty it is to withdraw the property of others, endeavour to keep it engaged in trade for their own profit ; and it would reduce the jurisdiction of this Court to a very low ebb, if we were told that no person could ever demand an account of the profits arising from an improper use of his money, without making himself and his property liable to the debts incurred by those who were making an improper use of his capital."

This case was affirmed on appeal in 17 *L. J. Ch.* 282. The point is very fully dealt with in the judgment of the Lord Chancellor. The property improperly and without authority used in the trade by the surviving partner, it is pointed out, never can be liable for the debts of that trade, except where the principle of "order and disposition" applies; (see p. 286.)

I have now dealt with the position under the English Law both of secured and unsecured creditors. Are their rights different under Contract Act? Section 262, Contract Act corresponds to S. 39, Partnership Act. The former section is but an instance of the application of the principle underlying the English section. If we take the relevant portions of the two sections, there is even a verbal resemblance. Section 262 says:

(6) [1747] 2 Swans. 586.
(7) [1345] 9 Beav. 239.

"The partnership property must be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him."

The idea underlying this is, the surplus, to the extent of each partner's share, is his property. That share must be either paid to him, or (that being his property) must be applied in payment of his separate debts. How is this language in substance different from S. 39? It says, to quote only the portion material,

"Every partner is entitled to have the property of the partnership applied in payment of the debts of the firm and to have the surplus assets, after such payment, applied in payment of what may be due to the partners."

Next, S. 263, Contract Act reproduces in effect S. 38, Partnership Act. I am unable to follow the argument that this section indicates that the Indian law is different. It says that, after a dissolution, the rights of the surviving partner continue "in all things necessary for winding up the business of the partnership."

Section 38 enacts that his authority contiuues

"so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."

As Pollock and Mulla point out, the Indian section expresses the English Law "if it be read with sufficient emphasis on the word 'necessary'."

Section 241 is next referred to as showing that the Indian Law departs from the English Law. This argument is again unsound. Section 241 provides that the property left by a retiring partner or the representative of a deceased partner to be used in the business is to be considered a loan within the meaning of S. 240. This section (S. 241) is one of a group of sections dealing with what is essential to the constitution of a partnership. (Sections 240 to 241). As Pollock and Mulla point out, these add nothing in principle to the law settled by the decision in *Cox* v. *Hickman* (8) (see commentaries under S. 240). Section 241 and the allied sections have their counterpart in S. 2, sub-S. (3), Partnership Act, which in their turn, superseded the provisions of the English Act, called, Bovill's Act. Further, how does S. 241 apply to the present case at all? It refers to a case where the property is left by the outgoing partner to be used in the business: that is to say, where he authorizes his share to be employed in the trade by the surviving partner. The use of the plaintiff's share of the property, in the trade subsequently carried on by Gokuldoss was unauthorized and this section cannot possibly apply.

The next section which has a bearing on the present point is S. 253. It is that section which declares that partners are joint owners of partnership property and (as a necessary corollary) that each partner is a part owner [sub-S. (1)]. This again is a mere re-enactment of the English rule (see S. 20, Partnership Act). It is impossible, therefore, to deduce from these sections that a departure from the English Law is intended.

I may at this point usefully cite a decision of the House of Lords: *Hugh Stevenson* v. *Aktingesellschaft* (9). An English company and a Germn company carried on a partnership business in England, until the outbreak of war between Great Britain and the German Empire, which operated as a dissolution of the partnership. After the outbreak of the war, the English company continued to carry on the business and to use the partnership plant for that purpose. It was held that the German company were entitled to a share of the profits made after the dissolution by the carrying on of the business by the English company with the aid of the German company's share of the capital. This case emphasizes two points: first, that the rights of partners in the assets of the firm are rights of property and do not depend merely on contract; secondly, the continuing partner is treated in respect of the outgoing partner's share in the property, as standing in a fiduciary relationship. The argument advanced for the English company is this: S. 42, Partnership Act, which provides that the outgoing partner is entitled at his option either to interest or to profits attributable to the use of his share, is inapplicable, as in the case of an alien enemy, the provisions of the Act have no application, the contractual relationship between the parties having become completely and finally severed: see the argument of Leslie Scott, K. C. Lord

(8) [1860] 8 H. L. C. 268=8 W. R. 754=9 C. B. (n.s.) 47=30 L. J. C. P. 126=7 Jur. (n.s.) 105=3 L. T. 185.

(9) [1918] A. C. 239.

Finlay in his judgment points out that the question to be determined does not depend upon any contract but on the rights of property which both partners have in the assets of the firm. Viscount Haldane observes that the analogy of a contract in respect of money due does not hold good, as the question is one of property. He adds:

"It depends on the principles which Courts of Equity apply to persons who are in possession of property under circumstances in which they are treated as standing in a fiduciary relationship."

Lord Dunedin stresses the same two points:

"The result in law is that they carry on the business as trustees for the partners until the winding up is effected. No doubt the enemy partner cannot receive the money during the war. But his property as such is not confiscated . . . . He will only get the fruits to which his property is entitled."

Lord Atkinson deals also with these two aspects at length:

"When a partnership has been dissolved by death or bankruptcy or otherwise, it has been decided that the relation existing between the surviving partner and his former partner . . . . is a fiduciary relation."

The observations of Kindersley, V. C., in *Darby* v. *Darby* (10) are cited by the learned Lord:

"What is the clear principle of this Court as to the law of partnership? It is that, on the dissolution of the partnership, all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule: it requires no special stipulation; it is inherent in the very contract of partnership."

The principle so clearly formulated in this case does not conflict with the rule contained in S. 43, Partnership Act, that the amouut due to an outgoing partner is merely a debt and as such is subject to the ordinary law of limitation.

I have now discussed the law bearing on the point. I shall now proceed to consider the various claims put forward. To deal first with the unsecured creditors of the new trade, their claim requires no further notice, as the plaintiff's share is, in no manner, liable for the debts due to them. Then, as regards secured creditors, I shall apply the principles I have stated to the facts of each case.

There are five cases before me relating to the claims of secured creditors. In regard to one of them (C. S. No. 434 of 1923), the parties are unable to agree whether the claim of the plaintiff in that case arose or not from a transaction connected with the winding up. I must, therefore, postpone the decision of this case till the report of the Official Referee is received. In regard to the four remaining cases, it is agreed that the claim preferred in each of them is unconnected with the winding up and that the facts giving rise to each of the claims are entirely independent of the business of the dissolved firm. I am asked, for this reason by all concerned, to deal with these four cases without waiting for the Official Referee's report.

It is unnecessary to refer in any detail to the title-deeds of the various properties filed as exhibits. The facts that emerge from the evidence, documentary and oral, are: (1) that the sale deeds in respect of every item of property (without a single exception) stood in the name of either the firm or the partners. Each claimant dealing with Gokuldoss had thus either actual or constructive notice that the property belonged to the dissolved firm; and (2) that each of these creditors dealt with Gokuldoss, not on the footing that he was the surviving partner engaged in winding up the concern, but under the mistaken belief that he was the manager of a joint Hindu family. In other words, each of them, in dealing with Gokuldoss, believed him to be the managing member of a coparcenary consisting of several members including the minor plaintiff.

We start thus with the position, that the transactions were not, in point of fact, connected with the winding up. It is not even suggested that, apart from the real facts, the claimants were under any misapprehension as regards the true state of things.

I shall first take the case of Messrs. Best & Co., (C. S. No. 85 of 1924). The mortgage in their favour comprises several items; but in this enquiry, only with a fractional share in one of them, we are concerned. The partnership became dissolved in 1908 and it is admitted that the transaction which gave rise to the debt did not take place earlier than 1919. In the course of the new trade carried on by Gokuldoss, he bought yarn from Messrs. Best & Co., and an amount

(10) [1856] 3 Drew. 495=25 L. J. Ch. 371=4 W. R. 413=2 Jur. (n. s.) 271.

was found due to them. Promissory notes were executed and properties were mortgaged in respect of this debt. This happened in 1922 and 1923. It is not even suggested that the claimants believed or had reason to believe that these transactions were entered into by Gokuldoss in connexion with, or in furtherance of, the winding up. On these facts any question of good faith is entirely excluded. Applying the principles which I have stated, these creditors are not protected and I must, therefore, hold that the share of the minor plaintiff in C. S. No. 622 of 1923, in the particular item of property to which I have referred, is not affected by the mortgage.

Mr. Duraiswami Aiyar, the plaintiff's learned counsel, calls another argument to his aid which in my opinion, is also well founded. He says in effect a party dealing with Gokuldoss cannot rely upon the latter's apparent authority of surviving partner if that party did not profess to deal with him as such partner. Messrs. Best & Co. dealt with Gokuldoss on the footing that he was the managing member of a Hindu coparcenary. As they did not deal with him as surviving partner, the question whether they believed in good faith that his act was in furtherance of the winding up or not, does not arise. *Farquharson Brothers &. Co.*, v. *King &. Co.* (11). In this case, a man named Capon sold his master's goods fraudulently and under an assumed false name. The fact was that his master authorized him to sell to certain known customers and any stranger misled by this apparent authority, would in law, on the ground of estoppel, be protected. The question arose, whether the respondents who believed Capon (who sold under a false name) to be the real owner acquired a good title. In a striking judgment, Lord Halsbury held that they were not :

"If they had represented their clerk Capon to be invested with disposing power, and (note the importance of the next sentence) if anybody, supposing Capon to be invested with that power, had acted upon it to his own prejudice, then undoubtedly estoppel would have arisen."

But such circumstances did not exist and the respondents, it was held, acquired no title. I need quote only one further sentence from the judgment in that case ;

"I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist." (P. 341).

The same principle was applied in *Underwood Ltd.* v. *Bank of Liverpool* (12) Scrutton, L. J., observes :

"So in my view you cannot rely on the apparent authority of an agent who did not profess in dealing with you to act as agent." (P. 792).

And Bankes, L. J., says :

"They considered that they were still dealing with Underwood the old customer, the principal, and not with a new Underwood, an agent." (P 783).

This principle is of general application not confined to what may be strictly called estoppel, or to principal and agent. In *Solomon* v. *Attenborough* (13) one of two executors, without the knowledge of the other, pawned articles of plate belonging to the estate and misapplied the money. The defendants the pawnbrokers, dealt with him not as executor but as absolute owner of the plate. It was held that as the pledger did not purport to act as executor, the defendants had no title to the plate and were bound to deliver it up. The following passage from the judgment of Buckley, L. J., brings out the point :

"They (the defendants' counsel) were further asked for authority for this proposition that if a person contracts, not purporting to deal as executor the purchaser who did not know he was executor can for the purpose of supporting the contract rely on the fact that he was executor. For that proposition they have cited no authority and, so far as I know, there is none."

Bank of Bombay v. *Suleman Somji* (14) also illustrates the same point. Their Lordships cite a passage from *In re, Queale's Estate* (15) which very tersely expresses the principle and which I shall therefore reproduce :

Fitz Gibbon, L. J., says :

"the bank dealt with him (the mortgagor) as and in his capacity of an individual owner, not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances, the bank can in my opinion, have no better title than that which its debtor really had in the capacity in which

(11) [1902] A. C. 325=71 L. J. K. B. 667=51 W. R. 94=86 L. T. 810.

(12) [1924] 1 K. B. 775.
(13) [1912] 1 Ch. 451.
(14) [1903] 33 Bom. 1=35 I. A. 139=10 Bom. L. R 1065 (P. C.).
(15) 17 L. R. Ir. 361.

he was dealt with, namely, as beneficial owner, i. e., as residuary legatee." (P 150.)

This principle was applied again by the Judicial Committee in *Balwant Singh* v. *Clancy* (16). The ratio decidendi of *Bijraj Nopani* v. *Pura Sundar* (17) and *Gharibullah* v. *Khalak Singh* (18) also supports the contention of the plaintiff. On this ground also the claim of Messrs. Best & Co., in so far as it relates to the plaintiff's share in the item in question, fails.

I understand that there is some dispute as regards the extent of the item (to which the plaintiff in C. S. No. 622 of 1923 is entitled) which is affected by my judgment. The parties expected that they would be able to agree in regard to the item. They have not been able to do so. But I need not postpone my judgment on that account. For this enquiry I direct the case to be posted on the 15th of April.

I shall next deal with the case of the Maharajah of Pittapuram, the plaintiff in C. S. No. 229 of 1924. The mortgage in his favour, as in the case of Messrs. Best & Co., comprises several items of which we are concerned only with one, the Cathedral Gardens, because the partnership owned that and not the others on the date of the dissolution. The claimant advanced to Gokuldoss about Rs. 3,85,000. He took a promissory note dated 22nd December 1922 and there was an equitable mortgage created on the following day. It is admitted that in point of fact neither this debt nor the debts (due to the Imperial Bank) to discharge which this loan was raised. were incurred for any purpose connected with the winding up. This claimant again dealt with Gokuldoss not as the surviving partner but as the managing member of a joint Hindu family. This fact is undisputed and, therefore, I do not propose to review the evidence on the point. I may observe that in regard to this property although the actual conveyance was taken in 1909 it is admitted that it was acquired by the old firm and with its moneys previous to the dissolution. As regards the question of good faith or reasonable belief, the remarks I have made in regard to the claim of Messrs. Best & Co. apply equally to this case. For the reasons already given, I hold that the plaintiff's share in the Cathedral Gardens is not affected by the mortgage created by Gokuldoss. This disposes of the claim of the plaintiff in C. S. No. 229 of 1924 so far as this enquiry is concerned.

Then comes the claim of the plaintiffs, Narayanaswami Chetty and others, in C. S. No. 50 of 1927. All the properties comprised in their mortgage had been acquired previous to the dissolution. Their claim calls for no special remark, as what I have already said in dealing with the claimants in the two previous cases, applies equally to them. I therefore hold that the plaintiff's share in these properties is not affected by the mortgage referred to.

Lastly remains the claim in C. S. No. 691 of 1928. The facts connected with this case are the following: Messrs. Kusaldoss and Sons sold goods to Gokuldoss and obtained for the price thereof hundis from him, dated 16th September 1922 and 25th October 1922. The goods had been sold a short time previous to the dates of the hundis. It is admitted that these transactions were not in any way connected with the winding up of the old firm. In this case again, it is not even averred that the creditors either in fact believed or had reason for believing that Gokuldoss bought the goods and gave the hundis for any purpose connected with the winding up. Then Messrs. Kusaldoss and Sons filed against Gokuldoss and others a suit in this Court, C. S. No. 433 of 1923, to recover the amount due on the hundis and obtained a decree. When execution was threatened Gkkuldoss offered to give security. An order was made permitting him to do so and security was accordingly furnished in respect of certain properties and we are now concerned with only three of them, those set forth in the plaint in C. S. No. 691 of 1928. The evidence of Kishendoss of Messrs. Kusaldoss and Sons makes it perfectly clear that they regarded Gokuldoss not as the surviving partner but as the manager of a coparcenary. Indeed,

(16) [1912] 34 All. 296=14 I. C. 629=39 I. A. 109 (P. C.).
(17) A. I. R. 1914 P. C. 92=12 Cal. 56=41 I. A. 189 (P. C.).
(18) [1903] 25 All. 407=30 I. A. 165=3 Sar. 483 (P. C.).

each one of these claimants makes a point of the fact that Gokuldoss was throughout believed to be the managing member of a joint family including, among others the plaintiff. The remarks I have already made apply with equal force to these claimants also. I therefore, hold that the plaintiff's interest in these properties is not affected by the charge in question.

In the view I have taken it is unnecessary to consider the argument that in so far as one of the three items is concerned no valid charge was created.

I may, in conclusion observe that the right claimed by the plaintiff and which has been discussed by me, is in respect of the immovable properties mentioned in Sch. A to the plaint in C. S. No. 622 of 1923. These had been acquired previous to the dissolution and were, therefore, the property of the old firm. There are certain other properties mentioned in Sch. B which the plaintiff admits were acquired subsequent to the dissolution. No evidence has been adduced before me as to how they were acquired. The case was opened with the statement by Mr. Duraiswami Aiyar, that his client did not propose to claim any right of priority over secured creditors in any of those items and that he, therefore, would not advance any argument regarding them. But towards the close of the case the learned counsel intimated that he did not wish to formally abandon his claim as he would like to have liberty to argue as a question of law before any appellate tribunal, that his client would have some right as against secured creditors in those items. I merely make a note at his request of what is stated to me.

The case is referred to the Official Referee for the taking of an account on the basis of the two judgments I have delivered (the preliminary judgment and the present judgment).

The question of costs including the costs of the Official Assignee deferred, pending the receipt of the report from the Official Referee.

There is a further issue which has been reserved—one that is common to the main suit C. S. No. 622 of 1923 and several suits filed by certain creditors. Though some evidence was incidentally directed to this point at the main trial I understand that the parties were under the impression that this issue was not then being tried. It is alleged that in 1919 there was a partition which had the effect of separating Dwarkadoss and his minor son, Ramdas, from Gokuldoss. This plea led to the following issue being raised in C. S. No. 622 of 1923:

"Did defendant 3 and his father become divided in status in 1919 from the other members of the family and is defendant 3 liable thereafter for any of the obligations of the Murali Doss Ram Doss and Company or Madras Import Company, or for any of the other reliefs claimed against defendant 2"?

(After discussing evidence on this issue his Lordship held that there was no definite and decisive intention to divide and proceeded). If my finding that there was no definite and decisive intention to divide is wrong, then the conclusion is inevitable that the brothers immediately on partition, the very next moment, became either reunited or entered into a fresh partnership. In either case, the minor's liability cannot be disputed.

Before concluding I would like to mention that I was led to suspect at the last stages of the hearing, that the fact that the minor's guardian ad litem happens to be a Bench Clerk of this Court gave to rise to some dissatisfaction. I understand that he was appointed guardian by the order of the Deputy Registrar made more than six years ago when he was practising at the Bar. No objection has since been taken to his continuing to hold the office. To place the matter beyond doubt, I asked Sir C. P. Ramaswami Ayyar if there was any desire that he should be removed from his office or whether his conduct was open to question. I am glad to say, he assured me, that there was no ground for complaint. I may note that when I delivered judgment on the principal issue in the case, I provided by consent for the guardian's fee although as it now transpires, his part of the case had not been gone into then.

By consent the plaintiff and the Official Assignee shall get their costs of this suit and in proceedings therein subsequent to my judgment dated 2nd May 1928, up to date. Certified for two counsel on both sides. The question whether these costs shall come from Sch. "A" or Sch. "B" properties is

reserved. The receiver will, for the present, pay Rs. 3,000 to the plaintiff and Rs. 3,000 to the Official Assignee towards these costs. If on taxation it is found that either party has received more than he is entitled to he shall bring the excess into Court.

P.R.S./V.S. *Order accordingly.*

A. I. R. 1930 Madras 405

WALLACE AND TIRUVENKATACHARIAR, JJ.

Sivaswami Iyer — Plaintiff — Appellant.

v.

Thirumudi Chettiar and *others*—Defendants—Respondents.

Letters Patent Appeal No. 106 of 1926, Decided on 3rd September 1928, against judgment of Odgers, J., in Second Appeal No. 401 of 1922, reported in *A. I. R.* 1925 *Mad.* 1057.

(a) Will—Construction—Absolute dedication to charity—Legatee held incompetent to alienate property except for necessary purposes of trust.

A Hindu, after having disposed of his nanja and punja lands, made the following provision as regards his remaining immovable properties and sums of money viz.: "The remaining properties my sister's son *V* enjoying permanently (Saswathai Anubhavithukondu) shall with the income of the said lands and the interest derivable from the capital amount of Rs. 584 kept by me for that purpose feed in his own house at Mayavaram every Dwadashi day according to his pleasure not less than ten Brahmins. With the income and the interest on Rs. 200 I have reserved with the said *V*, Archana should be done and offerings presented to Srimath Saba Nayagar of Chidambaram at Pradhosha times and Archana with Kunkumam is to be performed every Friday for Sivakama Sundari. All these things the said *V* himself shall conduct permanently (Saswathai nadathivandu) and after him his younger brother *S* shall conduct and afterwards their heirs should conduct them."

Held; that on a proper construction of the will the entire income of the lands was dedicated to the trust and that *V.*, *S.*, and their successors were constituted only as trustees for the conduct of the charities.

Held also: that, the gift of the entire income being devoted to charity amounted to the gift of the corpus itself; it was not, therefore, competent to *V* to alienate the property except for the necessary purposes of trust. [P 409 C 1]

(b) Hindu Law—Religious endowment—Alienation not justified by real necessity is void—In case of public trust, trustee who alienates can bring suit for recovery of property.

A trustee of a religious or charitable trust has no power to make any alienation of trust property except where it is rendered necessary in the interests of trust and any alienation which is not justified by real necessity or by reasonably accredited necessity for the purposes of the trust is void and in the case of public trusts, religious or charitable, even the trustee who alienates can bring a suit for the recovery of the property and he is not personally estopped from doing so. [P 409 C 2]

(c) Trusts Act, S. 64—S. 64 does not apply to public trusts—Simple mortgagee cannot take advantage of S. 64.

Section 64 does not apply to public or private religious or charitable trusts. The protection afforded by the section is not available to a transferee under a simple mortgage on which possession does not pass to the transferee. A judgment-creditor of the trustee who purchases trust property in Court auction is not entitled to the benefit of the section. [P 409 C 2, P 410 C 1]

(d) Right of suit—Subsequent events—Maintainability is to be determined not from subsequent events.

The question whether a suit as framed is maintainable has to be judged with reference to the circumstances as they existed at the date of the plaint. [P 410 C 1]

K. Bhashyam Ayyangar—for Appellant.

C. A. Seshagiri Sastri—for Respondents.

Judgment.—This appeal is preferred against the judgment of Odgers, J. dismissing with costs Second Appeal No. 401 of 1922. The plaintiff is the appellant before us and the main question involved in this appeal is whether the suit properties which originally belonged to one Panchanathier were by his will dated 8th January 1928 (Ex. A in the case) dedicated absolutely for the performance of a charity styled by him as Dwadashi Dharmam and the persons expressly nominated by him in the will for the conduct of the said charity, viz., his nephews Venkataramaiyer and Sivaswami were constituted as mere trustees for the performance of the said charity or whether under the said will Panchanathier bequeathed the suit properties to Venkataramaiyer personally subject to a trust in favour of the said charity which was to be conducted by him, and after his death by his younger brother Sivaswami Iyer and after the latter's death by their heirs in perpetuity.

The plaintiff's case is that the properties are absolutely dedicated to the charity and that Venkataramaiyer had no beneficial interest therein but was constituted only as a trustee for the performance of the charity with a wide discretion as to the manner of performing it and that after Venkataramaiyer's death, he, the plaintiff is the trustee

for conducting the said charity. Venkataramaiyer, however, in breach of the trust mortgaged the suit properties to Sadayappa Chetti the father of defendants 1 to 3 under Ex. B. After the death of Sadayappa Chetti and Venkataramaiyer, defendants 1 to 3 brought a suit against Venkataramaiyer's widow to enforce the said mortgage and obtained a decree for the sale of the said properties. The present suit was instituted by the plaintiff before the properties were sold in execution of the mortgage decree, the reliefs sought by the plaintiff being a declaration in his favour as trustee of the charity that the mortgage of the suit properties by Venkataramaiyer and the decree obtained thereon are not binding on the trust and for an injunction to restrain the defendants from interfering with the possession of the property. While the suit was pending in the trial Court, defendants 1 to 3 purchased the suit properties in the sale held in execution of their decree and got into possession thereof. Defendant 4 is the widow of Venkataramaiyer. She has been ex parte throughout.

The main pleas of defendants 1 to 3 are: (1) denial of the genuineness of Panchanathier's will; (2) suit barred by limitation as it was not brought within 12 years from the date of the mortgage to their father. No plea was raised by them in the alternative that even if the will is found to be genuine, the devise of the suit property therein is not to the charity absolutely but to Venkataramaiyer burdened with a trust in favour of the charity. The trial Court held that the will is genuine and that under it the suit properties are dedicated in trust for the charity. It overruled the plea of limitation. At the trial a further point was raised by the defendants that as they themselves had then got into possession of the properties, the suit for a bare declaration and injunction was not maintainable. With reference to that objection the plaintiff prayed for an amendment of the plaint by adding a prayer for possession but the District Munsiff rejected that application. He, however, held that the suit was maintainable in the form in which it was brought as on the date of the plaint the defendants were not in possession. In that view he gave a decree for plaintiff for the declaration and injunction prayed for.

Against that decree defendants 1 to 3 preferred an appeal which was heard by the Subordinate Judge of Mayavaram. The learned Subordinate Judge affirmed the finding of the District Munsiff as to the genuineness of the will. He further held that the suit was barred by limitation under Art. 134, Lim. Act, as it was not brought within 12 years from the date of the mortgage. He then allowed a further question to be raised, viz., whether on the construction of the will the devise of the lands was in trust for the charity or to Venkataramaiyer personally burdened with an obligation to perform the charity, and he held that the lands were not given in trust for the charity but that they were given to Venkataramaiyer for his own enjoyment with a burden of obligation to conduct the charity with the income thereof. As regards the objection taken to the maintainability of the suit he held that as the suit in its inception was rightly framed, it was maintainable. On this point, however, we find that the Subordinate Judge in another place in his judgment expresses the opposite opinion. He says:

> "Therefore, though the suit was properly laid with a consequential relief on the date of suit, yet, it was not a suit which could be maintained on the date of the trial as it was then only a suit for a bare declaration without a prayer for possession and without any consequential relief."

The Sub-Judge also observes that the District Munsiff was wrong in rejecting the plaintiff's petition for amendment of the plaint by adding a prayer for possession. Upon those findings the Sub-Judge holds that Venkataramaiyer had the right to alienate the properties and that the only right which the plaintiff has is to see that the charity is duly performed and that the persons in possession of the properties whoever they may be should contribute for the same out of the income of the properties. By his decree, however, he dismissed the suit with costs. Against the Subordinate Judge's decree the plaintiff appealed to this Court in Second Appeal No. 401 of 1922, which came on for hearing before Odgers, J. The learned Judge has dealt with only two questions in his judgment as sufficient for the disposal of appeal and they are: (1) limitation and (2) the

construction and effect of the will. On the first question he observes that the defendants gave up their contention that the suit was barred by limitation. On the second question he agreed with the Subordinate Judge's construction of the will that the properties were not dedicated absolutely to the charity, but were given to Venkataramaiyer personally burdened with the obligation to conduct the charity. In that view no further question arose and the appeal was dismissed with costs.

On behalf of the appellant it is contended that the construction put upon the will by the learned Judge and the Subordinate Judge is erroneous and that on its right contruction the suit properties are dedicated to the charity, that Venkataramaiyer has no beneficial interest therein and that the plaintiff is entitled to a decree as prayed for. The appellant also contends that the amendment of the plaint by adding a prayer for possession should be allowed and a decree for possession given to him in this suit.

The respondent's advocate supports the decree appealed from not only on the ground taken by the learned Judge but also on a further ground, viz., that the mortgagee, their father, was a bona fide transferee of the suit properties in good faith and for consideration and that as such he acquired a valid title thereto which in any view of the construction of the will would prevail against the trust.

The main question we have to consider relates to the construction of the will whether, according to its terms, there is an absolute dedication of the suit properties to the charity or whether the suit properties were given to Venkataramaiyer in perpetuity subject to a charge in favour of the charity. Under the will the testator purports to deal with his self-acquired immovable properties consisting of nanja and punja lands of the total extent of 16 mahs and 77 kulis and also with certain sums of money belonging to him. Out of the immovable properties he gives 9 mahs 42 kulis to his adopted son. As regards the remaining immovable properties and the sums of money the will provides as follows:

> "Barring those (lands given to the adopted son) the remaining 7 mahs and 35 kulis my sister's son Venkataramaiyer enjoying permanently (saswathai anubhav ithukondu) shall with the income of the said lands and the interest derivable from the capital amount of Rs. 584 kept by me for that purpose feed in his own house at Mayavaram every Dwadashi day according to his pleasure not less than ten Brahmins. With the income and the interest on Rs. 200 I have reserved with the said Venkataramaiyer Archana should be done and offerings presnted to Srimath Sabanayagar of Chidambaram at Pradosha times and Archana with Kankuman is to be performed every Friday for Sivakamasundari. All these things the said Venkataramaiyer himself shall conduct permanently (saswathai nadathivandu), and after him his younger brother Sivaswami shall conduct and afterwards their heirs should conduct them."

It will be seen that so far as the provisions of the will go, the income of the properties is to be devoted entirely to the charitable and religious purposes mentioned therein. The Rs. 584 the income of which is to be utilized for the Dwadashi Dharmam consists of two decree amounts and three simple loans which were outstanding and which Venkataramaiyer would have to realise for the purpose ofconducting the charity. Both the charity and tbe Archanas at the temple are to be performed for ever. As regards the persons who are to see to the performance of the said charity and the Archanas, the will says that they should be conducted by Venkataramaiyer himself permanently during his lifetime and after him by his younger brother Sivasami and after the latter's death by their heirs at law: and it is also quite clear that the persons who have successively to conduct the charlties have to do so with the income and the funds provided therefor, viz., in the case of Dwadashi Dharmam the income from 7 mahs and 35 kulis and the interest derived from the funds of Rs. 584 and as regards Archana from the income of the Rs. 200 kept with Venkataramaiyer. As regards the manner of conducting the charity, the will leaves a large amount of discretion to Venkataramaiyer who may conduct it in his own house at Mayavaram; but he should feed not less than 10 Brahmins every Dwadashi day. As regards his successors there is no similar provision. They are merely required to conduct the charity out of the lands and the fund of Rs. 584. Nor is there any provision in their case as to their permanently enjoying or permanently conducting the charities as there is in the case of .Venkatarama-

iyer. It is, however, quite clear that Venkataramaiyer's permanent enjoyment of the land (whatever that may mean) is subject to, firstly, his feeding not less than ten Brahmins every Dwadashi day and, secondly to the corpus of the charity funds, i. e., both the lands and the money passing intact to his successors who have to conduct the charity. If the testator's intention was (as, in our opinion, the will clearly shows) that after Venkataramaiyer's lifetime the entire income from the lands and the fund of Rs. 584 are to be devoted to the charity, is there anything in the will to indicate a different intention on the part of the testator as to the disposal of the income from the land during Venkataramaiyer's lifetime.

It is argued that as the will says that he is to enjoy permanently (saswathai anubhavithukondu) the testator intended to benefit him also personally and the benefit intended is not only to enure during his lifetime but permanently. As the learned Judge puts it he is to have an estate in fee simple though subject to the trust created in favour of the charity. In that view the property will descend to the personal heirs of Venkataramaiyer and will also be alienable but in the hands of the heirs of alienees it will be subject to the trust. In other words those who own the property for the time being will be bound to make over to the person who has to conduct the charity according to the will, the amount which may be required for it. This construction seems to us to be unwarranted. It rests chiefly on the expression "Venkataramaiyer shall permanently enjoy." But the tamil word (saswathai) is also used later on with reference to Venkataramaiyer himself conducting the charity and it must be taken that the testator used the word in the same sense in both the places. In our opinion both those provisions relate only to the lifetime of Venkataramaiyer.

In this view even if the construction were possible that some beneficial interest was intended in the property for Venkataramaiyer it will enure only during his lifetime. After his death the duty of conducting the charity is cast upon his younger brother Sivaswami and after him upon his successors as provided in the will. For the due performance of that duty Sivaswami and his successors in the office of trustee must be in possession of the income from the properties devoted to the trust as it is with those incomes the charity is to be conducted. The view that Venkataramaiyer is to have some beneficial interest in the property is based on the provision in the will that he should feed not less than ten Brahmins according to his pleasure. It is argued from this that during some years there may be a surplus which he may utilize for himself and, therefore, the testator intended to benefit him also personally, but it may also happen that during some years the income of the property may not be sufficient to feed even ten Brahmins every Dwadashi day. But all the same the testator enjoins that not less than ten Brahmins should be fed every Dwadashi day. The properties are after all comparatively small about 2 acres of wet and dry lands in the Mayavaram Taluk and a fund of Rs. 584 which had yet to be realized from the debtors. If the testator had limited the number of persons to be fed there may be some plausibility in the view taken. But instead of that he says that no less than ten Brahmins should be fed which indicates that the feeding of the Brahmins as far as the income will permit was his chief concern.

The view taken by the learned Judge and the Sub-Judge involves the further anomaly that the property is to be held by Venkataramaiyer's heirs or alienees but they were bound to make over the income thereof to Sivaswami and the other persons who are to conduct the charities and who if they liked could devote the whole of its income to charity, if indeed they are not bound to do so. The ownership of the property is under those circumstances reduced to nothing and such an owner cannot be expected to take any real interest in the management in the property the income of which he is to hold subject to the control of another. In our opinion a construction which leads to such a result can hardly be attributed to the testator. The main object of the testator is to provide permanently for the conduct of the charity and Archanas which he founded for his own spiritual welfare which purpose cannot be secured unless the properties he had set apart for the trust remained intact. That the

testator's only object was to provide for the permanent conduct of the charity is made clear from the recitals in the schedule which, however, were not referred to during the arguments. There he classifies the properties as follows: (1) Properties given to his adopted son, (2) details as to the fund of Rs. 584 kept for the aforesaid Dwadashi Dharmam (3) particulars as to the remaining lands (after deducting those given to the adopted son) which Venkataramaiyer is to enjoy permanently for the purpose of conducting the aforesaid Dwadashi Dharmam. This recital clearly shows that the sole object of the permanent transfer to Venkataramaiyer was for the conduct of the charity and for nothing else. Looking at the provisions of the will as a whole we are of opinion that the entire income of the lands is dedicated to the trust and that Venkataramaiyer, Sivaswami and their successors were constituted only as trustees for the conduct of the charities and that the provisions relating to Venkataramaiyer only show that during his lifetime he should alone conduct the charities and he should not be held accountable so long as he continued to feed not less than 10 Brahmins every Dwadashi day. The gift of the entire income being devoted to charity amounts, in our opinion to the gift of the corpus itself to the charity and Venkataramaiyer was only in the position of a trustee for the charity. It was not, therefore, competent to Venkataramaiyer to alienate the property except for the necessary purpose of the trust but such contingency can hardly arise in this case because, it is only out of the income of the property the charity is to be conducted and the corpus need not, therefore, be alienated at all. It, therefore, follows that neither the mortgage of the property by Venkataramaiyer under Ex. B. in favour of the father of defendants 1 to 3 nor the decree obtained by defendants 1 to 3 on the mortgage nor the purchase of that property in execution of that decree can affect the rights of the plaintiff as trustee for the charity.

The respondents' advocate, however, sought to support the decree on another ground, viz., that the mortgagee was a bona fide purchaser of the property without notice of the trust and, therefore, the alienation in his favour cannot be impeached. This also is a question which was not raised in the trial Court. In the lower appellate Court, however, these defendants raised the plea of limitation and in support of that plea they relied upon the said allegation. The plea of limitation was given up before the learned Judge of this Court. Now before us it is contended that the Subordinate Judge has found that the father of these defendants had been duped by Venkataramaiyer into believing that it was his private property and that he bona fide believing the same took the mortgage for consideration.

The contention thus advanced is, in our opinion, no less startling than untenable. If it is sound the only result will be that no public trust is safe because all that a fraudulent trustee has to do is to convey it to somebody else who is foolish enough to believe what the fraudulent trustee says, viz., that the property conveyed is his personal property and does not make any inquiries. In this case the mortgage in favour of the father of defendants 1 to 3 was a simple mortgage executed in 1903 and if the mortgagee had taken the ordinary precaution which every purchaser is expected to make of requiring the vendor to procure an encumbrance certificate he would have become aware of the trust created by the will in 1898. A trustee of a religious or charitable trust has no power to make any alienation of trust property except where it is rendered necessary in the interests of trust and any alienation which is not justified by real necessity or by reasonably accredited necessity for the purposes of the trust is void and the decisions have gone to this extent, viz., that in the case of public trusts, religious or charitable even the trustee who alienates can bring a suit for the recovery of the property and he is not personally estopped from doing so: see Mr. Ganapathy Iyer's Hindu and Mahomedan Endowments, 2nd Edn. p. 532 and foot-note (7) where all authorities are collected. The respondents' advocate relies on S. 64, Trusts Act, in support of the contention but in the first place the Act does not apply to public or private religious or charitable trusts, secondly, even if the rule embodied in that section can be

applied by way of analogy to religious or charitable trusts, the protection afforded by the section is only with reference to property in the hands, i. e., in the possession) of the alience and not to a transfer by way of simple mortgage as in the case before us, the transferee. Further according to the terms of the section itself, a judgment-creditor of the trustee who purchases trust property in Court auction is not entitled to the benefit of the section. We have, therefore, no hesitation in overruling this contention as altogether untenable.

The next question we have to consider is what is the decree to be passed in this case. Defendants 1 to 3 are now in possession of the suit properties though they were not in possession at the date of the suit. The plaintiff's application for the amendment of the plaint should have been allowed by the trial Judge and not dismissed and the lower appellate Court has taken a correct view on that point. The question whether the suit as framed is maintainable has to be judged with reference to the circumstances as they existed at the date of the plaint and the plaintiff's suit cannot, therefore, be dismissed as it has been done by the lower appellate Court whose decree has been affirmed in second appeal No. 401 of 1922.

We set aside the decree of this Court and of the lower appellate Court and remit the case to the Court of first instance with the direction that the plaintiff should be permitted to amend the plaint by adding a prayer for possession of the suit properties and paying the court-fees thereon within a fortnight after the receipt of this order by the Court of first instance and on such amendment, being made the decree of that Court will be modified by awarding to the plaintiff possession of the suit properties. We award to the appellant his costs in this Court and in the lower appellate Court to be paid by the contesting respondents (defendants 1 to 3).

P.R.S./V.S. *Appeal allowed.*

A. I. R. 1930 Madras 410

CURGENVEN, J.

Muthu Vaithilinga Mudaliar—Defendant—Appellant.

v.

Subbaraya Chettiar—Plaintiff—Respondent.

Appeal No. 181 of 1928, Decided on 23rd September 1929. from appellate order of Dist. Judge, East Tanjore, D/- 25th October 1928, in Appeal Suit No. 13 of 1928.

Civil P. C., O. 21, R. 2 — "Adjustment" means settlement presently extinguishing debts and not agreement to extinguish.

An adjustment in order to be within the meaning of O. 21, R 2 must be settlement which extinguishes the decree debt and not one which if carried into effect will extinguish it: *A. I. R.* 1922 *All.* 13 ; *A. I. R.* 1927 *Lah.* 537; *A. I.R.* 1930 *Lah.* 231: 43 *I. C.* 537 and (1915) *M.W.N.* 225, *Rel. on. A. I. R.* 1926 *Mad.* 184, *Dist.*

[P 411 C 2]

B. Sitarama Rao—for Appellant.

T. V. Muthukrishna Iyer—for Respondent.

Judgment.—The question arising in this case is whether the word 'adjustment' in O. 21, R. 2, Civil P.C., embraces an agreement to discharge the decree which the parties have still to carry out. The respondent had obtained a mortgage decree and the mortgaged property had been sold under it. While the sale was awaiting confirmation, the appellant here, who was the judgment-debtor, having filed a petition under O. 21, R. 90, the parties put in a joint statement to the effect that a compromise was impending and a few days later the appellant filed another petition in which he alleged that the respondent had agreed to an arrangement whereby the auctioned property should be conveyed to him for a sum of Rs. 2,600 on condition that he should reconvey it in one year at the price of Rs. 2,750, and that the further balance due under the decree debt should be discharged by the sale of other property by the judgment-debtor to a third person who was to give a promissory note for Rs. 900 to the decree-holder. When notice was issued to the latter, he stated that the compromise had fallen through and resisted the adjustment of the decree on the footing of this alleged agreement. Both the lower Courts have come to the conclusion that an agreement of this nature, even if true, will not amount to an 'adjustment' and I think upon the authorities cited to me

that this view is correct. A closely similar case was dealt with in *Lachman Das* v. *Ramnath Kalikamliwala* (1) in which Piggott, J , observed:

"It seems to me fairly clear that an oral agreement, not as yet performed by either party could not successfully be set up so as to prevent a decree-holder from proceeding with the execution of his decree. On the facts stated in the judgment-debtor's own petition, the decree-holder had not bound himself by anything more than an oral agreement; whether it was or was not open to him to reconsider his position, whether he was not justified in doing so by facts ascertained by him subsequently to the date of the alleged oral agreement, these and other similar questions might arise, if this were a suit for specific performance of the alleged oral agreement of 3rd July 1920, or a claim for damages against the decree-holder for having refused to abide by that agreement."

That I think is a consideration which should weigh, namely that the executing Court would be compelled to try issues which would properly arise in a suit for specific performance of a contract. Walsh, J., who concurred with Piggott,J , expresses the principle in a formula which has been adopted in some other of the cases.

"An inchoate contract, which if completed if completed would bar execution of a decree, cannot be pleaded as a bar to execution under O. 21, R. 2 and the judgment-debtor cannot claim that the contract should be completed and then be invoked in bar of execution."

Besides two cases from Lahore decided by single Judges, *Karam Chand Madan and Sons* v. *Dunlop Rubber Co. Ltd.* (1) *A. I. R.* 1927 *Lah.* 537 and *Maiadat Swami* v. *Ram Sarup* (2), where the Allahabad case was followed, we have a Madras case .*Ramakrishna Kadiriveluswami Naicker* v. *Eastern Development Corporation, Ltd.* (3). It is doubtful from the report in that case how far the agreement to compromise had actually gone, but I think there is no doubt that the learned Judges acted upon the principle that so long as it remains executory and has not been fully executed, it cannot amount to an adjustment under O. 21, R. 2; for they say that whatever may be the appellant's rights to claim specific performance and other remedies in a suit they cannot avail him in execution. A judgment of Wallace, J., in *Venkataswami* v. *Kotilingam* (4), has been cited as adopting the contrary view. It is true that it contains some observations which encourage this opinion, as for instance, where on p. 733, the learned Judge says:

"The agreement is an adjustment of the debt due, though it cannot be enforced unless certified and payment in terms of the adjustment will be under the terms of its full satisfaction for the debt."

And again

"An adjustment is clearly not the same thing as satisfaction."

It was a case where the judgment-debtor entered into a composition with a number of creditors and the question was whether the composition amounted to an adjustment where the creditor was a decree-holder. It is, however, to be observed that not only had the composition been entered into but the actual money had been paid under it so that it was not really a case of an executory contract at all. This is made clear by a closing passage in the judgment, where the learned Judge observes,

"In this case I think it is clear that the decree-holder agreed under a mutual composition scheme to accept payment of 80 per cent of his debt in full satisfaction of his debt, if paid within a reasonable time ; and the money was paid within a reasonable time. This, therefore was an adjustment of the debt tantamount to full satisfaction of the decree."

In the other Madras case cited for the appellant *Lodd Govindoss* v. *Ramdoss* (5) it is again impossible to ascertain what the precise facts were, but all that is laid down is that a transaction which extinguishes a decree is an adjustment under O. 21, R. 2. That would apply as well to an executed contract as to an agreement still to be executed. I think from these decisions that it is clear that an adjustment must be settlement which extinguishes the decree debt and not one which if carried into effect will extinguish it. To hold to the contrary would put the decree-holder in a very unfortunate position if satisfaction is recorded and the judgment-debtor then resiles from the agreement he had entered into. I consider that the view taken by the lower Courts is correct and I dismiss this Civil Miscellanous Second Appeal with costs.

P.R.S./V.B. *Appeal dismissed.*

(1) A. I. R. 1922 All. 13=44 All. 258.
(2) A. I. R. 1930 Lah. 231.
(3) [1918] 43 I. C. 537.
(4) A. I. R. 1926 Mad. 184.
(5) [1915] M. W. N. 225=28 I. C. 376=17 M. L. T. 222.

A. I. R. 1930 Madras 412

KUMARASWAMI SASTRI AND REILLY, JJ.

(*Garapati*) *Bulliraju* and *others*—Appellants.

v.

(*Garapati*) *Butchi Seetayyamma* and *others*—Respondents.

Appeal Suit No. 468 of 1923, Decided on 3rd February 1928, from decree of Sub-Judge, Cocanada, D/- 21st August 1927, in Original Suit No. 43 of 1922.

Hindu Law — Reversioner — Next reversioner colluding and prejudicing the reversion—Next presumptive reversioner can sue.

Where the next reversioners filed a suit challenging genuineness of a will left by the last male owner, and under which his widow got absolute rights, but withdrew the suit later on unconditionally on receipt of a consideration and thus precluded themselves from suing by their fraudulent or collusive conduct thereby prejudicing the reversion, it was open to the next succeeding reversioner to file a suit to establish their rights: 33 *M. L. J.* 471; 6 *Cal.*764 (*P.C.*) and 18 *Mad.*53, *Foll.* [P 413 C 1]

S. Swaminathan—for Appellants.

A. Krishnaswamy Ayyar—for Respondents.

Kumaraswami Sastri, J. — The plaintiffs are the appellants. Defendant 1 is the widow of one Subbarayudu who died on 21st March 1919 leaving a will which is alleged to have been executed on 10th March 1919. It is conceded that this will gave the widow absolute rights. The next reversioners filed O. S. No. 50 of 1920, for a declaration that the will which was set up by the widow, defendant 1, was a forgery. The suit was filed on 19th November 1920. Ex. B is the proceedings in that suit and it appears from the diary of the proceedings that the suit was on 25th July 1922 withdrawn by the plaintiffs unconditionally, each party bearing his own costs. It appears also that from 3rd March there was a talk of compromise. We find from the diary that some adjustment was hoped for on 3rd March. Then on 29th April we find an entry "A compromise is hoped for. On request the suit is allowed to stand over to 10th July 1922." Then there is a note on 10th July, "as some time is requested for settlement, it is adjourned to 25th July," and on the 25th the note is:

"the plaintiffs withdraw the suit. Defendant 2 signed the petition. The pleader for defendants 1 and 2 do not press for costs. The suit is dismissed without costs."

The compromise petition Ex. 1 runs as follows:

"Now that, subsequently, to the suit, we learn that the said will of the late Subbarayudu is just, genuine and one executed when he was in a state of sound sense and as such it is enforceable in every respect we hereby withdraw the said suit (para. 2)."

This is a statement which really admits the will to be genuine, valid and enforceable so that the plaintiff gave up the whole of their case as set up in their plaint. The present plaintiffs are the next presumptive reversioners who have filed this suit for a declaration that the will is not genuine. They state that they are entitled to sue as the next immediate reversioners defendants 2 to 6 who by receipt of money from defendant 1 admitted the genuineness of the will and withdrew the suit, precluded themselves from disputing the genuineness by their conduct. Various issues were raised, but the Subordinate Judge dismissed the suit on the ground that the plaintiffs are not entitled to sue.

As regards the case of the plaintiffs that the compromise in the previous suit was brought about by receipt of money, the Judge on the evidence finds that money was paid for the suit being compromised. The evidence as regards payment is that of witnesses P. Ws. 1 and 2, 3 and 4. Their evidence is corroborated by Ex. A series which contain endorsements of payment made on 25th, 26th and 27th July, the compromise being on 25th July 1922. The Subordinate Judge accepts their evidence and finds that there must have been consideration paid for the withdrawal of O. S. No. 50 of 1920 by the plaintiff in that suit. This evidence is attacked by the respondent, but we are unable on the evidence to come to a different conclusion having regard to the probabilities of the case, the date of the compromise and the dates on which the money was paid—it was paid on the date of the compromise and on the two succeeding days—and also to the fact that the plaintiffs who filed that suit and went on with the proceedings for nearly two years suddenly stated that they had no case at all and that the will was genuine. We find, therefore, in this case that the next reversioners who filed the previous suit to declare the will invalid compromised

the suit by receiving consideration. There is no evidence worth the name to show that there was any arbitration or any meeting of the pleaders or the persons interested, that the pros and cons were discussed and that it was really the withdrawal of a hopeless case for the purpose of avoiding the costs of litigation.

On these facts we find it difficult to hold that the present plaintiffs are precluded from filing the present suit. There can be little doubt that the will materially prejudices the interests of the reversioners as it really cuts off the reversion and the widow can do what she likes with the property. It has been held in *Ramalinga Mudali* v. *Arumugha Mudali* (1), that the withdrawal of the suit by the next reversioner without a trial on the merits gives a right to the next presumptive reversioners to file a suit. It is clear from *Rani Anand Koer* v. *The Court of Wards* (2) and *Gurulingaswami* v. *Ramalakshmama* (3), that where the next reversioners have precluded themselves from suing by their fraudulent or collusive conduct thereby prejudicing the reversion it is open to the next succeeding reversioners to file a suit to establish their rights. It is difficult to conceive of a case in which their rights are not prejudiced when the next reversioners file a suit and unconditionally withdraw it admitting in their petition the genuineness of the transaction which they had been impeaching all alone. It is clear evidence of fraud where they received money for themselves for such withdrawal. I think that the judgment of the Subordinate Judge cannot be supported. The suit was wrongly dismissed on the preliminary point that the plaintiffs were not entitled to institute this suit. .The decree of the Subordinate Judge will be reversed and the case remanded for disposal on the merits. Respondent 1 will pay the costs of the appeal. Costs of suit will abide and follow the result. The stamp duty will be refunded.

Reilly, J.—I agree.

P.R.S./D.D. *Case remanded.*

(1) [1917] 33 M.L.J. 471=42 I.C. 512.
(2) [1891] 6 Cal. 764=8 I. A. 14=4 Sar. 195 (P.C.).
(3) [1895] 18 Mad. 53=4 M.L.J. 237.

A. I. R. 1930 Madras 413

RAMESAM, J.

A. V. Subba Rao—Petitioner.

Civil Revn. Petn. No. 899 of 1929, Decided on 17th September 1929, against order of Dist. Judge, Ganjam, D/- 17th January 1929.

(a) Legal Practitioner—Fees—Vakil may otherwise adjust than by actual payment—Promissory note executed for fee is equivalent to payment—In such case certificate may not be dishonest.

There may be cases in which the fee due to a vakil may be otherwise adjusted though no actual money has passed. Such an adjustment, however, should be something more than a mere agreement to pay. For instance when a promissory note, especially a negotiable instrument is given, it may be equivalent to payment. In such a case a certificate may not be really dishonest even if no fee was received and it may be too strong an expression to describe such a certificate as a false certificate. [P 413 C 2]

(b) Madras Civil Rules of Practice—(Quaere).

Quaere.—It is doubtful if note (ii) to R. 30 in Legal Practitioners Rules is strictly correct. [P 413 C 2]

T. R. Venkatarama Sastri and *B. V. Viswanatha Aiyar*—for Petitioner.

Advocate-General—Amicus Curiæ.

Order.—There may be cases, in which the fee due to a vakil may be otherwise adjusted, by which I mean an adjustment amounting to more than a mere agreement to pay, though no actual money has passed. In such cases the fee certificate cannot be said to be false. When a promissory note, especially a negotiable instrument, is given it may be equivalent to payment, and I doubt if note (ii) to R. 30 in Legal Practitioners' Rules is strictly correct. But, as a matter of policy, the object of the rule seems to discourage the taking of promissory notes by advocates.

The cases above-mentioned show that a certificate may not be really dishonest even if no fee was received. In such cases it may be too strong an expression to describe the certificates as "false certificates."

In the present case, the Judge himself says 'no personal criticizm was intended.' I take this to be an expression of the Judge's opinion that the advocate was an esteemable person and is incapable of improper conduct. The later remarks merely show that the advocate might have been misled by the practice or otherwise.

I do not think any order is necessary in the matter.

P.R.S./V.S. *No order passed.*

A. I. R. 1930 Madras 414

PANDALAI, J.

(*Brahm*) *Seshayya* —Judgment-debtor—Appellant.

v.

(*Grandhi*) *Sattiraju*—Decree-holder—Respondent.

Appeal No. 52 of 1926 and Civil Revn. Petn. No. 949 of 1926, Decided on 30th April 1929, from appellate order of Sub-Judge, Cocanada, in Appeal Suit No. 128 of 1925.

(a) Civil P. C., S. 47—Objection regarding defect of attachment comes within S. 47.

Objection as to the defect or absence of necessary attachment of the property sold in execution comes within the provisions of S. 47: *A. I. R.* 1924 *Rang.* 124, *Rel. on.* [P 415 C 1]

(b) Evidence Act, S. 115—Waiver—Judgment-debtor consenting to decree-holder's holding sale at adjourned date without fresh proclamation and without raising question of want of fresh attachment and securing time for payment in consideration—He cannot be permitted to resile from his position afterwards—Civil P. C., O. 21, R. 66.

Where a judgment-debtor with full knowledge of his rights to insist upon the decree-holders to attach his property again, secures a postponement of the sale for a month, with a promise to pay the debt in that time, and agrees to decree-holder's holding the sale on that adjourned date without a fresh proclamation, in case he does not pay, and consents not to raise the question of want of fresh attachment, he cannot afterwards be permitted to resile from his position having secured an advantage to the prejudice of the decree-holder: 13 *C. L. J.* 243, *Dist.*; *A. I. R.* 1922 *Mad.* 447; (1917) *M. W. N.* 89; 24 *M.L.J.* 70; *A. I. R.* 1923 *Mad.* 211; 13 *C. L. J.* 243 and *A. I. R.* 1925 *Mad.* 1113, *Ref.*

[P 415 C 1]

(c) Civil P. C., O. 21, R. 66—Ground of want of attachment available at the time of notice of settlement of proclamation must be urged then and not reserved for later occasions—It operates otherwise as res judicata—Civil P. C., S. 11.

A party who is sought to be affected by the bar of res judicata should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contention against such a decision. [P 417 C 2]

Where a question of want of attachment is available to the judgment-debtor, the notice of settlement of proclamation gives him the opportunity of putting forward that ground, and that he must put it forward then, if he wants to do so and should not be allowed to reserve it for later occasion because if the objection succeeds it makes further execution proceedings futile: 40 *Mad.* 1016, *Foll.*; *A. I. R.* 1921 (*P. C.*) 23 and 8 *Cal.* 51, *Ref.*: *A. I. R.* 1924 *Mad.* 1 (*F. B.*), *Dist.*

[P 418 C 1]

(d) Civil P. C., O. 21, R. 57—Execution dismissed—Attachment ceases in spite of specific order that it will continue.

Where a Court dismisses an execution application the legal consequence of such dismissal is that the attachment ceases to exist in spite of an order that it should remain in force: 33 *Cal.* 482, *Foll.* [P 415 C 2]

(e) Civil P. C., O. 21, R. 64—Attachment is essential for sale.

Attachment of property is in normal execution. Procedure is an essential pre-requisite of Court sales. [P 418 C 1]

(f) Waiver—Waiver may be as to rights of parties concerned—Others' rights cannot be waived.

As a general rule parties may waive the advantages of provisions made to protect their own interest but not of those made to protect the interest of others or of the public.

[P 417 C 1]

(g) Madras High Court Civil Rules of Practice Rr. 67 and 176—If there is substantive grievance want of apt language is no impediment.

Judgment-debtor made an application asking for dismissal of decree-holder's execution application, a form of prayer which is obnoxious to Rr. 67 and 176:

Held: that if there was a real grievance to be redressed the mere fact that the application was not couched in the proper form ought not to stand in the way of redress. [P 415 C 1]

G. Lakshmanna—for Appellant.

K. Ramamurthi—for Respondent.

Judgment.—This is a second appeal by the judgment-debtor whose application E. A. 72 of 1925 dated 15th January 1925 praying that the decree-holder's execution application E. P. 543 of 1923 dated 7th December 1923 in execution of the decree in O. S. No. 676 of 1922 should be dismissed was itself dismissed by both the lower Courts. A preliminary objection to the second appeal was taken that no second appeal lies under S. 102, Civil P. C., as the decree in O. S. No. 676 of 1922 was of a small cause nature and the value of the subject-matter was less than Rs. 500. The appellant's advocate does not contest this objection which must prevail.

As he has also filed a revision petition against the order of the lower Courts I proceed to dispose of it. In substance the petitioner's (judgment-debtor's) objection in the lower Courts was that the decree-holder was proceeding to get his property brought to sale in the absence of a subsisting at-

tachment and that this irregularity should be stopped. The District Munsif did not enter into the merits of the objection but held that the form of the petitioner's-application (E. A. 72 of 1925) which in terms asked that another application E. P. 543 of 1923 should be dismissed was obnoxious to Rr. 67 and 176, Civil Rules of Practice, which forbid applications with that form of prayer. He was also of opinion that the objection did not fall within S. 47, Civil P. C., as it related only to procedure and not to the rights of the parties. On appeal the learned Subordinate Judge upheld the Munsiff's order but supported it on additional grounds, i. e., that the question of attachment or no attachment was res judicata and that the petitioner was estopped by his conduct from raising it.

As to the formal objections based on Rr. 67 and 176, Civil Rules of Practice, there is a substantive grievance raised by the petition and if it is true the fact that its redress was not sought in more apt language than that adopted, which was perfectly easy to adopt, need not stand in the way of that redress. Then as to the point that the objection was not one cognizable under S. 47, Civil P. C., it is ingenious but unsound.

What is said is that insisting on proper procedure being adopted for selling property in execution is raising a question not relating to execution, discharge or satisfaction of the decree; but only to procedure. The answer is that an objection as to the defect or absence of the necessary attachment of the property sold in execution comes within the provisions of S. 47 : *Ma Pwa* v. *Mahomed Thambi* (1).

The substantive grounds of res judicata and estoppel remain. To understand how these arise the following facts and dates are necessary. The decree was passed on 8th December 1923. In pursuance of an application for execution E. P. No. 434 of 1923 certain properties of the judgment-debtor were actually attached on 5th August 1923. In spite of this, the judgment-debtor on 10th August 1923 executed a mortgage of the attached property which would be invalid against all claims enforceable under that attachment (S. 64). On 17th September 1923 the decree-holder applied for sale of the attached properties and the matter was posted for 1st December 1923 for filing sale papers and encumbrance certificate. As those papers were not filed the Munsif on that day dismissed the application but added "attachment to be pending for two months." Under O. 21, R. 57 the Court could in such circumstances have adjourned the application if it thought that dismissal of the application was too severe a penalty for not producing the papers. But if the Court found it unable to proceed on account of the decree-holder's default and was unwilling to adjourn the matter and dismissed the application, the legal consequence was that the attachment ceased to exist, in spite of the order that it should remain in force *Namuna Bibi* v. *Rosha Miah* (2).

I cannot help thinking that the Munsif passed the order in December dismissing the application as he had to show its disposal before the end of the year but purported to keep the attachment alive for a fresh petition till next year as a kind of compensation for not adjourning the application which, if he had not been afraid of statistics, he would have done. All the subsequent disputes are due to this order. On 7th December 1923 the decree-holder applied again by E. P. 543 of 1923 for sale on the footing that the attachment was subsisting. The notice required by O. 21, R. 66 for settling the proclamation was served personally on the judgment-debtor on 11th January 1924. He did not attend at the settlement of the proclamation. An order for sale was made on 8th September 1924 fixing the sale for 17th November 1924. On that day the petitioner (judgment-debtor) appeared and filed an application (E. A. 2642 of 1924) praying for adjournment of the sale for one month undertaking to pay up the decree amount in the interval and agreeing to the sale being conducted without a fresh proclamation. The decree-holder consented to the adjournment on these terms and the sale was adjourned to 22nd December 1924. Before the latter date the mortgagee under the mortgage of 10th August 1923 filed a claim petition owing to the pendency

(1) A. I. R. 1924 Rang. 124=1 Rang. 533.

(2) [1911] 38 Cal. 482=13 C. L. J. 621=9 I. C. 558=15 C. W. N. 428.

of which the sale was not held on 22nd December 1924. The claim was dismissed and the mortgagee has filed a regular suit which is said to be pending. On 15th January 1925 the present application E. A. No. 72 of 1925 was filed by the petitioner setting out that the sale proceedings were incompetent as the attachment had ceased by the order of 1st December 1923 and that the sale should not be held without a fresh attachment.

The learned Subordinate Judge has held: (1) that the objection that there was no attachment should have been raised by the judgment-debtor in answer to the notice to settle the proclamation which was served on him and not having been so raised it must by the doctrine of constructive res judicata be deemed to have been decided against him when the order for sale was made on 8th September 1924 and (2) that in any case by his application of 17th November 1924 by which he consented in consideration of the sale being adjourned to have the sale conducted without a fresh proclamation he had waived all objections to the sale and affirmed the regularity and validity of the previous proceedings and cannot be now permitted to reprobate them. As to the state of knowledge in which the application for adjournment of sale was made by the petitioner the learned Subordinate Judge says that having regard to his conduct as could be gathered from the record both prior and subsequent to the previous execution petition it is very unlikely that he would not have become aware of the dismissal thereof and of the direction for sale in the present execution petition without fresh attachment.

The question is whether on the above facts and findings the petitioner can invoke the revisional power of this Court on the ground of want of jurisdiction, illegality or material irregularity. Taking the question of waiver first the advocate for the petitioner admitted that if the objection of want of attachment was an irregularity which the judgment-debtor could waive, he could not say that his client had not waived it. But he contended that attachment in such a fundamental requisite of Court sale that the judgment-debtor could not by his consent waive it. He admitted that if a sale is actually held and then it is found that there was no valid attachment, the absence of attachment alone is not sufficient to vitiate the sale and may be condoned: *Ma Pwa* v. *Mahomed Thambi* (1) at p. 541 (*of* 1 *Rang*); *Sheodhyan* v. *Bholanath* (3), *Kishory Mohun Roy* v. *Mahomed Mujaffar Hussain* (4), *Muthiah Chetty* v. *Palaniappa Chetty* (5), *Sivakolandai Pillai* v. *Ganapathi Ayyar* (6), *Velayuda Mooppan* v. *Subramania Chetti* (7), *Subramania Ayyar* v. *Krishna Ayyar* (8). But according to him if the absence of attachment is brought to light before the sale, then even consent of the judgment-debtor cannot cure the omission. He relies on *Sasirama Kumari* v. *Meharbhan Khan* (9). There was no question in that case of consent or waiver at all. In fact the judgment debtor consistently denied the decree-holder's contention that the attachment before judgment could survive the dismissal of the suit or could be revived by the reversal of that decree and the question was merely whether the error being brought to light before the sale, it should not be rectified by ordering a fresh attachment. That is no authority in favour of the petitioner's contention that even after affirming the proclamation proceedings by getting the sale adjourned and agreeing to the sale on the adjourned date without fresh proclamation, he can go back on that and set up the want of attachment of which according to the Sub-Judge he must have had previous knowledge. In *Kumara Goundan* v. *Thevaraya Reddi* (10), there was no sale. But as in this case a previous execution petition had been dismissed after a claim petition arising upon the attachment in pursuance of that petition was dismissed. Then another execution petition was filed in which an order was made for a fresh proclamation, though the attachment had ceased by the order dismissing the previous petition. The effect of this order is thus stated at p. 619:

"Though a fresh order in E. P. 196 of 1916 was taken without a fresh attachment and is

(3) [1899] 21 All. 311=(1899) A. W. N. 84.
(4) [1891] 18 Cal. 188.
(5) A. I. R. 1922 Mad. 447=45 Mad. 90.
(6) [1917] M. W. N. 89=37 I. C. 964.
(7) [1913] 24 M. L. J. 70=18 I. C. 458=(1913) M. W. N. 136.
(8) A. I. R. 1926 Mad. 211.
(9) [1911] 13 C. L. J. 243=9 I. C. 918.
(10) A. I. R. 1925 Mad. 1113.

final and binding between the decree-holder and judgment-debtor and cannot be questioned on account of want of attachment etc."

Attachment of property is in normal execution procedure an essential pre-requisite of Court sales—O. 21, R. 64 makes this clear. What is sold is the attached property. Where one property is attached, another property cannot be sold: *Thakur Burmha* v. *Jiban Ram Marwari* (11). Attachment is a fact from which certain important results follow which would not follow if the attachment was not actually and in fact effected: *Muthiah Chetty* v. *Palaniappa Chetty* (12). It is indisputable also that in this case the attachment which was effected on 5th August 1923 ceased by operation of law on 1st December 1923. All this, however, does not conclude the question why if absence of attachment is after a sale a mere irregularity which by itself is not sufficient to invalidate the sale, it should be before the sale more than a legal requirement which the judgment-debtor might so far as he is concerned waive. I am not concerned here with the effect of absence of attachment on other parties who have dealt in the property meanwhile with the judgment-debtor. But I can see no reason why a judgment-debtor should not himself be bound if with full knowledge of his rights he says to the decree-holder :

"I know that I have the right to insist on your attaching my property again. But I do not want that you should do so. It will only involve more trouble and delay to you and expense to me. I am prepared to pay your debt if you will agree to a postponement of this sale for a month and in consideration I agree that you may have the sale held on the adjourned date without a fresh proclamation in case I do not pay up before and I will not raise any question of want of fresh attachment."

The general rule is that parties may waive the advantage of provisions made to protect their own interest but not of those made to protect the interest of others or of the public. I am of opinion that so far as the petitioner's interests are concerned there was nothing to prevent him waiving the requirement of a fresh attachment and he having done so with knowledge of the facts and obtained an advantage to the prejudice of the decree-holder cannot now be permitted to resile from that position.

In view of the above opinion it is not necessary to go into the question whether the petitioner's objection is barred by constructive res judicata. But as it was argued I will briefly deal with it. The question on the authorities depends on whether the objection of absence of attachment was one which the petitioner should have urged in answer to the notice which was personally served on him to settle the proclamation : see *Raja of Ramnad* v. *Velusami Tevar* (13); *Mungal Prasad* v. *Girija Kant* (14). That depends on the object and purpose of settling proclamation and the kind of question which the judgment-debtor who is notified is entitled to raise at that stage and therefore should raise. In *Chidambaram Chetti* v. *Theivani Ammal* (15) it was held that the objection that the property intended to be sold belonged not to the deceased judgment-debtor but to his legal representative who had been brought on the record without notice to him was not a question which could or should have been raised at the settlement of the proclamation of which the legal representative had notice but at which he did not attend. The petitioner's contention is that the objection that there was no valid attachment is a similar objection though attachment is a necessary step before the proclamation can legally issue. In the Full Bench decision above referred to, the learned Chief Justice expressly said that the decision must be taken to be limited to the facts of that case (p. 780 of 46 *Mad.*). That decision is therefore useful only as an illustration of the general principle. That principle is stated in *Subramania Ayyar* v. *Rajeswara Sethupathi* (16) to be that the party who is sought to be affected by the bar of res judicata should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contention against such a decision. Whatever may be said about such questions as ownership of particular properties sought to be made lia-

(11) [1914] 41 Cal. 590=21 I. C. 936=41 I. A. 38 (P.C.).
(12) A. I. R. 1928 P. C. 139=51 Mad. 349=55 I. A. 256 (P.C.).
(13) A. I. R. 1921 P. C. 23=48 I. A. 45 (P.C.).
(14) [1881] 8 Cal. 51=8 I. A. 123=4 Sar. 248 (P.C.).
(15) A. I. R. 1924 Mad. 1=46 Mad. 768 (F.B.).
(16) [1917] 40 Mad. 1016=38 I. C. 627.

ble for the decree, I find it difficult to say that a question necessarily involved in making an order for sale, fixing a day for it and settling the terms of the proclamation is not the fact that the property intended to be sold had been attached, that being according to law the legal pre-requisite of sale. If therefore a question as to the attachment i.e., that no attachment subsists, is available to the judgment-debtor, it seems reasonable to hold, that the notice of settlement of the proclamation gives him the opportunity of putting it forward and that if he wishes to do so, must do so then and not reserve it to a later occasion, which course will only make further execution proceedings futile if the objection succeeds. The only consideration which makes me hesitate is the decision in *Sivagami Achi* v. *Subramania Ayyar* (17), where it was held that what takes place at the settlement of proclamation is of an administrative character and not judicial. But though the proceedings so far as they relate only to settling the terms of the proclamation such as fixing a date, or upset price, arranging the lots etc. may be administrative and this was all that was decided, that occasion may reasonably and ought in my opinion to be held to furnish an opportunity to the judgment-debtor to raise his objection, if any, to the attachment. In the absence of any direct authority on the point, I can only say that I am inclined to uphold the view of the Subordinate Judge.

The second appeal and the revision petition are dismissed with costs. Advocate fees one set.

P.R.S./P.R. *Appeal dismissed.*

(17) [1904] 27 Mad. 259=14 M. L. J. 57.

A. I. R. 1930 Madras 418

WALLACE, J.

(*Puthalath*) *Chatti Soopi* and *others*—Appellants.

v.

(*Chambatam*) *Veetil Kannan Nayar* and *others*—Respondents.

Second Appeal No. 216 of 1927, Decided on 18th March 1929, from decree of Dist. Judge, North Malabar, in Appeal Suit No. 374 of 1925.

(a) Malabar Law—Tarwad—Management can be in senior female member—Such management can be proved either by consent or general custom.

There is nothing to prevent the members of a a tarwad agreeing to or acquiescing in the management being in the senior female, and if the evidence be sufficient to establish their consent or acquiescence, there would be nothing illegal in such an arrangement. Such an arrangement can also be established by proof of general custom. [P 419 C 1,2]

(b) Malabar Compensation for Tenants Improvements Act, S. 4 (h)—Planting cocoanut trees in place of paddy without raising level is improvement, for which compensation can be claimed.

The land at the time when it was leased out was not fit for paddy cultivation and without raising the present levels the tenants substituted cocoanuts for paddy as the lie of the land was better fitted for cocoanuts than for paddy.

Held: that the planting of such cocoanuts would then be an improvement, the value of which the tenants are entitled to recover. [P 421 C 1]

A. S. Srinivasa Iyer—for Appellants.

A. Govinda Menon and *A. Achutha Menon*—for Respondents.

Judgment.—The facts necessary for the consideration of this second appeal are; plaintiffs 1 to 3 and defendants 1 to 3 are members of a Malabar tarwad. Plaintiff 1 is the senior male member, defendant 1 the senior female member and the mother of defendants 2 and 3. In 1876, by Ex. 13 this tarwad lived off from two other tarwads owing to quarrels after the death of the last female member, and an allotment of the property was made, the property being described as Stri Swothu. It was agreed, as is set out in Ex. 13, that :

"hereafter the Government assessment and renewal demises shall be in the name of the senior female member and that the senior male member shall collect rents and purapads."

It does not state in whom the right of management is vested, and that is one of the main points now in controversy.

In accordance with this stipulation the tarwad documents after that period were in the name of defendant 1's mother and after her in the defendant 1's name and none appears in the name of any male member. In 1909, Ex. C a renewal of a demise of the suit property is in favour of defendant 1 and the property is again described as Stri Swothu, and the tenants agreed to pay their rents to her. It is admitted that plaintiff 3 was a consenting party to this document. The period fixed in this expired in 1915. In 1917 there were renewals, Exs. E and F, for the eastern and western portions respectively again in favour of defendant 1. In 1920 the tenant of the eastern portion surrendered

his lease by Ex. F and the defendant 1 renewed it by Ex G in favour of one of her sons, defendant 2. Ex. H is a similar lease in his favour for his maintenance, and Exs. J and K are similar demises in favour of her other son defendant 3. The present appellants-defendants, 4, 6 and 10, are sublessees under them. The plaintiffs, of whom plaintiff 1, as noted, is the senior male member of the tarwad, sue on behalf of the tarwad to have these documents Exs. G H J and K declared invalid and not binding on the tarwad, and to eject the sublessees. The trial Court dismissed the suit. The lower appellate Court after remanding the case on certain points has, subject to a certain option on behalf of the sitting tenants, decreed the suits.

The main question argued was, who was the de facto manager of this tarwad? The tarwad property is known as Stri Swothu Jenm and considerable discussion has been devoted to the meaning of that term. There is no oral evidence about it. From certain reported cases a contention has sometimes been put forward that the term imports a tarward or tavazhi exclusively composed of females : see *Umah* v. *Keloth Cheriyoth Kutti* (1). The final pronouncement of this Court in *Muhammad Khuni* v. *Packrichi Umma* (2) declined to go into the question of the existance of such tarwads. It is not necessary to consider that contention in this case as there is no doubt that the property in its origin was putravakasam, and as it is admitted that plaintiffs 1 to 3 who are males are members of the tarwad. The meaning for which the appellants contend is that the management was vested not as usual in the senior male member but in the senior female member. There is nothing contrary to law in such an arrangement, aud there are known cases of it : see para 3 of the remand judgment of the District Judge in High Court printed papers in second appeals Nos. 1493 and 506 of 1919. Now such an arrangement could be established, I take it, in one of two ways, either by proof of general custom or by proof of general consent of the tarwad. No allegation of general custom was put forward in this case, nor was any issue framed to that effect. Nevertheless the lower Courts have allowed themselves to be led along this track and have pronounced against this custom and have lost sight of the alternative. The allegation in the written statement was merely to the effect that in this tarwad defendant 1 and her mother before her had the right of management and that it therefore did not vest in the male members. Now I take it that there is nothing to prevent the members of a tarwad agreeing to or acquiescing in the management being in the senior female, and, if the evidence be sufficient to establish their consent or acquiescence, there would be nothing illegal in such an arrangement. The point therefore to which the lower Courts ought to have addressed themselves on issue 1 was whether as a fact the management was in the hands of the senior female or not. This was the more necessary as it was admitted that the senior male, plaintiff 1, has never been in the management being employed somewhere outside. Plaintiff 3 claimed that the management was delegated to him by plaintiff 1, but plaintiff 1 did not go into the witness-box to speak to that fact nor do we know when the delegation was made. There was also the admitted fact that renewals of lease were as a matter of fact being taken by defendant 1, and that there is no instance of such a renewal by plaintiff 1 or 3. The general trend of the evidence is that such renewals were in the hands of defendant 1 and that plaintiff 3 took no part in such matters but left all such arrangements with the tenants on the expiry of their leases to be carried out by her, while the collection of rents was in the hands of plaintiff 3. Who then was the actual manager ? The lower Courts have given inadequate attention to these points and the lower appellate Court in fact has merely decided that the senior male member must have been the manager since the family is a tarwad although we know as a matter of fact that the senior male member was not managing. The lower appellate Court has really not given any finding on issue.

Possibly it did not consider it necessary to answer that issue because it held that otherwise the suit renewals of demises were invalid because not in the

(1) [1910] M. W. N. 693=8 I. C. 567.
(2) A.I.R. 1924 Mad. 28=46 Mad. 650 (F.B.).

interests of the tarwad, and that is the second point which falls to be decided. But before I go into this I may just in one sentence note another argument which found favour with the trial Court, namely, that even if the plaintiffs had the right to manage the properties they have lost it by adverse possession. This view I do not follow, as any arrangement with defendant 1 and her mother must have been by consent and therefore not adverse to the plaintiffs.

As to the binding character of the demises the trial Court held that they were not invalid, apparently because they were made by the de facto karnavan. The lower appellate Court after remanding the case on this point agreed with the case on remand that the demises were invalid because not in the interests of the tarwad. It is argued here that the plaintiffs have no right in law to challenge the alienations of the de facto karnavan, that their only right is a right to sue for her removal and that the only person who has a right to challenge them is the succeeding karnavan.

The trial Court in its judgment on remand held on this point that Ex. G. was binding on the tarwad and Exs. H. J. K. not binding. The lower appellate Court does not consider this aspect of the case but indicates its agreement with the view of the trial Court that Exs. J and K were improvident transactions, and as such not binding on the tarwad.

That being accepted, would it be a sufficient answer in law to say that they are still binding on the tarwad because the karnavan who granted them still remains in office? I think not. The appellant relies on *Abdulla Koya* v. *Eacharan Nair* (3) which is in his favour. The respondent quotes *Vattannatta Nair* v. *K. P. V. Kuppasan Menon* (4) which is to the opposite effect. The general argument now advanced by the appellant was considered by a Bench in *Kunhammad* v. *Kunhunni* (5) and rejected. In this state of the law I am not prepared to differ from the finding of the lower appellate Court that Exs. J. and K are not binding on the tarwad. So that, in any case whoever was the manager, Exs. J and K will not bind the tarwad but as to whether Exs. G and H will, that depends, in my view, on who was the karnavan and whether they were justified by necessity. I must therefore call upon the lower appellate Court to record a finding in the light of the above remarks as to whether Exs. G and H bind the tarwad. If for the purposes of that finding it is necessary to decide who was the de facto karnavan the lower appellate Court will decide that point also.

The third point is as to the value of improvements. The contesting defendants 4, 6 and 10 claim the value of improvements if they have to be ousted. The right to this value does not depend upon the validity of the lease; the sole question is whether the land has been improved during the period of the lease. It is plain that the lower appellate Court has gone wrong here. It has assumed that the whole area was fit for paddy cultivation and that the defendants for no obvious reason deliberately raised the level of parts of it and planted cocoanuts thereon. Under S. 4, Malabar Tenants Improvements Act, planting of cocoanuts is an improvement unless the contrary is shown. That it lay upon the plaintiff to prove that the defendants had deliberately converted low lands fit for paddy into high lands and had thus lowered the value of the lands. If what these defendants really did was merely to plant cocanuts on existing high land, it cannot be doubted that they made an improvement. This question of fact therefore has not been dealt with property by the lower appellate Court, since it assumes without going into the evidence that real paddy land was raised and converted into a cocoanut garden. I must have a finding as to whether any of the paramba was at the time of the lease to defendants 4, 6 and 10 fit for paddy cultivation, and if so, how much, and the value of cocoanuts planted on such area by these defendants.

Respondents 6 and 7 have not appealed, but appear and ask me to interfere on their behalf. As they have not appealed against the disallowance of the value of improvements, I see no reason for calling for a special finding on that in their case. If they can claim any benefit after the finding on the leases

(3) [1918] 35 M. L. J. 405=47 I. C. 945.
(4) [1919] 36 M. L. J. 630=51 I. C. 740.
(5) [1920] 38 M. L. J. 461=11 M. L. W. 532=57 I. C. 424=(1920) M. W. N. 335.

generally is received, the claim may be raised then. Time for submission of findings 6 weeks. For objection 10 days. [The following findings were submitted by the lower Court.

1. I find that both Exs. G and H are improvident transactions, and that they are not binding upon the tarwad of the plaintiffs and defendants 1 to 3.

2. . . , My finding therefore is that the whole of the land was, at the time of the lease to defendants 4, 6 and 10 fit for paddy cultivation.

After receiving the above findings, the following judgment was delivered.]

Judgment.—The .District Judge's finding on point (1) is accepted. On point (2) the District Judge has categorically answered the findings sent down but unfortunately they are not sufficient for a proper disposal of the case. That is because the frame of the issues sent down for findings was imperfect. The real point that had to be settled was whether defendants deliberately spoiled what was good double crop paddy land growing paddy by raising the level in order to substitute a crop of cocoanuts for a crop of paddy. There is, however, no evidence that they did that and it is almost incredible that they did. I take it then that the present levels of the land are their natural levels and have not been interfered with by defendants. It is reasonable further to infer that, in such circumstances, defendants would raise the better crop of the two, and did substitute cocoanuts for paddy because the lie of the land was better fitted for cocoanuts than for paddy. The planting of such cocoanuts would then be an improvement, the value of which the appellants defendants are entitled to recover. The figures of compensation are, as valued by the commissioner Rs. 43-10-10 to defendant 4, and Rs. 66-5-6 to defendant 10 for cocoanuts plus Rs. 1-5-3 to defendant 10 for one jack tree. Defendants 4 and 10 will get a decree for these amounts. These defendants are now no longer bound to remove those trees, and the decree of the lower Courts will have to be modified here. In para (3) of the decree after the word " improvement " insert " excluding cocoanut and jack tree, in the case of defendants 4 and 10 " and in para. 4 the figure of Rs. 100 is reduced to Rs. 75 (Rupees seventy-five). Time to remove other improvements is extended to three months from this date. Defendants 7 and 9 not having appealed, urge that I should make a similar award on their behalf, but I presume that they were content with the decree as it stood and refuse to interfere now. The parties to this appeal will pay each his and their own costs.

P.R.S./V.S. *Decree modified.*

A. I. R. 1930 Madras 421

RAMESAM, J.

(*Chennamangalath Illath*) *Govindan Nambiar* and *another*—Petitioners.

v.

(*Janala Perikamanna Illath*) *Kesava Vadhyan*—Respondent.

Civil Revn. Petn. No. 677 of 1927, Decided on 3rd April 1928 from order of Dist. Munsiff, Taliparamba, in Misc. Petn. No. 691 of 1926.

Civil P. C., S. 115—Refusal to correct pure arithmetical error—Order is revisable.

When there is a mistake purely of an arithmetical nature, Court cannot refuse to correct it. The matter is not one of discretion and the High Court will, therefore, correct the same in revision: 3 *M. L. W.* 499 and *A. I. R.* 1925 *All.* 187, *Dist.* [P 421 C 2]

P. Govinda Menon—for Petitioners.

O. T. G. Nambiar—for Respondent.

Judgment.—If there is the smallest possibility for saying that we do not know where the mistake lies, this is not a case to be taken in revision. But on the plaint and on the judgment, there is no scope for saying that we do not know where the mistake lies. The mistake lies on the person who did the arithmetical work, District Munsiff or another. The mistake is purely an arithmetical error and to refuse to correct it is sheer arithmetical laziness. The case of *Pitchayya* v. *Subba Rao* (1) does not help the respondents. That was not a case of arithmetical error and where the decree is in accordance with the judgment in such a case, there is no reason to amend. In the case of *Kishori Mohan* v. *Chhanga Lal* (2), there was an appeal, a final decree and complete execution of the decree and as a matter of discretion, the amendment was refused. There is no discretion in this case as I already pointed out, I allow the petition and substitute the figure Rs. 837-8 for Rs. 963-2-0. The petitioner, if he had

(1) [1916] 3 M. L. W. 499=34 I. C. 787.
(2) A. I. R. 1925 All. 187=47 All. 44.

been diligent, would be entitled to the costs of Civil Revision Petition. In the circumstances, there will be no order as to costs.

P.R.S./V.S. *Order accordingly.*

A. I. R. 1930 Madras 422

SUNDARAM CHETTY, J.

(*Sri*) *Chidambara Swaprakasa Pandara Sannadhi* — Plaintiff — Appellant.

v.

Somasundaram Pillai and *others*— Defendants—Respondents.

Second Appeal No. 64 of 1926, Decided on 3rd September 1929, from decree of Sub-Judge, Mayavaram, in Appeal Suit No. 51 of 1924.

Religious Endowments — Mutt — Permanent lease by Matadhipathi of general mutt property is valid for lifetime of grantor though not for benefit of mutt.

A permanent lease by the Matadhipati (head of a Mutt) of property forming part of the general endowments of the Mutt and not grant on any specific trust is valid for the lifetime of the grantor, even though the grant is not shown to be for any benefit or necessity of the mutt : (*Case Law Discussed*). [P 424 C 1]

T. V. Ramanatha Aiyar—for Appellant.

V. Balasundaram Iyer—for Respondents.

Judgment. — This second appeal arises out of a suit filed by the plaintiff-appellant for the recovery of possession of the plaint mentioned manai, together with arrears of rent, from the defendants, to whose ancestor this site was granted by the plaintiff under the registered lease deed Ex. A. It is dated 3rd July 1898. The plaintiff's case is, that he is the head of Sivaprakasa Swamigal Mutt, that the suit property which is situated in Madappuram village belongs to the aforesaid Mutt and that it was leased out to the father of defendants 1 to 3 who took it for erecting a house thereon for his occupation. Plaintiff's claim was resisted by the defendants on several grounds. It was urged that the lease granted by the plaintiff was a permanent lease, that no default was made in the payment of rent, that the plaintiff's suit was barred by limitation and that in case of eviction a sum of Rs. 1,000 should be paid as compensation for the house built on the suit site. Both the lower Courts have found that the lease granted under Ex. A was a permanent lease. The lower appellate Court has found that this permanent lease was not granted for any benefit or necessity of the Mutt, but, on a consideration of the case law on the point, held that the lease in question is good till the end of the plaintiff's lifetime, whatever may be the binding character of it so far as the plaintiff's successor is concerned. In this view the learned Judge dismissed the plaintiff's suit, confirming the decision of the first Court.

In this second appeal, the main contention urged before me is that the lower appellate Court is wrong in holding that the permanent lease under Ex. A granted by the plaintiff is valid for his lifetime. In order to decide this question, a brief review is necessary of the decisions which have dealt with the true status and position of a Matadhipathi or the head of a Mutt and his powers of alienation over the properties belonging to the Mutt. This question has been no doubt the subject of several decisions, but the real difficulty consists in understanding the true import thereof, on account of some passages in the several judgments containing observations which may at first sight seem to be difficult of reconciliation. In the case reported in *Vidyapurna Thirtha Swami* v. *Vidyanidhi Tirtha Swami* (1) there is a very learned and exhaustive discussion of this question, and the opinion expressed by both the learned Judges is that the head of a Mutt is not a mere trustee as the dharmakartha of a temple, but he has an estate for life in the permanent endowments of the Mutt and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution. The Matadhipathi is considered to have a beneficial interest in the usufruct and the surplus income belongs to him which he could dispose of at his will. In the judgment of the Privy Council in *Srinivasachariar* v. *Evalappa Mudaliar* (2), which was delivered by Lord Shaw, the distinction which was recognized in the case in *Vidyapurna Thirtha Swami* v. *Vidyanidhi Thirtha Swami* (1) between the head of a Mutt and the dharmakartha or trustee of a

(1) [1904] 27 Mad. 435=14 M. L. J. 105.
(2) A. I. R. 1922 P. C. 325=45 Mad. 565=49 I. A. 237 (P.C.).

temple is referred to with approval, and the particular passage at p. 581 is as follows:

"The position of dharmakartha is not that of a shebait of a religious institution, or of the head of a Mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character."

The question came up for decision again in this Court and was referred to a Full Bench : vide *Kailasam Pillai* v. *Nataraja Thambiran* (3). According to the opinion of the Full Bench, it could not be predicated of the head of a Mutt, as such, that he holds the Mutt properties as a life-tenant or trustee, but the question must be determined in each case upon the conditions on which they were given or which may be inferred from the usage and custom of the institution. That even the head of a Mutt would be a trustee with respect to any particular property shown to have been granted on specific trust, whereas with respect to the general assets of the Mutt he would be a sort of beneficial owner and not a mere trustee, is to be carefully kept in view in order to avoid confusion. This distinction has been recognised by Wallis, J., (as he then was), as would appear from the following observation on p. 280 of the aforesaid Full Bench decision :

" My answer is that heads of Mutts cannot be regarded as trustees of Mutt endowments except in so far as it may be shown that any particular endowment was granted to them on trust. It is unnecessary to discuss any other questions, but I desire to say generally that as at present advised I see no reason for differing from the conclusions arrived at in *Vidyapurana Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1), as to the position of the head of a Mutt with regard to Mutt properties as to which no specific trust is established in the manner already mentioned."

In *Muthusamier* v. *Methanithi Swamiyar* (4), the position of the head of a Mutt has been held to be not that of a tenant for life, but he is in a certain sense owner in a fee simple, though in many respects he has only the powers of a tenant for life. It was also stated that an alienation by him would be analogus to an alienation by a Hindu widow. The same question arose for consideration in a case which went up to the Privy Council whose judgment is found in *Vidya Varuthi* v. *Balusami Ayyar* (5). In that case, an exhaustive review of the aforesaid decisions, as also other decisions, has been made and the final conclusion arrived at by their Lordships is that the permanent lease granted by the Mathadhipathi over a part of the general property of the mutt could enure only for the grantor's lifetime and would be good till his death and would not bind his successor. In that case, the finding of both the Courts in India was that the lease was not made for necessity and that the land in suit was part of the general properties of the Mutt, not being subject to any special trust. On the basis of this finding of fact, the ultimate conclusion of their Lordships in that case rests. In dealing with the Full Bench decision in *Kailasam Pillai* v. *Nataraja Thambiran* (3) their Lordships state thus at p. 845 of *Vidya Varuthi* v. *Balusami Ayyar* (5) :

" All three Judges agreed in thinking that if any specific property was specifically entrusted to the head for specific purposes, he might be regarded a 'trustee' with regard to that property ; but that in the absence of any such evidence, the superior was not a trustee in respect of any part of the endowment."

To the same effect is the view taken in *Muthusamier* v. *Methanithi Swamiyar* (4), which was also considered by the Privy Council. As I have observed above, the land which was granted by the head of the mutt on permanent lease having been found to be part of the general endowments of the Mutt, and not to have been granted on any specific trust, the position of the mahant with respect to the land leased was taken to be not that of a mere trustee, but his position would be different, as stated in *Kailasam Pillai* v. *Nataraja Thambiran* (3) and *Muthuswamier's* case (4) referred to in the previous discussion. Now, the final conclusion arrived at by the Privy Council in that case, as stated in the following passage found on p. 855 (of 44 *Mad.*), would be intelligible ;

" He was let into possession by mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could enure only for the grantor's lifetime. According to the well settled law of India (apart

(3) [1910] 33 Mad. 265=5 I. C. 4=19 M.L.J. 778 (F.B.).

(4) [1915] 38 Mad. 356=25 M. L. J. 393 = 19 I. C. 694=(1913) M. W. N. 581.

(5) A. I. R. 1922 P. C. 123=44 Mad. 831=48 I. A. 302 (P. C.).

from the question of necessity, which does not here arise) a mahant is incompetent to create any interest in respect of the Mutt property to enure beyond his life."

The aforesaid dictum of the Privy Council in accordance with what their Lordships have stated to be the settled law, is in my opinion clearly applicable to the present case. In the plaint, the suit land is simply referred to as belonging to the Mutt, of which the plaintiff is the head. This land is treated simply as part af the general properties of the Mutt. There is absolutely no allegation in the plaint that the suit land is one granted to the head of the Mutt for any specific purpcse on a specific trust. As pointed out already the permanent lease in question granted by the plaintiff as head of the Mutt in respect of the suit land which is only part of the general properties of the Mutt, would therefore enure for his lifetime and would be good to that extent. In the face of the clear pronouncement of .the law by the Privy Council in *Vidya Varuthi's* case (5), on p. 855 (of 44 *Mad.*) the contention of the learned advocate for the appellant is unacceptable. If the distinction between the position of the head of a Mutt as regards any property shown to have vested in him on specific trust for a specific purpose, and his position as regards the general endowments of the Mutt, be carefully kept in view, there would be no confusion, in the matter of deciding his powers of alienation. As regards a property of the former kind, he would only be a mere trustee and as such an absolute sale or a permanent lease effected by him would be utterly void. The cases relied on by the learned advocate for the appellant in support of his contention that the permanent lease in question in the present case is void, seem to me to relate to alienations made by a trustee of an idol or any religious or charitable institution, or a dharmakartha or manager of a temple, or a mutawalli of a wakf who is only a trustee or manager: vide *Nagendranath Palit* v. *Rabindra Nath Deb* (6), *Sena Pena* v. *Chockalingam* (7), *Yasim Sahib* v. *Ekambara Ayyar* (8), *Sivaswami Ayyar* v. *Tirumudi Chettiar* (9), *Gajendra Nath Dey* v. *Ashraf Hussain* (10) and *Rama Reddy* v. *Rangadasan* (11). In such cases, it was held that the alienation would be void. But the principle of those decisions cannot be applied to the head of a Mutt in respect of an alienation made by him of any part of the general endowments of the Mutt, as to which he is not a mere trustee but a functionary having a much higher right with larger power of disposal and administration and a personal interest of a beneficial character, as observed by the Privy Council in *Srinivasachariar* v. *Evalappa Mudaliar* (2) (p. 581 of 45 *Mad.*). In the case of an alienation which would be void ab initio, the alienee usually pleaded adverse possession and limitation, but that plea prevailed in some cases and not in others. For instance, in the case reported in *Rama Reddi* v. *Ranga Dasan* (11), the view taken was that though the alienation was void, the possession of the alienee would not be adverse to the trustee who granted the permanent lease nor to the idol (the juridical person) which must be deemed to be in perpetual infancy. It is unnecessary to discuss the question of limitation in the present case, as I have held on the authority of the decisions referred to above, that the plaint mentioned lease will hold good for the lifetime of the grantor (the plaintiff). If the lease is good for the plaintiff's lifetime, the possession of the lessee cannot be adverse as against the plaintiff.

Some stress was laid on the appellant's side on the observations of their Lordships of the Privy Council in *Naina Pillai Maracayar* v. *Ramanathan Chettiar* (12), at pp. 332 and 353 (of 47 *Mad.*). But that case related to an alleged alienation of the property of a Hindu temple by the trustee thereof. However, there are general observations on p. 352 to the effect, that the position of the shebait, the manager or trustee of a temple as regards the power to deal with the endowed lands of the temple is analogous to the position of a mahant of a Mutt to deal with the endowed

(6) A. I. R. 1926 Cal. 490=53 Cal. 132.
(7) [1904] 27 Mad. 291=31 I. A. 83=3 C.W.N. 545 (P. C.).
(8) [1919] 37 M. L. J. 698=54 I. C. 497 = 10 M. L. W. 672.
(9) A. I. R. 1930 Mad. 405.
(10) A. I. R. 1923 Cal. 130.
(11) A. I. R' 1926 Mad. 769=49 Mad. 543.
(12) A. I. R. 1924 P. C. 65=47 Mad. 327 = 51 I. A. 83 (P. C.).

lands of a mutt. It is stated that except in a case of unavoidable necessity, they have no power to sell or mortgage the endowed property or grant a permanent lease thereof. After making these observations, their Lordships proceed to state that the law on this subject is well established, quoting among others the decisions of the Privy Council, in *Abhiram Goswami* v. *Shyam Charan Nandi* (13), and *Vidya Varuthi's* case (5). But in these two cases, the alienation made by a mahant or head of a Mutt was not held to be void ab initio, but was held to be good for the lifetime of the grantor. What was specifically decided in *Vidya Varuthi's* case (5) and *Abhiram Goswami's* case (13) with the recognition of the distinction between the position of the head of a Mutt in respect of specific trust property and his position in respect of the general properties of the Mutt cannot be deemed to have been abrogated by the general observations made in *Naina Pillai* v. *Ramanathan* (12).

For all the foregoing reasons, I am of opinion that the plaint mentioned lease will enure for the lifetime of the present plaintiff, the grantor, and will be good till the end of his lifetime. The present suit brought to eject the defendants is therefore unsustainable. In the result, the Second Appeal fails and is dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

(13) [1909] 36 Cal. 1003=49 I. C. 449=36 I. A. 148 (P. C.).

A. I. R. 1930 Madras 425

SUNDARAM CHETTY, J.

Subba Reddy—Defendant 1—Appellant.

v.

Guruva Reddy—Plaintiff — Respondent.

Second Appeal No. 1431 of 1925, Decided on 13th August 1929, against decree of Second Addl. Sub-Judge, Madura, in Appeal Suit No. 74 of 1924.

(a) Transfer ot Property Act, S. 54—Sale in favour of minor is not void—Minor.

A sale deed is not void by reason of its having been executed in favour of a person while he was a minor: 40 *Mad.* 308, *Foll.* [P 426 C 2]

(b) Registration Act. S. 32 (b)—Presentation by de facto guardian is valid.

The presentation of a sale deed by the maternal uncle of a claimant who was an orphan and who had no agnatic male relations for registration on behalf of the claimant as his guardian is valid. [P 426 C 2]

K. V. Krishnaswamy Ayyar and *K. V. Srinivasa Ayyar*—for Appellant.

B. Sitarama Rao and *C. V. Harihara Ayyar*—for Respondent.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondent to recover possession of a small plot of land on payment of a sum of Rs. 100 to the defendant (appellant) by way of redemption of an othi (usufructuary mortgage) held by him. The plaintiff's claim to the suit land is based upon the registered sale deed Ex. A. His claim was resisted by defendant 1 on several grounds which necessitated an elaborate trial and a good deal of arguments before the lower Courts. In this second appeal, they have filtered down to two main contentions which alone have been strenuously argued before me by the learned advocate for the appellant. They are: (1) that the sale under Ex. A is invalid as it was executel in favour of a minor, and (2) that this sale deed is invalid, as it was not validly presented for registration before the Sub-Registrar.

Before proceeding to discuss the question of law. a brief reference to the contents of Ex. A and some relevant facts would be sufficient. The plaintiff was a minor of about 16 years of age at the time of the execution of Ex. A. This sale deed was executed in his favour without being described as a minor represented by any guardian. As regards the particulars of the amount received by the vendors in respect of the sale, the document recites thus:

"The amount settled with you in respect of your discharing the debt due on the mortgage executed already on 23rd April 1912, to Meyyappatti Sara Subba Reddi by No. (1) out of us in respect of the undermentioned property is Rs. 100; the amount received by us as advance after settling the sale in the month of Ani last is Rs 55; the amount received by us in cash this day in the presence of the Sub-Registrar of Kalliudi is Rs. 345—total Rs. 500 for the three items. We have this day sold to you the undermentioned property for the aforesaid sum. You shall henceforth enjoy the said property from generation to generation with absolute rights."

It is in evidence that the plaintiff was an orphan having no agnatic male relations and his affairs were managed by his maternal uncle and father-in-law

Nagu Reddi (P. W. 1). It was P. W. 1, who first entered into an oral agreement for sale in respect of the suit land with defendants 2 and 3—settled the terms of the sale and also paid an advance of Rs. 55. As found by the learned Judge, there is no doubt that the prior oral agreement for sale was entered into not by the plaintiff but by his maternal uncle and guardian P. W. 1 on his behalf. A portion of the sale amount, namely Rs. 55 was also paid even before the execution of the sale deed. Out of the balance, a sum of Rs. 345 was understood to be paid in the presence of the Sub-Registrar at the time of the registration of the deed as admitted by P. W. 1. This sum, however, treated as having been paid at the time of the execution of the sale deed, as would appear from the recitals therein, adverted to above. The remaining sum of Rs. 100 which was to be paid in discharge of defendant 1's mortgage was also treated as another item of consideration that passed to the vendors. Thus, according to the recital in Ex. A, there was no contractual obligation outstanding in favour of the vendors, on the performance of which alone the title to the property should pass to the plaintiff. There is also the further fact borne out by the evidence that the sum of Rs. 345 was even tendered before the Sub-Registrar for payment, but the vendors declined to receive it: (vide Exs. B and C). This tender and the improper refusal tantamount to the performance of the obligation to pay the consideration by the plaintiff, even before the registration of the sale deed. Otherwise, it would be allowing one to take advantage of one's wrong to prejudice the rights of another.

That a sale in favour of a minor is ipso facto void is a dictum which is no longer good law. The decision in *Navakoti Narayana Chetty* v. *Logalinga Chetty* (1) has now been overruled by the Full Bench in *Raghava Chariar* v. *Srinivasa Raghava Chariar* (2). In that case, the question was discussed by the learned Judges at some length and the principles applicable to a sale or mortgage in favour of a minor have been succinctly stated by Srinivasa Ayyangar, J., at p. 336 as follows:

"A transfer cannot be void unless (a) the transferrer is incompetent to transfer or the transferee is incompetent to hold the property, (b) the transfer is conditional on the passing of consideration and the consideration did not pass, (c) the transfer is part of a transaction in which the transfer is made in consideration of covenants or contracts to be performed by the transferee and the transferee cannot be compelled to perform them."

In the present case, there is no good ground for holding that the transfer under Ex. A is void, as it does not come under any of the three categories mentioned above. This is clear from the facts and circumstances of this case referred to in the previous paragraph. Mr. K. V. Krishnaswamy Ayyar for the appellant urged that every act to be done by the plaintiff must have been performed before the execution of the sale deed and that otherwise the sale is invalid. If it is established that the title to the property should not pass in spite of the registration of the sale deed unless certain acts are done by the vendee prior to the execution of the sale deed, there will be some force in this extreme contention, but no such case has been made out. On the other hand, applying the principles enunciated in the aforesaid Full Bench decision I am satisfied that there is nothing to vitiate the sale under Ex. A by reason of its standing in favour of a minor. It is unnecessary to labour this point farther, by referring to some other decisions quoted during the arguments. I agree with the lower appellate Court that the sale deed Ex. A is not void by reason of its having been executed in favour of the plaintiff while he was a minor.

Coming now to the second point, we have to see whether Ex. A was presented for registration according to S. 32, Registration Act. Under Cl. (b) of that section the representative of a claimant under the document may present it for registration. S. 2, sub-Cl. (x), states that "representative" includes the guardian of a minor. In the present case, the evidence shows that P. W. 1, the maternal uncle of the plaintiff who was an orphan and who had no agnatic male relations, presented the sale deed for registration on behalf of the plaintiff as his guardian. That he was the de facto guardian of the plaintiff looking after

(1) [1910] 33 Mad. 312=19 M. L. J. 752=4 I C 383=7 M. L. T. 233.
(2) [1916] 40 Mad. 303=31 M. L. J. 575=36 I. C. 921=(1916) 2 M. W. N. 363 (F.B.).

his properties is established beyond doubt. The lower appellate Court has carefully considered this question in paras. 25 and 26 of its judgment and I fully endorse the view therein expressed. It is contended on the appellant's side that the word "guardian" used in S. 2, Cl. (x) should be deemed to be either a de jure guardian or a natural guardian recognized by the Hindu Law. The powers of a de facto and a natural guardian seem to be the same for all intents and purposes and there is no good basis for holding that the legislature intended to exclude a de facto guardian while using the term "guardian" in a comprehensive sense, as coming under the definition of "representative." In the chapter on Guardianship in Trevelyan's Hindu Law, 2nd Edn., it is observed on p. 215 that the Hindu Law prescribed a succession to the right of guardianship, failing the father, and the mother. In the absence of the elder brother and some other paternal relations, the maternal kinsmen were preferred in order of priority. That being so, P. W. 1 being the maternal uncle, would be a natural guardian or at least one who is competent to act as his natural guardian : vide the decision of the Privy Council in *Venkatappayya* v. *Rajah Nayani Venkata Ranga Row* (3). In my opinion the presentation of Ex. A for registration by P. W. 1 is not vitiated by any legal flaw. In this connexion I may also observe that any supposed defect in the original presentation has been cured by the re-registration of the sale deed according to the provisions of S. 23 (a), Registration Act. It is clear from the affidavit filed by the plaintiff (respondent) at the time of the hearing of this second appeal, that the sale deed Ex. A has been re-registered under S. 23 (a). This has retrospective effect and the defect, if any, in the original presentation has been cured.

The two main objections to the validity of Ex. A having failed, the decree of the lower appellate Court is confirmed and this second appeal is dismissed with costs.

P.R.S./M.N. *Appeal dismissed.*

(3) A. I. R. 1929 P. C. 24=52 Mad. 175=56 I. A. 21 (P.C.).

* A. I. R. 1930 Madras 427

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Kondalu Aiyar, In re.—Petitioner—Appellant.

Letters Patent Appeal No. 103 of 1929, Decided on 23rd October 1929, from order of Jackson, J., D/- 4th October 1929, in Civil Misc. Petn. No. 4152 of 1929.

*** Letters Patent (Madras), S. 15—Order dismissing stay application in second appeal—Letters Patent appeal does not lie over such order.**

Where an application to the High Court for stay of execution could not have been made independently of and apart from the second appeal pending, it is the appellate jurisdiction of the High Court that is invoked, and the order of dismissal of application is made in exercise of that jurisdiction ; over such an order Letters Patent appeal under S. 15 does not lie : *Harischadran Jagadev* v. *Lokeno Patnaik*, S. *R.* 12731 *of* 1928, *Rel. on* : *A. I. R.* 1928 *Mad.* 169, *Ref.* [P 428 C 1]

K. V. Venkatasubramania Iyer and *P. N. Appusami Ayer*—for Appellant.

Judgment.—This is a Letters Patent appeal from the judgment of Jackson, J., and the question is, does the appeal lie ? There was a second appeal filed ; in that an application was made for stay of execution of the decree of the lower appellate Court. The application was dismissed by Jackson, J., and this is an appeal from his order.

It is on account of the recent amendment of the Letters Patent that the present question arises. There was no certificate granted by the learned Judge declaring that the case is a fit one for appeal. Mr. Venkatasubramania Ayyar's contention is this. The order in question is not a judgment passed by the High Court in the exercise of its appellate jurisdiction. The very expression 'appellate jurisdiction', he contends, involves a scrutiny of a proceeding of an inferior Court. The order of the High Court refusing stay is not related to any order of the lower Court and has an independent existence. Moreover, power to grant or refuse stay is conferred on the High Court by an express provision in the Civil Procedure Code. On these grounds, he maintains, that the order in question was not made by a Judge of the Hjgh Court in the exercise of his appellate jurisdiction. This contention involves a fallacy. A similar argument was advanced in *Sadaka*

Muhammad v. *Batcha Sahib* (1) with reference to an interlocutory order in a Civil Revision Petition. Kumaraswami Sastri and Wallace, JJ., made the following observation :

"It is difficult to see how there can be any application apart from the Civil Revision Petition filed in the High Court as a party could not without filing a Civil Revision Petition in the High Court, ask for stay of execution of the decree in the lower Court."

These remarks apply to the present case. The application to the learned Judge could not have been made independent of, and apart from, the second appeal that was pending. We must, therefore, hold that it was the appellate jurisdiction of the High Court that was invoked and that the order was made in exercise of that jurisdiction. *Harischadran Jagdeo* v. *Lokeno Patnaik* (2) is a direct case on the point and supports our view. The appeal is dismissed.

P.R.S./V.S. *Appeal dismissed.*

(1) A. I. R. 1928 Mad. 169=51 Mad. 165.
(2) S.R. No. 12731 of 1923, decided by Ramesam and Tiruvenkatachariar, JJ.

A. I. R. 1930 Madras 428

RAMESAM AND JACKSON, JJ.

P. C. Muthu Chettiar —Plaintiff—Appellant.

v.

Maruthanayagam Pillai and *others* —Defendants—Respondents.

Appeal No. 96 of 1928, Decided on 29th July 1929, against decree of Sub-Judge, Madura, in Original Suit No. 38 of 1927.

(a) Contract Act, S. 74 — Compensation not exceeding penalty named is to be awarded.

All that the Act wants a Court to do is to award a reasonable compensation not exceeding the penalty named. It does not require a Court to separate the process into two parts viz., compound interest as compensation for non-payment of interest only and an additional amount as compensation for non-payment of principal : 26 *Mad*, 111, *Diss. from.* [P 428 C 2]

(b) Contract Act, S. 74 — Compound interest in general, should be awarded only at contract rate.

When the parties themselves have contemplated compound interest that may be made a ground of awarding compound interest but, in general, only at the contract rate, for, compound interest gives ample compensation for any kind of default : 34 *Cal.* 150 (*P.C.*), *Dist.* [P 429 C 1]

M. Patanjali Sastriar, and *C. S. Rama Rao Saheb*—for Appellant.

K. V. Sesha Iyengar and *T. R. Ramachandran*—for Respondents.

Facts.—Suit was brought to recover by sale of the hypotheca from defendant 1 personally and from the other properties of the defendants, Rs. 6234-5-2 being the amount due under a registered hypothecation bond dated 8th August 1913 executed in favour of the plaintiff by defendant 1 for Rs. 1,500 agreeing to repay the amount within one year with interest at 14 annas per cent per mensem and on default of due payment, agreeing to pay the entire amount then due on account of principal and interest with compound interest at Rs. 1-2-0 per cent per mensem with annual rests. The plaintiff claimed interest at 14 annas per cent per mensem for the 1st year and compound interest at Rs. 1-2-0 per cent per mensem from the beginning of the 2nd year with annual rests as stipulated in the bond.

Ramesam, J.—The learned advocate for the appellant has relied on *In re, Annamalai Chetty* v. *Veerabadran Chetty* (1), and *Sundar Koer* v. *Rai Sham Krishen* (2), and asked us to award compound interest at some enhanced rate after default. In the first of these cases, the learned Judges considered that compound interest was compensation for non-payment of interest only and there must be some compensation for non-payment of principal. Under the latter heading they increased the rate from 15 to 24. I am not aware of any case in which this method has been adopted, or in which the decision has been followed. Though the decision has been frequently cited before me, I have never followed it. I now think it is necessary to state my dissent from that decision. All that the Act wants us to do is to award a reasonable compensation not exceeding the penalty named. It does not require us to separate the process into two parts.

The case in *Sundar Koer* v. *Rai Sham Krishen* (2) is a peculiar case. It contains two stipulations by way of penalty and two enhanced rates. The High Court awarded compound interest

(1) [1903] 26 Mad. 111.
(2) [1907] 34 Cal. 150=34 I. A. 9=5 C. L. J. 106 (P.C.).

at the lower enhanced rate and the Privy Council confirmed the decision. The remarks of the Privy Council are not in favour of the appellant. I do not mean to say that if the Court wishes to award compound interest at an enhanced rate, it is precluded from doing so. All that I am saying is that it is not bound to do so. In my opinion, when the parties themselves have contemplated compound interest, that may be made a ground of awarding compound interest but, in general, only at the contract rate, for, compound interest gives ample compensation for any kind of default.

I award compound interest at 10½ per cent (the contract rate) throughout. Even if this works out at more than what the lower Court has awarded, I would not give costs in appeal. Cases of this kind are not matters for appeal unless the decision of the first Court is very perverse. In appeal each party will bear its own costs.

Jackson, J.—I agree.

P.R.S./V.S. *Order accordingly.*

A. I. R. 1930 Madras 429

WALLACE AND WALSH, JJ.

P. Gnanamma and *another*—Appellants.

v.

Rajaseetharamachandra and *others*—Respondents.

Appeal No. 389 of 1928, Decided on 18th April 1929 against order of Sub-Judge, Nellore, D/- 27th February 1928 in E. P. No. 69 of 1927.

Civil P. C., O. 21, R. 2—Even agreement to adjust must be certified—In absence of certification judgment-debtors cannot oppose transfer of decree though in violation of such agreement.

Not only an adjustment of a decree must be certified under O. 21, R. 2 but even an agreement to adjust requires certification. In the absence of any such certification of an agreement to adjust, the judgment-debtor has no locus standi to oppose the transfer of a decree on the mere ground that there was an agreement to adjust by which the judgment-debtor was not to transfer the decree.

[P 429 C 2; P 430 C 1]

Raghava Rao—for Appellant.

P. V. Venkatrama Iyer and *V. Ramanatha Iyer*—for Respondents.

Judgment.—This E. P. No. 69 of 1927 was put in for recognition of a transfer of the decree in O. S. No. 58 of 1917 on the file of the Court of the Sub-ordinate Judge of Nellore. The first respondent is the transferee decree-holder. The objections raised by the judgment-debtor to the transfer were disallowed and the petition allowed. The appeal is against that order.

The judgment-debtor had filed E. A. No. 365 of 1926 before the District Court alleging that there had been an adjustment of the decree. This petition was transferred to the Subordinate Judge for disposal and it appears to have been disposed of at the same time as the present petition and adversely to the judgment-debtor but the order has not been filed.

The first point for determination in the present petition has been stated by the lower Court as follows:

"Whether the agreement pleaded by the judgment-debtors even if true operates as an adjustment of the decree within the meaning of O. 21, R. 2, Civil P. C."

In para. 5 of the order the learned Sub-Judge says:

"For the reasons given in my order passed on that petition (i.e., E. P. No. 22 of 1927 in the course of which E. A. No. 365 of 1926 was put in) my finding on the point No. 1 is in the negative."

The appellant has neither filed a copy of that order nor supplied the other side with a copy so that we are not in a position to know the reasons stated in that order. So far, however, as the present petition is concerned the appellant admittedly filed no certificate of adjustment and for purposes of this petition we take it that no adjustment has been certified. An attempt was made to argue that though an adjustment must be certified under O. 21, R. 2 if such adjustment is to be used as a bar in execution an agreement to adjust need not be certified. We cannot accept this contention which would defeat the whole object of O. 21, R. 2. An attempt was made to argue that one of the terms of the alleged agreement to adjust was that the judgment-creditor should not transfer the decree and that the transfer can be opposed on these grounds. Assuming for a moment that an uncertified agreement of this sort could be pleaded as a bar in execution it is sufficient for the purposes of this appeal to state that no such agreement was alleged in the counter and it cannot be set up now.

As stated above, the appellant has not chosen to file the order of the Court in which his application to have the alleged

adjustment or agreement to adjust recognized is a bar to execution.

We hold that in the absence of any certificate of adjustment the judgment-debtor had no locus standi to oppose the transfer and on the terms of the counter he has put in, the transfer could not be opposed.

The appeal must be dismissed with costs of 1st respondent. The transferee decree-holder will, of course, be bound by any adjustment recognized by the Court on the application in E. A. No. 123 of 1921.

P.R.S./R.K. *Appeal dismissed.*

A. I. R. 1930 Madras 430 (1)

JACKSON, J.

D. Madar Sahib—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 617 of 1929, and Criminal Revn. Petn. No. 561 of 1929, Decided on 29th November 1929.

(a) Madras District Municipalities Act, Sch. 4, R. 30—Distraint warrant signed by facsimile stamp is irregular and invalid.

Where an officer leaves a facsimile stamp of his signature behind him, which the peons continue to use, a warrant issued stampted by such facsimile is quite irregular and invalid. [P 430 C 2]

(b) Madras District Municipalities Act, Sch. 4, R. 30—Warrant must be issued under sign manual—Civil P. C., S. 2 (20) has no application to District Municipalities Act—But illiterate may affix mark under Madras General Clauses Act, S. 3 (29).

Under the Distrtct Municipalities Act a warrant must bear the signature of the Chairman. Signature must be taken in its accepted sense of sign manual. The fact that in S. 2 (20), Civil P.C., sign is used as including stamp has no bearing on the Madras District Municipalities Act. But if the Chairman happens to be illiterate, under S. 3 (29), Madras General Clauses Act, he may affix his mark. [P 430 C 2]

(c) Madras District Municipalities Act, Sch. 4, R. 31—Distrainer has no right to take front door—Accused resisting such distraint is protected by rule of self defence and cannot be convicted under Penal Code, S. 332.

A distrainer having a warrant has no right to take the front door of a house, and if he threatens to do so, such a proceeding renders the house unsafe calling for immediate defence of private property. Further if the accused resists such attempts he cannot be said to have exceeded his right of self-defence and any conviction under Penal Code, S. 332, is liable to be set aside : 13 *Mad.* 518, *Foll.* [P 430 C 2]

V. L. Ethiraj and *S. Ramachandran*—for Petitioners.

K. S. Vasudevan for *Public Prosecutor*—for the Crown.

Order.—The two petitioners have been sentenced to three months' simple imprisonment and Rs. 50 fine under S. 332, I. P. C., for resisting a distraint under a warrant purporting to have been issued by the Municipal Chairman of Cuddapah. It seems clear that there was no warrant. The prosecution theory is that the ex-Chairman left a facsimile stamp of his signature behind him, which the peons continued to use. Of course this would be quite irregular and would give no validity to a warrant.

It is clear from Appendix A, Sch. 4, District Municipalities Act that the warrant must bear the signature of the chairman. Signature must be taken in its accepted sense of sign manual. The fact that in S. 2 (20), Civil P. C., sign is used as including stamp has no bearing on the Madras District Municipalities Act. The only departure from the general rule is that if the Chairman happens to be illiterate, under S. 3 (29), Madras General Clauses Act, he may affix his mark. Even if the distrainers had a warrant they had no right to do so as they threatened, and take the front door of the house *Queen Empress* v. *Sahaik Ibrahim* (1), a proceeding which rendered the house, unsafe, and called for immediate defence of private property. In the circumstances I am not prepared to hold that the accused exceeded that right. The conviction is set aside and the fine ordered to be refunded. Accuseds' bail is released.

P.R.S./V.S. *Conviction set aside.*

(1) [1890] 13 Mad. 518.

A. I. R. 1930 Madras 430 (2)

BEASLEY, C. J. AND CORNISH, J.

K. V. Ayyaswami Pathar and *another*—Appellants.

v.

M. R. Ry. Manavikrama Zamorin Rajah and *others*—Respondents.

Letters Patent Appeal No. 132 of 1925, Decided on 10th September 1929, from judgment of Phillips, J., D/- 29th April 1925, reported in *A. I. R.* 1926 *Mad.* 849.

(a) Limitation Act, Art. 143—Claim based upon forfeiture of lease by reason of alienation—Art. 143 applies and time runs from date of alienation, *A. I. R.* 1926 *Mad.* 849, *Reversed.*

Where a claim is based upon a forfeiture of a lease by reason of alienation of the demised land and nothing else, the article applicable for the purpose of limitation is clearly Art. 143 and limitation commences to run rom the date of the alienation : 38 *M. L. J.*

275 ; *A.I.R.* 1922 *Mad.* 274 (*F.B.*) and 15 *Mad.* 123 ; 24 *C. W. N.* 1064, *Rel. on.* (1917) *M.W.N.* 419, *Ref.* **A.I.R. 1926 Mad. 849, Reversed.** [P 432 C 2]

(b) Precedent—Question decided in different ways by same Judge—His later decision is preferable.

Where a Judge decides a question in a certain way and later the same Judge decides that very question in a contrary way, his later decision may be taken as altering his former opinion. [P 431 C 2]

B. Sitarama Rao and *P.S. Narayanaswami Iyer*—for Appellants.

K. Kuttikrishna Menon and *P. S. Ramachandra Iyer*—for Respondents.

Beasley, C. J.—This Letters Patent appeal is from a judgment of Phillips, J. in S. A. No. 1520 of 1922. The respondent here was the plaintiff in O. S. No. 26 of 1918 in the Court of the District Munsiff at Alathur. He sued for recovery of possession of land from the appellants here, who were the defendants in that suit. The suit, with the exception of a small item which was decreed in the plaintiff's favour, was dismissed. The plaintiff appealed to the Subordinate Judge of South Malabar and he also dismissed the suit on the ground that it was barred by limitation. The plaintiff then presented a second appeal to this High Court and Phillps, J held that the suit was not barred by limitation and as there were other points in the case for determination he referred the appeal back to the lower appellate Court for decision on those other points and any other points that might legally arise. He stated that the view of the case set out before him did not seem to have been pleaded definitely in the lower Courts and he therefore thought that the respondents were entitled to a further hearing. The defendants in that suit are the appellants here.

The only question that we have to decide is whether the suit is barred by limitation or not. The plaintiff in the suit demised the suit property to Krishnan Nair and Kunju Nair on adimayavana right on 7th April 1898. In 1900, the lessees assigned their right to defendant 1 and the father of defendant 2. There is a provision in the lease that on the expiry of every 12 years a renewal fee of Rs. 125 shall be paid by the lessee and further documents exchanged between the parties. The assignees who are some of the defendants in this suit brought a suit in 1913 for renewal of the adimayavana lease and for the acceptance of the renewal fee which they had tendered to the plaintiff. It was held in that suit that the adimayavana lease being inalienable, the plaintiffs could not obtain a valid assignment and therefore their suit was dismissed. The appellate decision in that suit is reported in *Venkatagiri Pattar* v. *Zamorin of Calicut* (1). It was there held that the tenure known as adimayavana or anubhawam tenure is inalienable under Malabar Law. The Bench in that case consisted of Ayling and Napier, JJ. But a Bench consisting of Ayling and Krishnan, JJ. has later taken the contrary view and as Ayling, J. was one of the Bench in the *Venkatagiri Pattar's* case (1) his later decision may be taken as altering his former opinion. That case is *Zamorin of Calicut* v. *Unikat Karnavan Samu Nair* (2) and it was held that this adimayavana tenure is not inalienable by custom in South Malabar and that the jenmi is not entitled to forfeit it on alienation. Evidence of custom was called for in that appeal and it is quite clear from the judgments, that the Bench held the view that a custom of inalienability had not been made out. On page 286, Ayling, J says :

"the oral evidence has been rightly appreciated by the Subordinate Judge and on a survey of the evidence as to custom, oral and documentary, the conclusion is irresistible that for the period to which it relates no legally enforceable custom of forfeiture on alienation has been proved."

The period to which Ayling, J. referred was the period from 1896 onwards. Both the Judges further held that the Subordinate Judge's finding that up to 1896 there was a custom of inalienability involving forfeiture on alienation and that the custom had since fallen into desuetude was unsound ; so that this case may be taken as deciding that this tenure is not inalienable and that there is no custom of forfeiture on alienation. Mr. Kuttirkrishna Menon argued before us that this decision did not go to the length of deciding that there was no forfeiture on alienation. It clearly goes to that length and it is the latest decision upon the point. In *Ayyakutti* v. *Krishna Pattar* (3) a Full Bench decid-

(1) [1917] M. W. N. 413=40 I. C. 769=6 M. L. W. 114.
(2) [1920] 38 M. L. J. 275=55 I. C. 380=27 M. L. T. 111.
(3) A.I.R. 1922 Mad. 274=45 Mad. 334 (F.B.).

ed that in the case of land in Malabar held on santhathi brahmaswom tenure the landlord has no right of re-entry on alienation of the land by the tenant. The adimayavana tenure is similar to the santhathi brahmaswom tenure and, although the question whether such tenures are alienable or not was referred to in the Full Bench, they did not think it necessary to decide that question but merely decided that the landlord on alienation had no right of re-entry. The fact that the earlier decision, that in *Venkatagiri Pattar's* case (2) decided that such a tenure was inalienable has an important bearing on this case because we have to decide what the plaintiff's claim in his suit for recovery of possession was based on. For the appellant here it was argued that the respondent's claim was based on forfeiture on alienation of the property whilst for the respondent it was contended that it was based on the non-renewal of the tenure at the expiry of 12 years, that it was only after the 12 years had expired that limitation commenced to run and that this is a case to which Art. 144, Lim. Act, applies. The appellant on the other hand, contended that Art. 143 is the article applicable and that time commenced to run from the date of the alienation and that therefore the suit is barred by limitation. If Art. 143 is the proper one, then clearly the suit is barred by limitation. Phillips, J., however, held that the proper article is Art. 144 and that time only commenced to run when the possession became adverse, namely, after the 12 years's lease had expired. He did not apply Art. 143 because that article only applies to suits to enforce relief claimable by reason of forfeiture or of breach of condition under a contract, which in his view could only apply to suits brought against parties who have incurred that forfeiture or committed the breach. He says :

" in the present case, the defendants are not parties to the lease deed and have not themselves incurred any forfeiture or broken any condition in a contract between them and the plaintiff."

In my view, Phillips, J. was wrong in thinking that Art. 143 only applies to persons who have themselves incurred the forfeiture because there are decisions of this Court on Art 143 to which the alienee was a party and against whom relief was claimed. Such a case is *Madhavan* v. *Athi Nangiyar* (4). Although it is quite true that in that case defendant 1 who was the grantee of the demise was the only one of the defendants who pleaded limitation, the alienee supported the written statement of defendant 1. In *Motilal Pal Choudhry* v. *Chandra Kunwar Sen* (5), a lease provided that the lessee was to enjoy the land from generation to generation for purposes of residence without any power of alienation and that in the event of such alienation the lessor would be entitled to khas possession. The lessee sold the land and the lessor sued to recover possession and the alienees were made parties to the suit, and it was held that Art. 143 was applicable and the period of limitation was 12 years and time began to run from the date of alienation and not from the date when the lessee surrendered possession to the transferee. In the case in *Zamorin of Calicut* v. *Unikat Karnavan Samu Nair* (2), to which reference has already been made, the suit was to recover possession of properties from the persons in possession of them, namely, the alienees. This is quite clear from a statement of the facts by Krishnan, J. at page 277 where he says :

" if the defendants are right in their contention that no forfeiture was caused by the alienations in their favour . . . . . "

so that it is quite clear that the alienees were the defendants and it was held that Art. 143 applied, that the starting point of limitation is the forfeiture itself and moreover that there is nothing in the article about the lessor's knowledge of the alienation. The general scheme of the Act with regard to Arts. 140 to 144 does not place any such limitation as to parties as in the opinion of Phillips J. it does. Take, for instance, Art. 140 which is a claim for possession of immovable property by a remainderman or reversioner or a devisee. That must be against anybody who is in possession of it. Similarly Art. 144, Also 142. Art. 143 it appears to us is not limited to those who have committed the breach of the condition which has entailed forfeiture but also includes those who are in possession by reason of the alienation which may entail forfeiture. On that point I am of the

(4) [1892] 15 Mad. 123=2 M. L. J. 81.
(5) [1920] 24 C. W. N. 1064=60 I. C. 312.

opinion that Phillips, J. was wrong. But I have still to consider what the plaintiff, the respondent here, based his claim upon. The plaint in the suit sets out in para. 2 all the details of the grant. It includes at the end, it is quite true, the provision with regard to the renewal at the expiry of 12 years. Then para. 3 says :

"the adimayavana right holds good for itteramkandath tarwad only and it cannot be alienated and if it is alienated, the tarwad forfeits right by the alienation and then the plaintiff obtains a right for redemption of the items."

Then in para. 5 it states as follows :

"As the adimayavana right which was held by Itteramkandath tarward was alienated in favour of the defendants it has lapsed and it has been so declared by the High Court decree aforesaid"

and in para. 6 :

"it was only by the aforesaid suit in O. S. No. 148 of 1913 that the plaintiff's predecessor in sthanam became aware of the alienation of the right held by Itteramkandath tarwad. There was no occasion previous to that of knowing the fact of the alienation."

This is an attempt by the plaintiff to get over the bar of limitation by pleading ignorance of the alienation until a subsequent date though in law ignorance would not prevent time running against him. Taking the plaint by itself, it seems to me to claim to recover possession of the property because of the alienation by the original grantees but the matter is made more certain from the issues framed in that suit. They were as follows :

"(1) What is the nature of the grant in favour of Krishna Nair and Kunju Nair ? 2) Has the holding been forfeited by reason of the alienations alleged ? (3) If so, has the plaintiff any right of re-entry ? (4) Has the plaintiff waived his right to enforce the forfeiture, if any ? (5) Is the suit barred by limitation ? (6) Is the price of paddy claimed correct ? (7) Is the suit bad for want of first defendant's alienees as parties defendant ? (8) To what relief is the plaint entitled ?"

There is no issue there as to a right to recover possession on non-renewal. The suit was fought out in the District Munsiff's Court and in the Subordinate Judge's Court on the footing of forfeiture by alienation. It is true that some of the defendants themselves pleaded adverse possession which would be Art. 144. But the case contended for by the plaintiff, the respondent here, in the trial Court and in the lower appellate Court was one of forfeiture on alienation and we are satisfied that it was the decision which he had got in his favour in *Venkatagiri Pattar's* case (2) and the view taken by that Court as to the custom of inalienability of such a tenure that enabled him to file his suit and claim that, as the property had been alienated, he was entitled to possession of it on the ground of forfeiture. The Subordinate Judge found that, as the tenure was determined by forfeiture, the plaintiff, the respondent here, was entitled to resume the properties ; but with regard to the question of limitation he held that as the alienation took place in 1900 the forfeiture was incurred then and, as the suit was instituted more than 12 years after that it was clearly barred by Art. 143, Lim. Act. The case presented in the second appeal was, in my view, a totally different case to that in the lower appellate Court and the District Munsiff's Court and we are clearly of the opinion that no such claim as is now put forward, namely, that of a right to possession on account of non renewal of the tenure at the expiration of 12 years was ever in contemplation. I am of the view that the respondent should not be allowed to put forward a totally different case to that upon which the suit was fought in the lower Courts. His plaint is quite clear and the claim is based upon a ferfeiture by reason of alienation and nothing else. In this Court we intend to confine ourselves to that claim. The article applicable is clearly Art. 143 and limitation commenced to run from the date of the alienation. In my view, the respondent's claim in the Court below was clearly barred. It is not necessary for me to express any opinion as to whether or not such tenures are inalienable. I merely contend myself with saying that the latest decision upon the point, namely, that in *Zamorin of Calicut* v. *U. K. Samu Nair* (2) decided that there is no custom in Malabar against alienation. The Letters Patent appeal is therefore allowed with costs to appellant only. One set of costs. Cross-objections allowed without costs.

Cornish, J.—I agree.

P.R.S./V.S. *Appeal allowed.*

A. I. R. 1930 Madras 434

ANANTAKRISHNA AYYAR, J.

(*Dumina Rosario*) *Saldanha* and *others*—Defendants—Appellants.

v.

Roman Catholic Church, Mermajal—Plaintiff—Respondent.

Second Appeal No. 495 of 1928, Decided on 31st July 1929, from decree of Sub-Judge, South Kanara, in Appeal Suit No. 286 of 1926.

(a) Lease—Permanency—Absence of words indicating hereditary nature is important circumstance in considering whether lease is mulgeni.

The absence of the words "from generation to generation" or "you or your descendants" is an important circumstance to be taken into consideration in the construction of a lease claimed to be a "mulgeni" lease. 34 *Mad.* 231 and 26 *Mad.* 157, *Ref.* [P 435 C 2]

(b) Trustee — Perpetual lease of church property cannot ordinarily be granted—Trustee cannot be presumed to grant it.

So far as "Devasthanams" churches and temples are concerned, it is not ordinarily open to the trustee to grant perpetual leases in respect of the trust properties, and the trustee should not be presumed as doing something beyond his powers, such as granting a perpetual lease of the trust properties. 15 *C. L. J.* 227; 34 *Mad.* 535 and *A. I. R.* 1917 *P. C.* 33, *Foll.*; 12 *L. W.* 191, *Ref.* [P 435 C 2; P 436 C 1]

(c) Lease—Construction—Duration indefinite—Hereditary interest not specifically granted—Lease is not permanent—Only life interest passes.

If a lease be made to a man for an indefinite period, it onures, generally speaking, as far as his lifetime, and passes no interest to his heirs unless there are words showing an intention to grant a hereditary interest. 3 *Cal.* 210 (*P.C.*); 12 *Cal.* 117 (*P.C.*), *Rel. on*; *S. A. No.* 1524 *of* 1920 (*Mad.*); 30 *Cal.* 20 and 883; 15 *Mad.* 199; 8 *Cal.* 664 (*P. C.*); *Wood* v. *Davies*, (1881) 6 *I.R.* 50, *Ref.* [P 436 C 1]

(d) Lease—Construction—Words "lessor shall not demand higher rent than Rs. 96" or "lessee alone shall have right to make improvements and not lessor" cannot be construed to indicate perpetual lease.

The clauses in a lease for an indefinite period that "the lessor shall not demand additional rent higher than Rs. 96" or that "the lessee alone shall have the right to make improvements to the exclusion of the lessor" cannot by themselves be taken to mean that the lease is perpetual one. [P 437 C 1]

(e) Lease—Construction—Lease for indefinite period—Costs of improvements thrown on lessee—Measure of continuity is indicated but not necessarily perpetuity.

In the construction of a lease for an indefinite period clauses which throw the cost of improvements on the lessee indicate some measure of continuity but not necessarily perpetuity: 43 *Cal.* 332, *Foll.* [P 437 C 2]

(f) Adverse possession—Landlord and tenant—Permanent tenancy is not acquired by mere lapse of time—Permanent tenancy.

A tenant cannot, by any amount of declaration and acting on his part, acquire as against the landlord title by adverse possession to the properties covered by the lease and mere lapse of time does not enable a tenant to acquire the right of a permanent tenant: *A. I. R.* 1924 *P. C.* 65 and *A. I. R.* 1923 *P. C.* 205, *Foll.* [P 438 C 1]

K. Y. Adiga—for Appellants.

B. Sitarama Rao—for Respondent.

Judgment.—In this case the plaintiff (The Roman Catholic Church, Mermajal) represented by John Francis Cutinha instituted O. S. No. 404 of 1924 on the file of the District Munsif's Court, Mangalore to eject the defendants, the Saldhanas, on the ground that the suit properties belong to the Church and were leased to the father of defendant 1 and the grandfather of the other defendants in 1858 under Ex. D. The lessee died in about 1876 but defendant 1 who is the surviving son and the other defendants who are the grandsons of the original lessee, continued in possession of the properties paying the rent stipulated in Ex. D. On 2nd October 1923 the plaintiff gave notice of ejectment and the suit was instituted on 13th July 1914. The main pleas raised by the defendants are: (1) that the defendants are mulgeni tenants under Ex. D and are not liable to be ejected and (2) that they have acquired mulgeni rights by adverse possession. There were two subsidiary questions of which one related to the amount of rent to which the plaintiff would be entitled to in case he is allowed to eject the defendants, and the other related to the exact value of the improvements to which the defendants may be entitled to if they have to surrender possession of the properties.

The rights of the parties turn on the construction to be placed on Ex. D. The Court of first instance construed it in favour of the defendants and dismissed the suit for possession. The lower appellate Court, however, construed the document in the way sought for by the plaintiff and has given a decree in ejectment. The second appeal is accordingly preferred by defendants 2 to 6, defendant 1 having died and I have to construe this document. The document is set out in full in para. 7 of the lower appellate Court's judgment and is as follows:

"Genichit (lease deed) executed by Juje Saldhana in favour of the Mermajal Church dated 22nd August 1858.

Particulars of the rent of Rs. 96 fixed for Kori bettu land bail and bettu comprising six Mudies and Bagayat starting with Rs. 80 payable in January 1859 and rising by increments so as to reach Rs. 96 in 1869, besides the yearly perquisites. You shall not demand additional rent over and above Rs. 96. This term shall be void in case any portion of the rent should fall in arrears. In case a new tenant should be introduced owing to my default in paying rent regularly or in case I surrender the holding to the Church, I shall have no claim to improvements. I have no right to sell or cut down the trees in the land except for domestic purposes without the consent of the 'ten' (meaning the Church Assembly). I have no right to sell away my improvements to strangers but am bound to make them over to the Church for a fair price. I alone shall have a right to make improvements in the land and you (the lessor) shall have no right to do so."

The main arguments in favour of the defendant are set out in para. 12 of the original Court's judgment and the arguments in favour of the plaintiff are contained in para. 10 of the lower appellate Court's judgment. Thus these paragraphs contain all the arguments advanced by the respective parties. On behalf of the appellants, their learned advocate Mr. Adiga laid main stress on the following circumstances so far as I was able to follow him. He drew my attention to the following sentences in the document:

"You shall not demand additional rent over and above Rs. 96. I have no right to sell or cut down trees in the land except for domestic purposes without the consent of the "ten" (meaning the Church Assembly)—I have no right to sell away my improvements to strangers but am bound to make them over to the church for a fair price. I alone shall have right to make improvements in the land and you (the lessor) shall have no right to do so."

Some of these provisions no doubt go to support the contention raised by the learned advocate for the appellant; but I have to construe the document as a whole. In construing a document which is claimed to evidence the grant of mulgeni lease, one would expect the initial recital therein, as one finds generally in such cases, that the document is styled a "mulgeni" document. In the case before me, there is the further fact that the landlord, the Church, has not executed any document in favour of the tenants. Ex. D is by the lessee to the Church. This is rather important because it is not pretended in this case that the defendants or their ancestor had any right to these properties prior to the date of the lease Ex. D. In fact it appears from Ex. G that on 17th May 1841 these properties were purchased by the Church by payment of cash to its former owner Abbakku, with whom the defendants have nothing to do. Now the circumstance that the document is executed only by the lessee in favour of the lessor and that no document has been executed by the lessor, is, I think an important circumstance which I have to take into account in considering whether what was granted by the lessor is permanent mulgeni right. Again there is the further circumstance that when such permanent mulgeni rights are conferred one would naturally find the words:

"you (the lessor) shall enjoy the properties 'from generation to generation,' "from son to grandson"

or other words to that effect: see mulgeni documents referred to in *Vidyapurana Thirthaswami* v. *Uggannu* (1), and *Parameshri* v. *Shanlaga* (2). In this particular case these words 'from generation to generation" or 'you and your descendants' are absent and I think that this is also an important circumstance to be taken into consideration. I have got yet another circumstance that this lease is granted by the Church, and it has been laid down by the highest judicial authority that so far as Devasthanams, churches and temples are concerned it is not ordinarily open to the trustee to grant perpetual lease in respect of the trust properties, since that would prevent the trust from having the benefit of increased rents in future. The decision in *Satya Sri Ghosal* v. *Kartik Chandra Dass* (3), is one of the earliest of such cases. The decision in *Devasikamony Pandara Sannadhi* v. *Palaniappa Chettiar* (4), to the same effect was confirmed by the Privy Council in *Palaniappa Chetty* v. *Devasikamony Pandara Sannadhi* (5). See also the decision of Sir John Wallis, C J. and Krishnan, J., re-

(1) [1910] 34 Mad. 231=20 M. L. J. 640 =7 I. C. 321=(1910) M. W. N. 333 (F.B.).
(2) [1903] 26 Mad. 157=12 M. L. J. 189.
(3) [1912] 15 C. L. J. 227=13 I. C. 596=16 C. W. N. 418.
(4) [1911] 34 Mad. 535=20 M. L. J. 969=9 I. C 281=(1911) 2 M. W. N. 154.
(5) A. I. R. 1917 P. C. 33=40 Mad. 703=44 I. A. 147 (P.C.).

ported in *Chinnammal* v. *Rathnasabapathy Chettiar* (6).

It is unnecessary for me to multiply decisions in support of this proposition as it is clear that trustees of religious institutions could not ordinarily grant perpetual leases in respect of trust properties. When construing documents granted by trustees, I think it is legitimate to bear in mind that the trustees should not be presumed to be doing something beyond their powers such as granting permanent leases of trust properties.

Now bearing these principles, when I proceed to construe Ex. D. I am not able to find anything definite in it which would enable the defendants, the tenants, to contend that perpetual rights have been conferred on them. The learned advocate for the appellant is no doubt correct in contending that the scheme of the lease is that the initial rent should be Rs. 80, and the rent was to be gradually increased to Rs. 96 which should be the highest rent agreed between the parties as payable for the year 1869. After that comes the provision "you shall not demand additional rent over and above Rs. 96." The question then is whether the two sentences occurring in Ex. D give the tenants the perpetual or mulgeni rights in respect of these properties. My attention has been drawn to certain Privy Council cases which are useful in construing such documents. The case in *Lakhraj Roy* v. *Kunhya Singh* (7), is a case where the Privy Council had to consider what exactly would be the period for which an indefinite lease would continue. At p. 212, their Lordships observe:

"If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs unless there are some words showing an intention to grant a hereditary interest."

In the case before me I am unable to say that there are words showing an intention to grant hereditary interest; in fact no such words occur in the document. The same principle was re-affirmed by the Privy Council in the case reported in *Tulshi Pershad Singh* v. *Ramnarain Singh* (8).

This Court had to consider a similar question in second appeal of 1920 decided by Oldfield and Ramesam, JJ. They had to consider in that case a document styled chalgeni lease, providing that the lessees were entitled to continue in possession so long as they paid their rent, and they observed as follows:

"The lease under consideration was granted before the Transfer of Property Act. We, therefore, deal with it in the light of authority."

After quoting *Tulshi Pershad Singh* v. *Ram Narain Singh* (8); *Agin Bindh Opadya* v. *Mohan Bikram Shah* (9); *Narasingh Dayal Sahu* v. *Ram Narain Singh* (10) and *Rajaram* v. *Narasingh* (11), the learned Judges proceeded to observe as follows:

"These cases show that in the absence of special provision or ground for inference from surrounding circumstances a lease must be construed as for the life of the lessee."

Another decision of the Privy Council reported in *Bilasamony Dasi* v. *Raja Sheo Pershad Singh* (12), lays down the same principle. The Privy Council there decided that the word "mokarari" did not necessarily import perpetuity, although it may do so:

"Used in connexion with the ijara in a patta this word is not inconsistent with such interest being only for life."

In answer to the contention that the word mokarari implies something permanent this was what their Lordships observed at p. 671:

"This committee on appeal from a decision of the High Court held that these words might mean either permanent during the life of the person to whom the grant was made or permanent as regards the hereditary descents."

They also laid down at p. 673 that it was for the tenants to show that under the document of lease a perpetual right was granted of them. They remarked:

"As the appellant is unable to point to any words in the patta importing perpetuity, it appears to their Lordships upon a consideration of the object of the patta and its language and provisions, as well as the surrounding circumstances, that the intention to grant a perpetual lease does not sufficiently appear."

A decision of the Irish Court also to the same effect, reported in *Wood* v. *Davies* (3), was also read to me. There the question that arose for decision was this:

(6) [1920] 12 M. L. W. 191=59 I. C. 241=(1920) M. W. N. 532.
(7) [1877] 3 Cal. 210=4 I. A. 223 (P.C.).
(8) [1886] 12 Cal. 117=12 I. A. 205=4 Sar. 646 (P.C.).
(9) [1903] 30 Cal. 20=7 C. W. N. 314.
(10) [1903] 30 Cal. 883.
(11) [1892] 15 Mad. 199.
(12) [1882] 8 Cal. 664=9 I. A. 93=4 Sar. 925 (P.C.).
(13) [1881] 6 I. R. 50.

" After the death of the lessee, was the lessor bound to give notice to quit before he would be entitled to the possession of the properties."

The Court held that in the absence of express words granting any higher right to the lessee, an indefinite lease would enure only during the lifetime of the lessee, and that on the lessor's death the lease terminated, and that the landlord was not bound to give any notice to quit before he claimed possession of the properties. It should also be remembered that the landlord, in the present case—the Church—is not likely to eject its tenants capriciously as private landlords might do, and a tenant coming into possession under a devasthanam or Church would ordinarily expect to be allowed to continue in possession so long as the proper rent was paid. The fact that the rent to be paid was fixed at Rs. 80 for the first year and at Rs. 96 for the year 1869 does not necessarily imply that there was to be a perpetual lease. The provision " you shall not demand additional rent over and above Rs. 96' should I think, having regard to the context, be taken to mean that no rent higher than Rs. 96 would be demanded during the currency of the lease ; which means that during the lifetime of the lessee he shall not be asked to pay more than Rs. 96 as rent per year. The lower Courts have discussed the bearing of the other clauses in the lease. I am not able to find anything definite in those clauses which would enable me to say that any perpetual lease was granted. Before I part with this portion of the case I should refer to two further clauses which were commented on by the learned advocate for the appellant, "I alone shall have the right to make improvements in the land and you (the lessor) shall have no right to do so." Taken literally and strictly the landlord is not entitled to enter on the premises during the currency of the lease, much less is he entitled to make any improvements during the currency of the lease without the permission of the lessee ; so that the fact that during the currency of the lease the lessor shall have no right to effect improvements does not in any way show that the interest created by the lease is a permanent or mulgeni interest.

As regards the condition relating to improvements, a decision of the Calcutta High Court in *Ram Narain Singh* v. *Chota Nagpur Banking Association* (14), by Jenkins, C. J., and two other Judges may be referred to. After remarking that the expression isthemrari mokrarari (fixed rent), 'does not per se convey either lexicographically or by way of custom an estate of inheritance, their Lordships proceed to remark that" clauses in a lease which impose a restraint on transfer or cutting down of fruit bearing or income yielding trees by the lessee are not consistent with the theory of a perpetual lease :

" Clauses which throw the cost of improvements on the lessee indicate some measure of continuity but not necessarily perpetuity."

After having given my best consideration to the various clauses contained in this lease deed Ex. D, I am not satisfied that the lower appellate Court's view that the lease in question is not mulgeni or permanent lease is erroneous. That was the main argument of the learned advocate for the appellant. But even apart from the construction of Ex. D, the learned advocate for the appellant argued, that there are certain circumstances which would prove that the Church authorities (the plaintiffs) clearly intended by the document to grant a permanent lease. He refers to two documents Exs 4-C and 8-A, which are two receipts granted, one in 1859 and the other in 1923. Turning to Ex. 4-C, all that I am able to find there is this :

" Receipt granted on 12th March 1878 to etc., received Rs. 96 (Rupees ninety six) as per genichit and Rs. 1-8-0 (one rupee and annas eight) for road cess in full."

From this the learned advocate argues that because there is a reference to genichit it must be taken to mean that the incidents of Ex D were incorporated in and confirmed by that document. I am not quite clear that one is entitled to go so far. All that is meant, I think, is that the rent paid is with reference to the property included in or referred to in the geni-chit. If Ex. D itself did not confer permanent rights, I do not see how Ex. 4-C would be useful to confer the same.

The other document Ex. 8-A is a very recent one dated 10th June 1923, whereas the suit itself was filed on 13th Sep-

(14) [1916] 43 Cal. 332=36 I. C. 321.

tember 1924. Ex. 8-A is commented on by the lower appellate Court in para. 15 of its judgment. In that exhibit there is a reference to kayam geni, and prima facie this document would lend support to the learned advocate's contention. But the finding of the lower appellate Court as regards this document is that this document was written by a Sacristan of the plaint Church who is the son-in-law of defendant 5. P. W. 1 the administrator of the Church swears that he did not know of this recital in Ex. 8-A, that Judge Carasth who wrote Ex. 8-A was Miran and clerk, and that he is the son-in-law of defendant 5; and as soon as the Vicar came to know of the recital of kayam geni in Ex. 8-A the Vicar dismissed the writer who wrote it. The receipt is dated 10th June 1923 and the suit notice is dated 2nd October 1923 Ex. A, so that this circumstance does not really help the contention of the defendants. On the whole, I am not able to find anything definite which would in any way help me in construing this document Ex. D as a permanent lease. For the above reasons I have come to the conclusion that the main ground taken by the learned advocate for the appellant fails.

If the defendant's predecessor came into possession under Ex. D, and if the defendants had been paying rent regularly after the original lessee Saldhana's death up to and inclusive of the year 1923, they could not possibly acquire the right of permanent tenants by reason of mere lapse of time. It is settled law that a tenant could not, by any amount of declaration or acting on his part, acquire as against the landlord title by adverse possession to the properties covered by the lease: *Nainapillai Marakayar* v. *Ramanathan Chettiar* (15) and *Madhava Rao Waman* v. *Raghunath Venkatesh* (16), are two recent decisions of the Privy Council which make this position perfectly clear. Further in this particular case it is not quite clear whether the Church authorities had notice of the setting up by the defendants on some occasions of their right as mulgenidars (perpetual lease-holders.) I, therefore, think that both the lower Courts were right in deciding this point about the acquisition by prescription of the mulgeni right by the defendants against them.

The last point raised by the appellant relates to the form of the decree that has to be passed in this case. The decree passed by the lower appellate Court is this:

"On payment by the plaintiff to defendants 2 to 6 Rs. 4,278-12-0 an account of improvements, defendants 2 to 6 do surrender to plaintiff possession of the properties in plaint Schs. A and B described in the lower Court's decree, with future mesne profits at the rate of 48 muras of rice and Rs. 100 per annum from the date of plaint (13th July 1924) until delivery of possession or until the expiration of three years from this date whichever event first occurs."

It was argued that the defendants' possession could not be said to be that of a trespasser before they were paid the value of improvements, and the value of improvements in this case represents rather a large sum being Rs. 4,278-12-0. No doubt the rent stipulated in Ex. D is only Rs. 96, and the present income from the properties is said to be 48 muras of rice and Rs. 100 per annum. This income presumably represents the result of the improvements effected on the properties by the defendants. Further there is the other circumstance that in this case Ex. D to which both the Church and the lessee were parties is not a very clear document, so that if the defendants left the matter to be decided by the Courts it could not, in the particular circumstances of this case be said, be taken to show clear malafides on their part. No doubt the lower appellate Court, and this Court, have construed the document differently from the way in which the defendants want to construe it, but that is no ground for saying that their conduct was malafide or fraudulent, in having retained possession of the properties. In any event the fact that the plaintiff has to pay Rs. 4,278-12-0 before getting possession of the properties would in my opinion in the particular circumstances of this case be a ground for modifying the decree of the lower appellate Court in the way in which I propose to modify the same. The plaintiff would be entitled to mesne profits at the rate mentioned in the lower appellate Court's decree, not from the date

(15) A. I. R. 1924 P. C. 65=47 Mad. 337=51 I. A. 83 (P.C.).
(16) A. I. R. 1923 P.C. 205=47 Bom. 798=50 I. A. 255 (P.C.).

of the plaint as mentioned by it, but only from the date on which he deposits that amount in the 1st Court, or otherwise duly tender it to the defendants. Till that is done, the plaintiffs would only be entitled to rent at Rs. 96, a year. I modify the decree of the lower appellate Court in this respect. As the appellants have substantially failed in this second appeal, they will pay the costs of the respondent in this second appeal. The decree of the lower appellate Court will be confirmed in other respects. As, in my opinion, no question of past mesne profits arises, the plaintiff would be entitled to Rs. 96 per annum from 13th April 1924 till the date on which the plaintiff deposits the amount into Court or otherwise makes due tender as aforesaid.

P.R.S./J.M. *Decree modified.*

A. I. R. 1930 Madras 439

PANDALAI, J.

(*Muttavi*) *Venkatacharyulu* and *another*—Defendant—Appellants.

v.

(*Vemavarapu*) *Ramkrishna Rao*—Plaintiff and Defendant 1—Respondents.

Second Appeal No. 697 of 1924, Decided on 2nd May 1929, against decree of Sub-Judge Masulipatam, in A. S. No. 61 of 1923.

(a) Hindu Law—Religious Endowment—Management—Creditor, advancing money to Devasthanam, must show justification of it.

In lending moneys to managers of religious institution, it is not enough that the purposes are necessary, but the creditors must also show that they made enquiries and satisfied themselves that on the occasion on which they made the advance, the loan was justified by the state of the institution's finance. Moreover it is necessary at every time that the debt is either renewed or transferred to a new person, to show not merely that in its origin there was a nucleus of binding debt but that at the subsequent time it was necessary to borrow to pay off the old debt. If that were not so, the door to fraud would be wide open. [P 440, C 1]

(b) Contract Act. S. 235—Person purporting to act as agent of Devasthanam—Creditor advancing money on that faith—On failure of authority debtor is personally liable under S. 235.

If a person borrows money from a creditor purporting to act as agent of the Devasthanam and the creditor having advanced the money on that faith, when it turns out that the person had no authority and was not entitled to borrow on behalf of the Devasthanam, S 235 immediately comes into play and he is bound to recoup the loss to which he has put the creditor. [P 440, C 2]

P. Somasundaram and V. *Govindarajachari*—for Appellants.

V. Krishna Mohan and *M. Patanjali Sastri*—for Respondents.

Judgment.—This second appeal is by defendants, 2 and 3 father and son, against the decree of the lower appelate Court by which it varied the decree of the Court of first instance and dismissed the plaintiff's suit so far as defendant (respondent 1) Sri Venkatesa Swami Devasthanam was concerned and gave a decree instead against these appellants. The suit was brought upon a promissory note executed to the plaintiff respondent, 2 a cousin of the appellants for Rs. 700, dated 16th November 1917. The suit was brought against the Devasthanam mentioned above, and against the present appellants, the first of whom executed the promissory note and the second of whom was impleaded as the son of the debtor. The plaintiff's case was that appellant 1 was the archaka and manager of the Devasthanam and had borrowed this sum as such for purposes binding on the Devasthanam and therefore, a decree was prayed in the first instance agaist the Devasthanam and, in the alternative, if it was found that the Devasthanam was not liable, against these appellants. The District Munsiff found that the debt was borrowed for and on behalf of the Devasthanam and for purposes binding upon it and gave a decree against the Devasthanam dismissing the suit as against the appellants. Defendant 1 (respondent 1) appeared. The learned Subordinate Judge after going into the evidence found that the loan was not proved to have been incurred for purposes binding on Devasthanam and dismissed the suit as against it. He, therefore, gave the plaintiff the alternative relief claimed and passed a decree against the appellants.

In second appeal two points have been urged: (1) that the decision of the lower appellate Court exonerating the the Devasthanam is incorrect, and (2) that the decree against the appellant is incorrect because the note sued

upon was executed by appellant 1 so as to exclude his personal liability and as agent on behalf of the Devasthanam. I can see nothing in the judgment of the Subordinate Judge on the question as to the binding character of the debt upon the Devasthanam which is open to objection in this Court. The appellant's learned advocate complained that the Subordinate Judge had misstated the nature of the evidence to be given by the plaintiff in a suit of this kind. What the Subordinate Judge has said is that:

> "the authorities noted in margin clearly show that in lending moneys to managers of religious institution, it is not enough that the purposes are necessary, but they must also show that they made enquiries and satisfied themselves that on the occasion on which they made the advance, the loan was justified by the state of the institution's finance".

As far as I know, this is correct and the appellants' advocate has not shown how it is incorrect.. Take, for instance, this very case. The present loan is said to have had its origin in a debt so long ago as 1902 incurred from one Lakshmamma. That was transferred to one Elliah, who held the loan till about 1913 and during that period took three renewals. Then the loan transferred to one Ammayya and from him to this plaintiff in 1917. Now the appellant's argument is that it is enough for his plaintiff in this case to show that in 1902 Lakshmamma's bebt was binding upon the Devasthanam and that the subsequent borrowing to pay off the previous loan which had its origin in Lakshmamma's debt must, therefore, be also binding upon the Devasthanam. That is incorrect. It is necessary at every time that the debt was either renewed or transferred to a new person, to show not merely that in its origin there was a nucleus of binding debt but that at the subsequent time it was necessary to borrow to pay off the old debt. If that were not so, the door to fraud would be wide open. There is, I think, nothing in this point and nothing else has been urged to show that the finding of the Subordinate Judge on that question can be assailed

The next question is whether the decree against the appellants passed in the alternative canbe supported. It was urged that the promissory note Ex. A was signed by appellant 1 on behalf of Sri Venkatesa Swamivaru and that the signature being in that form excluded the personal liability of the appellants. The English translation of Ex. A as printed, no doubt, translates the Telugu word (*tharapuna*) as "on behalf of"; but it is contended for the respondent that the word does not necessarily mean "on behalf of" in the legal sense but merely 'of' or 'on the side of'. The word *'taraf'* is an Arabic word which according to Brown's Dictionary means 'side,' 'quarter', 'district'. It is also colloquially used in Telugu to mean 'on behalf of' as in the expression *'Vathi Tharapuna'* witness on the side of or on behalf of the plaintiff. That being so, I cannot conclude merely from the use of the expression *tharapuna* in the signature that appellant's 1 personal liability was excluded.

But assuming that the signature does convey the legal meaning that the signatory was signing not on his own behalf but on behalf of someone else, the case for the appellants would not be improved because appellant 1 having borrowed the money from respondent 2 (plaintiff) purporting to act as agent of the Devasthanam and the plaintiff having advanced the money on that faith, when it turns out that appellant 1 had no authority and was not entitled to borrow on behalf of the Devasthanam, S 235 Contract Act immediately came into play and he is bound to recoup the loss to which he has put the plaintiff. In this view of the case it is unnecessary to consider whether the objection to personal liability raised by the appellant's advocate should be allowed to be taken in this Court as it was not expressly taken in the grounds of appeal. The second appeal fails and is dissmissed with costs, one set to each of respondents 1 and 2.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 441

BEASLEY, C. J., AND
PANDALAI, J.

(*Shroff*) *Veerappa* and *others* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Cases Nos. 336 and337 of 1929 and Criminal Revn. Petns. Nos. 303 and 304 of 1929, Decided on 17th October 1929, from orders of Sess. Judge, Kurnool, D/- 25th March 1929, in Criminal Revn. Petns. Nos. 1 and 2 of 1929.

(a) Madras Local Boards Act (1920), S. 166 (1)—S. 166 (1) is intended to make persons who use road of District Local Board to pay for that privilege.

Section 166 (1) is intended to make persons who use the road of a District Board for making money by using motor vehicles upon it pay for that privilege. The first part is intended to make persons who ply a motor vehicle for hire within the limits of the District Board pay for it by taking out a license, and the latter part of it is intended to make persons who pick up passengers at separate fares outside the area of the District Board and who carry those passengers over a road of the District Board also take out a license : *A. I. R.* 1928 *Mad.* 166, *Dist.* [P 442 C 2]

(b) Madras Local Boards Act (1920), S. 166 (1)— Meaning of "separate fares" explained.

What is meant by "separate fares" is individual fares as distinguished from a fixed amount for the whole vehicle. [P 442 C 2]

(c) Interpretatien of Statutes — Words clearly expressing intention of legislature— Definition from English cases should not be accepted.

Where a Court is dealing with the words of a section which clearly express the intention of the legislature, no definitions of the same words should be accepted from English cases. [P 442 C 2]

L. C. Veeraraghava Iyer — for Petitioners.

Public Prosecutor—for the Crown.

Order. — The Assistant Engineer, Kurnool, under the authority of the President, District Board, Kurnool, filed a complaint against the owner and driver respectively of Bus No. K. V. 62 alleging that they had committed an offence by using that bus on 14th October .1928 for carrying passangers at separate fares on the Chittoor—Kurnool road without the District Board's license, an offence coming within the purview of S. 166 (1), Madras Local Boards Act of 1920 and punishable under S. 207 of that Act. The complaint was presented to the Stationary Sub-Magistrate, Kurnool. He recorded the complainant's sworn statement and, holding that the act complained of was not "plying a bus for hire" and that the contracts with the passengers had been entered into within the limits of the Kurnool Municipality and not within the limits of the jurisdiction of the District Board, decided that upon the allegations made, there had been no contravention of S. 166 (1), Local Boards Act. He therefore dismissed the complaint. A petition for revision was presented to the Sessions Court, Kurnool Division by the complainant against that order and the Sessions Judge set aside the order of the Sub-Magistrate and directed the District Magistrate to take the complaint on the file and make such further enquiry into it as was necessary under the law. Against that order the petitioners have presented this criminal revision petition.

According to the sworn statement of the Local Fund Assistant Engineer, on the date in question the bus was carrying passengers at "separate fares" from Kurnool to Nandyal and the owner of the bus had not obtained the license from the District Board required by S. 166 (1), Madras Local Boards Act. The facts seem to be that the passengers were picked up within the municipal limits of Kurnool and carried in the bus to Nandyal going over, in the course of the journey, one of the roads belonging to the District Board of Kurnool. For the purposes of the argument before us and in the Court below it was not suggested that any passengers were picked up by the petitioners at any place within the limits of the District Board.

The short point for consideration by us is whether this motor bus under the circumstances must obtain a license from the District Board of Kurnool. S. 166 (1), Madras Local Boards Act is as follows :

"No person shall, on any public road in a district, ply any motor vehicle for hire or use any such vehicle for carrying passengers or goods at separate fares or rates on such road, except on a license obtained from the President of the District Board."

The Stationary Sub-Magistrate held that the second part of Cl. (1), S. 166 namely, "use any such vehicle for carrying passengers or goods" must have the same interpretation placed

upon it as that applicable to the first part, namely, "plying for hire," and that, as there had been no plying for hire within the limits of the District Board's area, no license was necessary and no offence had been committed. Before the learned Sessions Judge the petitioners relied on a decision reported in *Local Fund Overseer, Mayavaram* v. *Pakkiriswami Thevan* (1). In that case Madhavan Nair and Curgenven, JJ. held that a person who lets out his car for hire within a municipality need not obtain a license from a District Board, if the car travels beyond the municipal limits and traverses any of the District Board roads and that the "plying of a motor vehicle for hire" means the act of waiting for or soliciting custom, and therefore, so soon as any person has hired it, the act of plying for hire is complete and that it cannot be said that a vehicle plies for hire on a public road merely because it is made use of a hired vehicle on that road and that a vehicle cannot be said to ply for hire on a road unless the actual hiring takes place on that road. The facts are set out on p. 215 as follows:

"The case was tried as a summons case and he was asked to show cause why he should not be convicted upon a complaint that he had plied his motor car for hire from Mayavaram to Tranquebar on the 27th, 28th and 29th March 1925 without obtaining a license."

Although, however, the terms of the complaint were not supported by the prosecution evidence, a defence witness was examined who deposed that the accused was in the habit of letting out his car for hire to vakils, mirasdars and others wishing to engage a car for a trip from Mayavaram. It may be taken, therefore, that the accused in this case admitted hiring out his car for journeys from Mayavaram. In the other case (C. C. 200) the question put to the accused was in similar terms and the evidence was in consonance with it. In both the cases only the first portion of S. 166 (1) would apply, because admittedly there is no proof that the vehicles were used for carrying passengers or goods at separate fares or rates. The statement of the facts, in our view, makes this clearly distinguishable from that because according to the sworn statement of the Local Fund Assistant Engineer the passengers in this case were carried at separate fares whereas in *Local Fund Overseer, Mayavaram* v. *Pakkiriswami Thevan* (1) the whole bus had been engaged for the trip from Mayavaram. Therefore the only thing that that Bench had to consider was the first part of S. .166 (1) and not the latter part of it and the argument on behalf of the Board in that case was that a vehicle plies for hire on a public road if it is made use of as a hired vehicle on that road, so that it is not ta necessary condition that the actual hiring should take place upon that road. That argument, however, did not find favour with that Bench and we think quite rightly. We are in entire agreement with .the decision in that case. But here the facts are different. Before us on behalf of the petitioners it is argued that the latter words of Cl. (1) of the section namely, "use any such vehicle for carrying passengers at separate fares" on a District Board road mean plying for hire on the District Board road. If this is so, then the latter part of the clause is redundant. We cannot accept that argument. We think that that section is intended to make persons who use the road of a District Board for making money by using motor vehicles upon it pay for that privilege. The first part is intended to make persons who ply a motor vehicle for hire within the limits of the District Board pay for it by taking out a license and the latter part of it is, in our view intended to make persons who pick up passengers at separate fares outside the area of the District Board and who carry those passengers over a road of the District Board also take out a license. What is meant by "separate fares" is individual fares as distinguished from a fixed amount for the whole vehicle and it was as we read the facts in the *Local Fund Overseer, Mayavaram* v. *Pakkiriswami Thevan* (1) the latter case that was there being considered.

We are referred to several English cases but except where the definitions are given of what is "plying for hire" they do not assist us because we are here dealing with the words of a section which in our view, clearly express the intention of the legislature. Under these circumstances, we are satisfied that the order of the Sessions

(1) A. I. R. 1928 Mad. 166=51 Mad. 527.

Judge was quite proper and we agree with the reasons he has given for that order. This criminal revision case is, therefore dismissed. For the reasons given above, criminal revision case 337 of 1929 is also dismissed.

P.R.S./V.S. *Petition dismissed.*

A. I. R. 1930 Madras 443

WALLACE, J.

Nogi Reddy—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 946 of 1928, and Criminal Revn. Petn. No. 683 of 1928, Decided on 26th April 1929, from judgment of Sess. Judge, Kurnool, in Criminal Appeal No. 12 of 1928.

(a) Criminal Trial—Judgment vitiated by confusion and wrong notion about facts cannot be upheld—Criminal P. C. S. 439.

A judgment in a criminal appeal, which is vitiated by a confusion of ideas, by a wrong view of facts and by a too cursory dismissal of the defence evidence, cannot be upheld in revision. [P 443 C 2]

(b) Criminal P. C., S. 202—Person making enquiry under S. 202 can import his personal knowledge.

There is nothing which prohibits a person to whom a complaint is sent for enquiry under S. 202 from importing his own personal knowledge into it or examining witnesses whom he knows to be able to throw light on the matter : *A. I. R.* 1927 *Mad.* 19, *Ref.* [P 444 C 2]

V. V. Srinivasa Iyangar and *B. Somayya*—for Petitioner.

N. S. Mani for *Public Prosecutor*—for the Crown.

Order.—This is a petition against the conviction of the petitioner for criminal misappropriation. It was charged and found against the petitioner that he in his capacity as Village Munsiff misappropriated for himself a sum of Rs. 10 collected by him from the complainant in the case. The conviction was confirmed on appeal and the petitioner asks me to interfere in revision.

It is necessary to go shortly into the facts alleged. The petitioner admits having passed to the complainant a receipt for Rs. 10, Ex. A-1, on 12th January 1928. That receipt is on a sheet of paper and appears between two other receipts, Ex. A, for Rs. 10 dated 3rd January 1928, and Ex. A-2, for Rs. 20 on 5th February 1928. Exs. A-1 and A-2 are on a piece of paper which has been passed to the sheet on which A appears. The complainant's case was that he paid all three sums. It is admitted by the petitioner that no credit has been given in his accounts to the complainant for the payment on 12th January 1928. His explanation is that no payment was made on that date, but that he made the entry as the complainant said to him that he had lost the former sheet with the receipt given on 3rd January 1928, and so he has given a duplicate. In explanation of the difference of date the petitioner's case was that as the complainant did not remember the date he himself only inserted the year and the month and that the figure 12 is not his. The complainant examined in the witness box stated that the payment of Rs. 10 on 12th January 1928, was entered on the same sheet as the receipt Ex. A, and that a new sheet was begun with the receipt Ex. 42 on 5th February 1928. That is quite obviously not correct. On the other hand, the petitioner has not explained how if the sheet containing A was not with him when he entered A-1, he entered the word "ditto" in Cols. 2 and 4, and why the entry A-1 is not stated therein to be a duplicate receipt. I do not further go into these points as I am of opinion that the appeal will have to be re-heard by the lower Court and I do not wish to hamper its decision.

I consider that the appeal must be re-heard because the lower Court's judgment is vitiated by a confusion of ideas and by a too cursory dismissal of the defence evidence. The defence case was that the complaint which the complainant made to the Tahsildar really was not that he had paid Rs. 10 to the petitioner which has not been credited but that he had paid Rs. 5 in excess of what was due. The petitioner admitted that he had collected a few rupees in excess from the complainant but that excess collection was duly credited and therefore, was not misappropriated. Such small excess collections are very common and almost inevitable during the kist collection season, and so long as they are duly credited no real harm is done. But the lower appellate Court fixes on the admission of excess collection as an admission that the petitioner had dishonestly collected that amount and as a proof, therefore, of embezzle-

ment. That is obviously a wrong view altogether, since the accounts show the excess collection and, therefore, there was nothing dishonest about it. In another part of its judgment the lower appellate Court seems to think that there was not,as a fact any excess collection. I do not follow its argument here. It admits that the actual amount due from the complainant was Rs. 56-3-10. The trial Court puts at Rs. 55, and that the complainant paid Rs. 30 to the petitioner, and then Rs. 29-11-9 on a distraint. So obviously there was excess collection. The Sessions Judge thinks D. W. No. 8 in setting out the story of this excess collection "gives away the appellant completely," and in another passage he speaks of the defence story as being that complainant suspected the petitioner of having misappropriated Rs. 5; but the defence story was that the complainant suspected the petitioner of having collected Rs. 5 in excess. As a matter of fact this excess collection has no real relevancy to the case of the embezzlement cf Rs. 10 and the fact that a few rupees were collected in excess and credited in the petitioner's account is no evidence whatever that he collected and misappropriated Rs. 10.

The Sessions Judge again too cursorily dismissed the defence evidence. The strong part of the defence case was the evidence of the Tahsildar and his Revenue Inspector and duffadar that on 11th February 1928 the complainant had admitted to them that his only complaint against the petitioner was the matter of the excess collection and not any matter of misappropriation. It happened that the complainant in this case was sent on 20th March 1928, by the Magistrate to the Tahsildar (as Taluk Magistrate) for enquiry under S. 202, Criminal P. C. He examined the karnam who supported the complainant and returned the complaint with his opinion (Ex. G) that the petitioner was criminally responsible. When it was returned again with a direction to examine the petitioner himself the Taluk Magistrate refused to do so quoting a recent Full Bench decision of this Court in *Appa Rao Mudaliar* v. *Janki Ammal* (1). Now in neither report by him did the Tahsildar mention that at a conversation a few days earlier the complainant had admitted that he had no complaint to make about the misappropriation; nor did he examine the Revenue Inspector and duffadar about this conversation. This is undoubtedly a remarkable circumstance to which due weight has to be given. The Tahsildar's explanation is that at that stage he should not import facts within his personal knowledge, and thought he had no jurisdiction to examine the Revenue Inspector and duffadar. He was not pressed further and asked what provision of law prevented him from examining them or importing his own personal knowledge. It is suggested before me that he might have thought that the Full Bench decision prevented him from going into the accused's side of the case. If it were so his view was clearly mistaken. There is nothing in the decision which prohibits a person to whom a complaint is sent for enquiry under S. 202 from importing his own personal knowledge into it or examining witnesses whom he knows to be able to throw light on the matter. But the lower appellate Court has jumped, rather hastily, to my mind, to the conclusion that tha Tahsildar's explanation is dishonest, and that the story of the admission of the complainant is, therefore, untrue. I think this part of the case requires a more balanced consideration than has been given to it especially since the lower Court proceeds to infer from the Tahsildar's dishonesty that neither the Revenue Inspector nor the duffadar can be speaking the truth. I regard the lower appellate Court's judgment as vitiated by these unsatisfactory features which have prevented a proper decision of the appeal. I consider that the appeal ought to be re-heard because the allaged offence is not a trivial one, and if really committed by the petitioner he cannot be allowed to go unpunished. I, therefore, reverse the decision of the lower appellate Court and remand the appeal for being re-heard. The petitioner will remain on bail pending the re-hearing.

P.R.S./V.S. *Case remanded.*

(1) A. I. R. 1927 Mad. 19=46 Mad. 918 (F.B.).

A. I. R. 1930 Madras 445

CURGENVEN, J.

Ramanujam Naidu—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 115 of 1929 and Criminal Revn. Petn. No. 97 of 1928, Decided on 29th July 1929, from judgment of Joint Magistrate, Kumbakonam, in Criminal Appeal No. 49 of 1928.

Motor Vehicles Act, S. 4 (a) — Police officer stopping vehicle need not be one engaged in regulating traffic.

Part (a) of the section requires that a driver should stop in three sets of circumstances, firstly that traffic may be regulated, secondly that a name and address may be obtained with a view to prosecution, and thirdly for the purpose of enforcing any of the provisions of the Act, such as checking the license and inspecting a bus where it is suspected to be overloaded and it is not necessary that the police officer stopping the vehicle should be engaged in regulating traffic. [P 445 C 2]

Watrap S. Subramania Ayyar—for Petitioner.

K. Venkatraghavachari for *Public Prosecutor*—for the Crown.

Judgment.—These proceedings under the Motor Vehicles Act were instituted against the petitioner on a report by Head Constable No. 1346 to the Sub-Inspector of Kumbakonam. In the charge framed against him it was alleged that he drove bus No. 333 in Kaluthai Tope Road, Kumbakonam, and

"instead of stopping his bus on seeing bus No. 416, which came in the opposite direction, and without caring for the regulation under which C. P. I. (the Circle Inspector) asked him to stop, drove very fast."

There are two separate actions imputed in this charge, the first being that the accused failed to stop his bus on seeing bus No. 416. I understand it to be the rule that, when two motor buses are about to pass each other, it is the duty of one of them to stop, presumably in the interests of safety. It has been admitted, however, by the prosecution in this case that, on the occasion in question, it was the duty of the driver of the other bus 416 to stop his vehicle and accordingly the petitioner was found not guilty of failing to observe this rule.

There remains the charge that he failed to stop when the Circle Inspector asked him to do so. It has been contended on behalf of the petitioner that, under S. 4, Motor Vehicles Act, a driver can only be stopped by a police officer who is engaged in regulating traffic. This, I think, is so clearly against the language of the section as not to merit further discussion. Part (a) of the section requires that a driver should stop in three sets of circumstances, firstly, that traffic may be regulated, secondly that a name and address may be obtained with a view to a prosecution, and thirdly, for the purpose of enforcing any of the provisions of the Act. The allegation by the prosecution is that the bus was overloaded and that the Inspector wished to inspect it and to check the license. These, I think, were reasons for stopping it coming under the third and last category above the enforcement of the Act.

There remains the question of fact whether, before the petitioner's bus passed the bus in which the Inspector was seated, he made a sign to the petitioner to stop which the petitioner saw and disregarded. I should in ordinary circumstances have accepted the evidence of the two police witnesses, were there not considerable difficulty in the way of such a course. The report of the Head Constable, which certainly ought to contain the elements of the offence charged is, as I read it, that the petitioner's bus ought to have stopped when passing the other bus and that it not only failed to do so but did not stop in spite of the order of the Circle Inspector. I am quite unable to extract from this report the definite statement that, irrespective of the rule requiring the stopping of the bus upon meeting the other bus, the Circle Inspector signalled to the petitioner to stop before the passing took place. This is also the impression which I get from the examination-in-chief of both the Head Constable and the Circle Inspector. The Head Constable says :

"Bus Tan No. 333 driven by the accused passed and it was not stopped even when I and the Inspector asked him to do so."

In chief examination the Inspector says "It did not stop when it passed my bus" and it was only elicited from him in cross-examination that hands were put up to stop the bus. The driver and the conductor of bus No. 416 were examined as D. Ws. 1 and 2 and one was unable to state whether, before the accused passed bus No. 416, the Inspec-

tor raised his hand, whereas the other denied that such an action took place. There is no doubt that, after the petitioner had driven his bus by, the police officers called out to him to stop and he eventually stopped. But inasmuch as the conviction is based on the finding that the petitioner received and disregarded the signal to stop before passing the other bus I am unable to agree that the evidence supports it.

I allow the petition, set aside the conviction and direct that the petitioner be acquitted and the fine, if paid, be refunded.

P.R.S./P.R. *Conviction set aside.*

A. I. R. 1930 Madras 446

BEASLEY, C. J., AND PANDALAI, J.

Gunduthalayan — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 432 of 1929 and Criminal Revn. No. 733 of 1929, Decided on 2nd November 1929, from order of Sess. Judge, Salem, in Criminal Case No. 18 of 1929.

(a) Penal Code, S. 302 — High Court's power to enhance sentence defined.

The High Court should not enhance the sentence unless it is satisfied that the sentence of death was the only possible sentence which could have been passed by the Sessions Judge: *A. I. R.* 1925 *Bom*, 268, *Rel. on.* [P 447 C 2]

(b) Criminal P. C., S. 423—Appeal to High Court—It is desirable before sending notice of enhancement of sentence, that record of case is sent for.

Although it is quite legal for High Court to issue notice of enhancement at the time of admitting an appeal, when an appeal comes up for admission by the appellate Court, it would be desirable if before causing a notice to show cause against enhancement of sentence to be sent, the records of the case were sent for.

[P 447 C 2]

N. S. Mani—for Appellant.

Public Prosecutor—for the Crown.

Beasley, C. J. — There were two charges against accused in the Sessions Court of Salem, one of murder under S. 302, I. P. C. and the other of causing hurt with a dangerous weapon under S. 324, I. P. C. He was convicted of both the offences and was given a sentence of tansportation for life in respect of the charge of murder and three months' rigorous imprisonment in respect of the other charge.

When the appeal came up for admission by the High Court the learned Judge who had to consider it admitted the appeal as of course is the invariable custom in cases of murder appeals, and at the same time ordered notice to issue to the accused to show cause why the sentence of transportation for life awarded to him should not be enhanced; so that we have here his appeal against his conviction and also his appearance on notice to show cause why the sentence passed on him should not be enhanced.

The facts of the case can be stated quite briefly and they are that in the village of Pavalathampatti there was the usual festival in connxtion with the Pongal and the procession of bulls in front of the temple and the custom, according to the evidence, is that the first honours should go to certain persons. In this case, P. W. 10, was entitled to the first honours, according to the evidence being so entitled on the hereditary principle. But the accused who is a distant cousin questioned P. W. 10's right to enjoy the first honours; there was a dispute about it and the Goundan headman thought that it would be better to adjourn the bull play for two days in order that the matter might be settled. Then (there is a conflict about this), the accused is said by the majority of the prosecution witnesses to have objected to any adjournment of the play saying that he was entitled to the honours; and there is evidence that the deceased man also objected to the adjournment saying that the matter might be decided on the spot, that the deceased remonstrated with the accused for interfering with the judgment of the headman and that the result was a sort of a challenge to him, whereupon the accused took out his knife and stabbed him on his left nipple inflicting a very serious injury from which he died. At this P. W. 3 ran forward to interfere and he was also stabbed by the accused and this forms the subject of the other charge against the accused, namely, causing hurt with a dangerous weapon. The dying man was taken to the Salem Hospital. In the meantime his father, P. W. 6, gave a report to the Village Munsiff in which the accused was charged with the offences. The deceased also made a dying declaration, Ex. C, to the Stationary Sub-Magistrate in which he sets out the dispute with regard to the honours and states that

it was the accused who stabbed him. He died on the 17th, the date of the occurrence being the 15th. Although in his defence the accused denies that he ever stabbed the deceased and says that the crime was foisted on him, the evidence is quite clear and abundantly proves that it was the accused and none other who stabbed the deceased and clearly justifies his conviction of the offence of murder and Mr. Mani who appears on his behalf does not dispute the justice of his conviction. He, however, is concerned with the question of sentence and argues that under all the circumstances the sentence passed by the learned Sessions Judge is the correct one and the learned Sessions Judge has properly exercised his discretion in awarding the lesser sentence. What the learned Sessions Judge says about it is contained in para 6 of his judgment. He therein states

"As regards the punishment to be awarded, this appears to be an offence committed without premeditation. Some evidence has been adduced for the prosecution that there was ill feeling between the accused and the deceased on account of a woman called Thailammal, who had been allowing the accused her favours, and whom the accused suspected of becoming intimate with the deceased. I do not attach much weight to this evidence, and I do not think that any such enmity was the cause of the stabbing. I find, therefore, that the offence was committed without premeditation and on one of these unfortunate momentary impulses which seem to be so common amongst the inhabitants of this district. I consider, therefore, that the accused, who is a young man of 24, may be shown mercy; and the sentence of the Court is that he be sentenced to transportation for life upon the first count under S. 302, I. P. C."

Those are the reasons given by the learned Sessions Judge and we think the proper test to be applied to these cases for enhancement of sentence is whether the only sentence which could have been passed on the evidence was the sentence of death. In a case before a Bench of the Bombay High Court, *Emperor* v. *Mangal* (1), Sir Norman Macleod, C. J. says this:

"There are many murder cases which come on appeal to this Court in which it has been evident that the Sessions Judges were too lenient and had exercised the discretion which they are given by law too much in favour of the accused. But, as I have already stated, we do not like to interfere except when we think that the sentence of death is the only possible sentence to be inflicted. In this case, although we think that the Sessions Judge ought to have sentenced the accused to death, we are not disposed to proceed with the notice to enhance the sentence."

(1) A. I. R. 1925 Bom. 268=49 Bom. 450.

We are of the opinion that the reasons stated by Sir Norman Macleod, C. J. for not interfering with the discretion of the Sessions Judge are sound, namely, that the High Court should not enhance the sentence unless it is satisfied that the sentence of death was the only possible sentence which could have been passed by the learned Sessions Judge. In this case, although we think that the sentence that should have been passed upon the accused was one of death, we cannot say that it was the only possible sentence which could have been passed.

Under those circumstances we are not disposed to interfere with the punishment awarded by the learned Sessions Judge.

At the same time we are quite satisfied that the accused was properly convicted of the offence of murder and of causing hurt with a dangerous weapon and his appeal against his conviction must be dismissed.

Another matter to which our attention was directed by Mr. Mani was that the learned Judge who admitted the appeal ought not, at the time of admitting the appeal, to have caused notice to issue for enancement of sentence and that the proper procedure is for the Criminal Bench itself on hearing an appeal, if satisfied that there should be an enhancement of the sentence, to issue notice to show cause against enhancement and he has referred us to the case in *Emperor* v. *Mangal* (1), to which we have already referred. But in that case the Bench of the Bombay High Court, whilst holding that this procedure adopted was quite legal, expressed the opinion that it was undesirable. We agree that the procedure is not illegal and it is one which has been very frequently adopted in this Court. At the same time we wish to say that we think that when an appeal comes up for admission by the appellate Court it would be desirable in future if, before causing a notice to show cause against enhancement of sentence to be sent, the records of the case were sent for. We think that would be more regular than merely reading the judgment of the learned Sessions Judge and

issuing notice as was done in this case though no doubt sufficient of the facts appear in that judgment.

P.R.S./V.P. *Appeal dismissed.*

A. I. R. 1930 Madras 448 (1)

JACKSON, J.

Public Prosecutor—Appellant.

v.

Munusami Mudali— Accused — Respondent.

Criminal Appeal No. 329 of 1929, Decided on 6th September 1929, from acquittal order of Sess. Judge, North Arcot, in Criminal Appeal No. 40 of 1928.

Madras Abkari Act (1 of 1886), S. 30—Officer has no power to arrest though armed with search warrant.

Though an officer armed with his own report can arrest a person under S. 31 an officer armed with a search warrant from the Collector under S. 30 is not authorized under that or any other section to arrest, [P 448 C 1]

S. Venkatachala Sastri—for Respondent.

Judgment.—This is an appeal against an acquittal. Accused was acquitted for an offence under S. 224, I. P. C., because his arrest in his house by a searching abkari officer was held to be illegal.

The point taken by the learned Public Prosecutor is that under S. 30, Act 1 of 1886, the Collector may issue a warrant authorizing a search, and under S. 31 an abkari or police officer of a certain rank after recording reasons may search. The officer in the latter case under S. 31 may, if necessary, arrest, but, though the person to whom a warrant is given, may be an officer of the same rank, he is not authorized under S. 30 or any other section to arrest. It is anomalous that an officer armed with nothing more than his own report can arrest, and an officer armed with a regular search warrant cannot arrest.

I fully see the anomaly, but I am unable to read the Act so as to avoid it. The Act seems to be badly drafted.

In these circumstances, the acquittal must stand. The appeal is dismissed.

P.R.S./J.M. *Appeal dismissed.*

✻ A. I. R. 1930 Madras 448 (2)

JACKSON, J.

Ramasami Mudaliar—Petitioner.

v.

Ramalinga Udayar and *another*—Respondents.

Criminal Revn. Case No. 755 of 1929, and Criminal Revn. Petn. No. 684 of 1929, Decided on 21st November 1929, from order of Addl. Dist. Magistrate, Tanjore, D/- 26th August 1929.

✻ Criminal P. C., Ss. 251 to 259—Accused leading evidence of good character by way of defence—Prosecution cannot as of right lead rebutting evidence—If essential to just decision, Magistrate may allow such rebutting evidence but prosecution cannot insist upon his doing so.

In a warrant case tried under Chap. 21, when the accused leads evidence of good character by way of defence the prosecution cannot as a matter of right claim to lead rebutting evidence for the Code of Criminal Procedure gives the prosecution no such privilege. If the Magistrate in his discretion thinks such evidence essential to the just decision of the case he may summon it, but the prosecution cannot insist upon his doing so. [P 448 C 2]

A. Srirangachariar for *V. Rathnam*—for Petitioner.

Parakat Govinda Menon—for the Crown.

Order.—The question raised in this petition is whether in a warrant case tried under Chap, 21, Criminal P. C., when the accused leads evidence of good character by way of defence, the prosecution may as a matter of right claim to lead rebutting evidence. The learned Magistrate is right in holding that the Criminal Procedure Code gives the prosecution no such privilege. If the Magistrate in his discretion thinks such evidence essential to the just decision of the case he may summon it, but the prosecution cannot insist upon his doing so.

The reason for this rule is probably that it is only in rare cases that general evidence of good character is of much avail; especially as till the contrary is proved an accused person is always presumed to be of good character. Therefore, to make character a substantial issue in an ordinary case would be waste of time. Anyhow the law of procedure is clear, and there is no ground for this petition. The petition is dismissed.

P.R.S./V.S. *Petition dismissed.*

* A. I. R. 1930 Madras 449
Special Bench

BEASLEY, C. J., AND RAMESAM, PANDALAI, EDDY AND CORNISH, JJ.

S. A. Subbiah Iyer—Petitioner.

v.

Commissioner of Income-tax, Madras—Respondent.

Original Petn. No. 180 of 1928, Decided on 20th January 1930.

(a) Income-tax Act (11 of 1922), S. 66—Scope.

Section 51 (1) of the Act of 1918 is not similar to S. 66 of the present Act. [P 450, C 2]

***(b) Income-tax Act (11 of 1922), S. 66 (1)—Assessee neglecting to apply to Commissioner to refer question within one month of order cannot ask High Court to direct Commissioner to refer it on ground of its importance.**

After an order has been made an assessee who has neglected to make application to the Commissioner to refer a question of law arising out of that order within one month of the making of that order cannot, many months afterwards, ask the Court to require the Commissioner of income-tax to refer the same question to the High Court merely because it is one of importance: *A.I.R.* 1223 *P.C.* 138, *Dist.*

[P 450 C 2]

***(c) Income-tax Act (11 of 1922), S. 66 (1)—S. 66 is not intended for benefit of assessee.**

Section 66 (1) is not intended to benefit an assessee but is merely to enable the Commissioner when he feels any difficulty with regard to a question of law to refer the matter himself to the High Court. [P 450, C 2]

(d) Income-Tax Act (1922), S. 66 (2)—Point not raised before Commissioner in time cannot be subsequently raised for requiring him to state case.

If a point of law is not raised before the Commissioner of Income-tax within the time specified by S. 66 (2) it cannot be raised at all and the Commissioner cannot be required to state a case to the High Court raising that question: *A. I. R.* 1928 *Mad.* 889 (*F. B.*), *Confirmed*: *A. I. R.* 1928 *Rang.* 281, *Ref. A. I. R.* 1921 *All.* 819 *Expl*: [P 451, C 1]

***(e) Income-tax Act (11 of 1922), S. 4 (2)—Money remitted from foreign business—Presumption that it is out of profit is mixed question of law and fact—Onus of rebuttal is on assessee.**

The question whether the ordinary presumption that money remitted from a foreign business and received in this country is out of profits, is a mixed question of fact and law and obviously such a presumption can be rebutted the onus of doing so being upon the assessee. [P 451, C 2]

***(f) Income-tax Act (11 of 1922), S. 4 (2)—Assessee receiving remittances from money lending business outside British India—Use to which such remittances are put does not alter character in which it was received.**

Where an assessee has a money lending business outside British India and such business makes remittances, to the assessee, the use to which an assessee chooses to put his money on receipt of it cannot alter the character in which it was received. [P 453, C 2]

(g) Civil P. C., S. 100—Question of law—Legal inference from admitted facts.

Question as to what is the legal inference from admitted facts is a question of law. *A. I. R.* 1918 *P.C.* 92 *Foll.* [P 456, C 1]

(h) Income-tax Act (11 of 1922) S. 4 (2)—Assessee receiving remittance from business in foreign Country—Presumption is that it is out of profits.

If an assessee's foreign business remits money to him in a country in which his profits from his business in that country are assessed to Income-tax, the presumption is that the remittance is a remittance from out of the profits of the foriegn business. *The Scottish Provident Institution v. John Allan* 88 *I. T.* 478 and *A. I. R.* 1926 *Mad.* 767 *Rel. on.* [P 452 C 2]

V. V. Srinivasa Iyengar and *P. R. Srinivasan*—for Assessee.

M. Patanjali Sastri—for the Crown.

Beasley C. J.—In accordance with order of the High Court dated 24th April 1929 three questions have been referred to the High Court under S. 66 (3), Income-tax Act by the Commissioner of Income-tax, Madras. Those questions are: (1) whether a sale and conveyance by a debtor of the assessee in respect of a money lending business carried on by the assessee out of British India in discharge of the principal and interest of debt due to such business of lands situate in British India amounts to a remittance into British India of profits of the assessee made in that foreign business; (2) whether the presumption as to foreign remittances being from out of the profits is applicable or available in a case where the dealings between the British and the foreign business consist of large sums of money being more or less regularly repaid by remittances by the foreign business and (3) whether the said presumption is applicable or available in a case where the moneys remitted are in the current dealings account and debited to such account and not to the personal or profits account of the assessee and where interest earned every year by the British Indian business in respect of such dealings is included in the assessment of the British Indian business.

Question (1) was not submitted to the Commissioner of Income-tax for reference to the High Court when the assessee under S. 66 (2), Income-tax Act, required the Commissioner to refer the other two questions to the High Court; and the High Court in directing the Commissioner of Income-tax to refer all

the three questions reserved to the Commissioner the right to contend that the reference on the first point did not lie at all by reason of the fact of its not having been submitted to him under S. 66 (2) of the Act. That question was fully argued on the reference. The Commissioner by his order on the petitioner's application dated the 23rd February 1928 stated that his request could not be granted, that S. 66 (1) had no application and that the petitioner could have preferred an application under S. 66 (2) but did not so. Admittedly, the petitioner did not prefer an application under S. 66 (2) but Mr. V. V. Sreenivasa Ayangar contends that the High Court can nevertheless require the Commissioner to refer the question under S. 66 (1) if the question raises an important point of law for decision. He further contends that, even if S. 66 (1) has no application, then under S. 45, Specific Relief Act, the High Court can decide the question. On the former question he relies upon a decision of the Privy Council in *Alcock Ashdown and Co. Ltd.*, v. *Chief Revenue Authority of Bombay* (1). In that case it was held that it is the duty of the Chief Revenue Authority under S. 51, Income-tax Act, 1918, to state a case and refer it to the High Court when in the course of an assessment a serious question of law arises. On page 752 (*of* 47 *Bom.*) Lord Phillimore stated:

"In their Lordship's view, always supposing that there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state case for the opinion of the Court, and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state a case."

It was argued the S. 51, Income-tax Act of 1918, is similar to S. 66 of the present Act namely, the Income-tax of 1922. Section 51, Income-tax Act of 1918 is as follows:

"If in the course of any assessment under this Act or any proceeding in conection therewith other than a proceeding under Chapter 7 a question has arisen with reference to the interpretation of any of the provision of this Act or of any rule there under, the Chief Revenue authority may, either on its own motion or on reference from any revenue officers subordinate to it, draw up a statement of the case and refer it, with its own opinion thereon, to the High Court, and shall so refer any such question on the application of the assesses, unless it is satisfied that the application is frivolous or that a reference is unnecessary".

We do not agree that that section is similar to section 66 of the present Act. Under S. 51 (1) of the Act of 1918 the assessee could apply to the Chief Revenue Authority to refer any such question and he was not limited in that section as to the time in which he had to make his application within one month of the passing of the order under S. 31 or S. 32 and furthermore requires that application to be accompanied by a fee of Rs. 100/- or any such lesser sum as may be prescribed. Mr. Sreenivasa Ayyangar's contention is that the assessee has two remedies open to him, one under S. 66 (1) and another under 66 (2). We are unable to accept that contention. It is most unlikely that the legislature intended to give an assessee two remedies one within a specified limit of time and another without any such limitation. It cannot seriously be argued that after an order has been made an assessee who has neglected to make an application to the Commissioner to refer a question of law arising out of that order within one month of the making of that order can, nevertheless, many months afterwards, ask the Court to require the Commissioner of Income-tax to refer the same question to the High Court merely because it is one of importance. Moreover it is clear that S. 66 (1) is not intended to benefit an assessee but is merely to enable the Commissioner when he feels any difficulty with regard to a question of law to refer the matter himself to the High Court. The asseseee therefore, not having made his application to the Commissioner to refer question (1) to the High Court within one month of the passing of his order, cannot ask the High Court to direct the Commissioner to refer such a question.

It was also contended on behalf of the assessee that any point of law arising out of the facts of the case can be taken cognizance of by the High Court and an opinion given upon it, because S. 66 says that the Commissioner is to draw up a statement of the case and it is contended that

(1) A. I. R. 1923 P. C. 138=47 Bom. 742=50. I.-A. 227. (P. C.)

this means the whole case i. e., the whole assessment. In support of this contention *Shiva Prasad Gupta* v. *Commissioner of Income-tax U. P.*, *A. I. R.* 1929 *All.* 819 was referred to. There it was decided that though ordinarily the Income-tax Commissioner would be the officer who would frame the points of law that arise in the case stated by him and though he would be expected to give his own opinion on those points of law for the benefit of the High Court, S. 66 requires the High Court to decide the questions of law that arise in the case i. e., the High Court is entitled to "resettle the issues" as it were and to decide those issues. On p. 821 Mukerji, J. states:

"The meaning and object, however, of the entire S. 66 seems to me to be free from obscurity. My impression is that the High Court has to accept the facts as found by the Commissioner of Income-tax and if necessary may call for more facts by asking him to make a fresh statement of them under Sub-S. 4, S. 66. But it is for the High Court to find out from the contention of the assessee on the one hand and the contention of the Income-tax authorities on the other, what is the real point of law that arises between the parties and what it has to decide. This reading of S. 66 seems to be clear to me from among other matters the fact that the High Court is nowhere called upon to decide such question as may be framed by the Commissioner of Income-tax."

In my view this decision does not mean that the assessee is entitled to argue any question of law which may arise out of the assessment and which he has not asked the Commissioner of Income-tax to refer to the High Court but merely means that the High Court can, if it chooses, alter the questions referred by the Commissioner of Income-tax or reject them altogether and decide the real questions of law at issue between the Commissioner and the assessee at the time when application was made to him to refer the question or questions. This question has also been considered by a Full Bench of this Court in *Commr. of Income-tax* v. *Thiruvengada Mudaliar* (2) and it was there held that if a point of law is not raised before the Commissioner of Income-tax within the time specified by S. 66 (2), Income-tax Act, it cannot be raised at all and the Commissioner cannot be required to state a case to the High Court raising that question. It was because the correctness of this decision was questioned that this present reference was directed to be heard by a Bench of five Judges. In my view that decision was correct. In *A. K. A. C. T. V. Chettiyar Firm* v. *Commr. of Income-tax* (3) and in *In the matter of Ishar Dar Dharam Chand* (4), a decision of the Lahore High Court a similar view was taken.

Obviously S. 45, Specific Relief Act, is of no avail to the assessee because by sub-S. (d) of that section it is subject to the proviso that the applicant has no other specific and adequate legal remedy. In this case a remedy is provided by S. 66 (2), Income-tax Act of 1922, but the assessee neglected to avail himself of it. The assessee therefore cannot be permitted to argue the point of law raised in question (1), and it is unnecessary to state any of the facts out of which that point of law emerges.

With regard to questions (2) and (3), the answer to question (2) answers question (3). I, however, think that question (2) does not really raise the question we have to decide. As it stands, the answer clearly must be in the negative. The real question is whether the ordinary presumption that money remitted from a foreign business and received in this country is out of profits, is one which can be rebutted and what facts rebut it. Mr. Patanjali Sastri in the course of his argument was driven to take up the attitude that it could not be rebutted although he was bound to admit in the earlier stages of his argument that such a presumption could be. He further contended that if it could be rebutted it was purely a question of fact whether it had been rebutted. I think this is a mixed question of fact and law and that obviously such a presumption can be rebutted, the onus of doing so being upon the assessee.

The facts are that the petitioner is a resident of Tinnevelly carrying a money lending business in Tinnevelly and various other places outside British India of which Quilon in the Travancore State is one. The petitioner was assessed for the year 1926-27 on an income of Rs. 68,395 the year of account being the year ending 16th August 1925. The

(2) A. I. R, 1928 Mad 889 (F. B.).

(3) A. I. R. 1928 Rang. 281=6 Rang. 492.
(4) 2 Income-tax Cases. 12.

details of the assessment were as follows:

	Rs.
Income from property.	200
Income from other sources (remittances from petitioner's foreign business)	69,473
Total	69,673
Less Loss in petitioner's Tinnevelly business ...	1,278
Total	68,395

The amount of remittances of foreign profits was calculated by the Income-tax Officer as follows:

	Rs.
Drawings from petitioner's Tinnevelly shop (there were no profits in this shop and there were large remittances from the foreign branches to this shop)	21,469
Amount drawn from Quilon for purchases of lands in Tenkasi Taluk ...	43,810
Amount drawn form Quilon branch by debit to assessee's drawings account for purchase of lands	4,000
Amount received from Quilon in the shape of articles	194
Total	69,473

The Income-tax Officer found that the profits of the petitioner's foreign business for the year amounted to Rs. 1,99,185 and held that the sum of Rs. 69,473 should be regarded as a remittance out of profits and accordingly included it in the petitioner's assessment. From this assessment the petitioner appealed to the Assistant Commissioner and it was found that during the year of account the petitioner had drawn Rs. 89,847 from his foreign businesses in excess of the amount sent by him to those businesses. The petitioner's course of business was to supply foreign business with money from Tinnevelly. This money he himself borrowed from other persons. The money sent by the petitioner to his foreign businesses was sent by means of hundis and money remitted from those foreign businesses to Tinnevelly was also sent by means of hundis. There was a continuous flow of money during the year in both directions. The Tinnevelly business made no profits in the year of account. The Assistant Commissioner held that as the money received from the foreign businesses was in excess of that sent by the petitioner to those foreign businesses, the excess should be regarded as a remittance of foreign profits. He enhanced the assessment by Rs. 68,378 by taking the excess figure of Rs. 89,847 and deducting from it a sum of Rs. 21,469 which had been applied in part by the petitioner towards the discharge of borrowings by him in his Tinnevelly business. The petitioner then preferred an appeal to the Commissioner of Income-tax against the Assistant Commissioner's order of enhancement and succeeded in reducing the assessment. The petitioner applied to him to refer the following question namely :

"whether or not Rs. 67,209 can be taxed as a remittance of foreign profits under S. 4 (2) Income-tax Act in the facts and circumstances of this case."

The Commissioner of Income-tax declined to refer that question being of the opinion that it was not one of law. He was, however, directed to refer the question to the High Court and it has come up in the shape of questions (2) and (3).

If an assessee's foreign business remits money to him in a country in which his profits from his business in that country are assessed to income-tax, the presumption is that the remittance is a remittance from out of the profits of the foreign business. *The Scottish Provident Institution* v. *John Allan* (5) followed *In re : A. V. P.M. R. M. Murugappa Chettiar* (6). In the latter case it was decided that money remitted to the headquarters of of a firm in British India from a branch situated on a foreign country is presumed to be profits and not capital and is assessable to income-tax as profits unless the assessee proves the contrary. The Commissioner of Income-tax argues that the assessee has mixed up his accounts of capital account in Quilon, a corrent account and a profit account; in his books there is no separate fund kept in respect of these items. It is admitted by him that these remittances from the

(5) [1903] A. C. 129=72 L. J. P. C. 70=19 T. L. R. 432=4 Tax. Cas. 591=67 J. P. 341=88 L. T. 478.

(6) A. I. R. 1926 Mad. 767=49 Mad. 465.

current account in Quilon are shown in that account to be remittances from capital and are similarly shown in the Tinnevelly books to be received in the shape of capital. It is argued that nevertheless the remittances were not from capital at all but were from profits because it is shown that there were profits earned by the foreign business to an amount more than enough to repay the loans received from Tinnevelly and that no businessman would be likely to remit capital when he has profits out of which he can repay the loans and in this contention he is supported by the observations made in *Allan's* case (5). In the report of that case in 4*Tax Cases* on p. 419, Lord Mclaren stated :

"But, where a capitalist company, as in the present case, has invested large sums for a period of 15 years in a colony, and has an agent employed not only to receive interest but also to receive the capital of the investment when paid up and to reinvest it, even if unappropriated remittances are made to this country, I think every one would agree they must be dealt with according to the ordinary course of business and these remittances must be presumed to be paid in the first place out of interest so far as they are income, and in the second place out of principal or capital. I think that rule results from the fact that no prudent man of business will encroach upon his capital for investment when he had income uninvested lying at his disposal."

The Commissioner's contention goes to the length of saying that a businessman is not to be allowed to conduct his own business as he chooses. In the present case the Commissioner of Income-tax agrees that the assessee has acted perfectly honestly, that is to say he intended to remit capital and not profits from Quilon to Tinnevelly and kept genuine accounts and made true entries in those accounts but contends that nevertheless as profits were earned in the assessee's foreign business those remittances must be held to be from those profits and not to be capital. It seems to me clear that as the Commissioner of Income-tax admits that the assessee acted honestly in making the entries in the account books and had a bona fide intention of remitting capital and not profits his argument that the sums remitted are liable to be taxed must at once fail, and I am far from saying that the assessee did what a prudent man of business would not do. He had borrowed money in Tinnevelly for the purpose of lending it out to his foreign business and to make a profit on it and what he had borrowed had to be repaid. I see nothing unbusinesslike in his choosing to repay those loans out of capital rather than wait until he winds up his foreign business as the Commissioner of Income-tax suggests he should do.

Another argument addressed to us was that the remittances from the foreign business must be remittances of profits and not capital by reason of the fact that part of the sums remitted was used by the assessee for repaying the loans taken in Tinnevelly for the conduct of the Tinnevelly business and part for the personal expenses of the petitioner. With regard to the former reason, I think that the fact that the funds were utilised for repayment of the loans taken at Tinnevelly supports the assessee's case rather than weakens it and with regard to the latter reason the use to which an assessee chooses to put his money on receipt of it cannot alter the character in which it was received. If this money was received in British India as capital the fact that the assessee chose to use some of it for his own personal expenses did not change its nature.

For those reasons the answer to questions (2) and (3) is that in the circumstances of this case the presumption as to foreign remittances being out of profits has been rebutted by the assessee.

Rupees 300 costs of this reference are directed to be paid by the Commissioner of Income-tax to the assessee. Rs. 100 deposited is to be returned to the assessee.

Ramesam, J.—I concur with the order just pronounced by my Lord. On questions 2 and 3, I only wish to add that Allan's case (5) itself shows that the presumption laid down therein is a rebuttable presumption. To say that, even where the party indicates some evidence of his wish to withdraw the capital, leaving the profits in the foreign country he muet be deemed to have withdrawn the profits and left the capital is to make the presumption irrebuttable. On the contention for the Income-tax Commissioner (at one stage of the argument) the capital can only be brought up last i. e., only when the trader wishes to wind up his business in the foreign country. This is to dictate

to him in what order he should withdraw his funds and it is difficult to see why it should be so.

It must be remembered that this method of treating his funds is available to the party only once in respect of a particular item of capital. Only when another item of advance is made can he claim again to withdraw capital. If once it is conceded that the trader may call back his capital it is for him to choose in what particular year he does so and to indicate his choice by accounts (which there is no reason to suspect) or otherwise. Once the choice is made, the presumption is rebutted.

Pandalai, J.—I agree with my Lord for the reasons stated by him that it is not opento the assessee to raise before us question (1) which relates to Rs. 43,810.

Questions (2) and (3) relate to Rs. 67,209 the amount which the Income-tax Commissioner attributed to foreign profits rceived in British India in the year of account and they both present different aspects of the same matter whether the Commissioner was justified on the account books and other materials furnished by the assessee and the nature of his business, in thinking that there was any presumption that the sum in question was profits and if there was any presumption in the matter whether he ought not to have held that it was rebutted. Whether the sum was in fact profits or capital is ultimately one of fact. But if in determining that fact, the Commissioner has acted on a presumption which either did not arise or which in the admitted facts must be held to have been rebutted then the conclusion is vitiated by an error of law and this Court will correct it. The ground of the Commissioner's decision is stated as follows in para 5 of his order dated 3rd September 1927 :

"It is arguable that the appellants discharged debts due to creditors in British India that he had no funds in British India to draw upon and he must therefore have drawn upon his foreign business. As there were profits in the foreign business more than sufficient to cover the discharge of these liabilities it must be presumed that these profits were drawn upon . . . If the appellant incurred liabilities in the course of his British Indian business and met them by drawing on his funds abroad there is certainly a presumption that any profits that may have been available abroad were drawn on for this purpose.'

The Commissioner accordingly made a calculation on a comparison of the volumes of the Tinnevelly business with that of the foreign business and computed Rs. 77,209 to be amount repaid on account of the purely British Indian liabilities and so held that sum to represent the foreign profits received at Tinnevelly.

The question before the Commissioner was whether the balance according to the current, account as it is called of remittances passing during the year between the Tinnevelly head office and the foreign branches of the assessee's business represent or must be presumed to be profits. When regard is had to the nature of the assessee's business which may be broadly described as carrying on a money lending business in Travancore and Cochin with money borrowed at Tinnevelly it is seen that the account is in no way intended to show the profits of the business at all but on the contrary it represents on one side the working capital sent by Tinnevelly to the foreign shop and on the other, the amounts returned from the latter to Tinnevelly for repayment to the depositors from whom the assessee had borrowed. There is a separate profit and loss account in the books of the foreign shops. There is no question that the books are not honestly and properly kept or that they were intended to conceal the facts. It was also admitted that if the opening balance in the account were taken into consideration there was no excess remittance to Tinnevelly at all the excess of Rs. 89,847 being the result if only the remittances during the year of account were taken. As to this the Ccommissioner in para 4 says :

"I think the appellant is right on this point also. The argument underlying what has been known as the "theory of excess remittances" is that in so far as money brought into British India is found to be in excess of the sum required to replace money previously sent abroad, it should be presumed that the money sent in is a remittance of profit if profit was available for remittance. In this case, there seems to be no doubt that the balance shown as due by the foreign shops at the beginning of the year represent money supplied at some time or other from Tinnevelly. The "net remittance" of Rs. 89,849 in the year of account was not sufficient to replace the sums supplied but not replaced in the previous years. A mere comparison of the amounts of remittance each way is not therefore by itself a sufficient ground for

holding that money was sent in otherwise than in replacement of money previously sent out."

Having thus, I think rightly, held that a mere comparison of remittances each way is not sufficient to say that money was sent in otherwise than in replacement of money previously sent out the Commissioner went on to hold, I think, wrongly that so much of the remittances to Tinnevelly as were utilized to pay off Tinnevelly debts must be presumed to be foreign profits received in British India.

It is difficult to see how the character of a remintance into British India, whether it is capital or profits is to be judged by the use to which it is put after its receipt in British India. If a man received his foreign profits in British India they will be equally liable to tax whether he pays debts, or gambles with them. But if what he received was not profits but his foreign capital he cannot be taxed here because he pays off therewith the debts he had incurred to carry on his business, local or foreign. The nature of the remittance must depend on what it was in origin. If the moneys remitted were not or cannot be presumed to be profits when remitted the fact that debts were paid off with them cannot make them such.

Before us the main contention was not that the repayment of Tinnevelly debts shows that the money with which it was done was from foreign profits brought into British India because it was recognized that it only showed that the assessee was paying off borrowed capital sent to foreign business and returned therefrom. But the main contention was that according to the rule in the *Scottish Provident Institution* v. *Allan* (5) followed in *In re. Murugappa-Chettiar* (6) when there are profits available in a foreign country and remittances are made from that country into British India the inference must be drawn that such remittances are from profits and this in spite of whatever the assessee may do and of the fact that according to the books of the assessee accepted as properly and honestly kept such remittances are shown to be and are honestly regarded by the assessee himself to be return of capital previously sent from British India to the foreign country for the business there.

The decisions cited do not support the contention to the length to which it goes. In the *Scottish Provident Institution* case (5) about £1,500,000 had been sent to Australia for investment and after making the remittance in question there was still more than £1,800,000 in investment there. Apparently in order to escape the British tax, the Australian branch office of the company had according to instructions accompanied each of the disputed remittances with a letter to say that it was towards particular advances, most of them made several years previously. On these facts the Lord President of the Court of Exchequer (Scotland) concluded his judgment in the lower Court with the observation that under the circumstances indefinite remittances to this country must be presumed to consist of interest not of capital so long as the amount of capital remitted to Australia for investment still remains invested there. (4 *Tax Cases* 419). Lord Maclaren similarly said that the sound principle is that the source of the fund remitted in the absence of evidence to the contrary, must be determined according to the ordinary course of business in dealing with uninvested funds (p. 420). In the House of Lords, the Lord Chancellor referred to the instructions and letters above referred to as mere nicknaming the sum received and said that the right of the Crown could not be defeated thereby. (1903 *A. C.* 135). Lord Davey referred to the fact that the company had in all remitted 1½ millions to Australia and had at the end of the year in question 2½ millions there and that in every sense that is profit. As to the attempt to make out that what was remitted back were sums which had been sent out several years previously, his Lordship said it was mere book-keeping and not actual facts. The mere calling it capital for the purpose of the Inland Revenue Department will not make into capital that which is essentially and in truth profit (p. 137) Lord Shand and Lord Robertson also referred to the fact that the sum still in Australia was more than the sum sent there (pp. 136 and 138). The decision in *In re: Murugappa Chettiar* (6) does not carry the matter further than to show that where the Commissioner has not misdirected himself as to the nature and scope of the presumption, the Court will not interfere with his inference on

the question of fact whether the remittance was profits or capital.

In this case the Commissioner in my opinion misdirected himself in raising the presumption where the admitted facts did not leave any scope for it, or to put it in another way where he ought to have held that the admitted facts rebutted it. In the first place, the presumption is certainly rebuttable and can only be used in the absence of proof to the contrary. Whether the proof is sufficient is certainly a matter for the Commissioner only. But in the present case there is no dispute as to the facts i.e., the course of business and assessee's books which are admitted to be honestly kept in the usual course of that business and the only question is what is the proper legal inference from those admitted facts and this is a question of law: *Nafar Chandra Pal* v. *Shukur Sheikh* (7) at 195 (*of* 46 *Cal.*)

The Commissisner recognized that there was no ground in the amounts of remittances to and from Tinnevelly for holding that more money was sent to Tinnevelly than was necessary to replace capital previously sent out. He recognized that the foreign business was financed by borrowing at Tinnevelly, and that these loans were repaid by remittances from foreign businesses. There was nothing to show as there was in the *Scottish Provident Institution* case that the investments still left in the foreign country were more or less than the unreturned capital plus the foreign profits earned more than three years prior to the year of account which are not liable to tax. The important fact on which the presumption was based in that case was therefore lacking in this and I am not sure that in using the presumption in that case care should not be taken to see that the circumstances are similar.

In any case, I cannot accede to the contention that even when it is shown that the assessee who has borrowed in British India and carried on a business with such borrowed capital and in foreign parts wants to return his borrowed capital and for that purpose remits that capital to British India and has deliberately and honestly maintained his books in the usual course to show what he has done, there is still a presumption that the source from whence he repays his debt is his foreign profits and not the borrowed capital. So long as it is open to a man to keep his foreign profits abroad, it is not for the Commissioner or anyone else to compel him to do what he is not bound to do by law. After all a man can remit any particular amount of capital from foreign parts into British India only once and further remittances unless there were fresh capital sent out which could be returned must be from profits. The order in which a man must dispose of his capital and profits is for himself to determine and where as in this case, he has determined that order and there is nothing to suspect his bona fides or to whose (sic) that his books are intended to conceal his real purpose, we cannot by resort to a presumption hold that he has done what he had not done and what he cannot be compelled to do.

I agree that the answer to the second and third quessions must be as proposed by my Lord.

Eddy, J.—I agree with the judgment of my Lord and desire to add only a word or two with regard to the construction of S. 66, Income-tax Act. The contention that under this section an assessee has alternative remedies is in my opinion untenable. It is quite plain from sub-S. (2) of that section that an assessee who desires a question of law to be referred to the High Court must make his request to the Commissioner to refer it within one month of an order affecting him. *Expressio unius est exclusio alterius.* None the less it was contended before us that when he had allowed that time to go by he might avail himself of the provisions of the first subsection of that section. The first subsection of that section, in my opinion, confers no rights on the assessee at all. It is a provision, as I think, to enable the Commissioner to seek the assistance of the High Court when a question of law arises. Moreover the provision, as I think, contains its own time limit. Observe the words:

"If, in the course of any assessment under this Act or any proceeding in connexion therewith."

If one reads these words in conjunction with the rest of the subsection, it is clear, I think, that this provision is

(7) A. I. R. 1918 P. C. 92=46 Cal. 189=45 I. A. 183 (P. C.).

to enable the Commissioner to refer a question of law to this Court before he or any Income-tax authority subordinate to him as the case may be comes in the first instance to a final determination with regard to any assessment.

Cornish, J.—After the judgments which have been delivered it is hardly necessary to add anything more. But I will say a few words on the point raised in the argument whether the Court could entertain a question of law not referred to the Court by the Commissioner of Income-tax and which he had not refused to refer at the request of the assessee. The scheme of S. 66 appears to be this : sub-S. (1) enables the Commissioner to obtain suo motu a determination by the High Court of a question of law. Sub-S. (2) enables an assessee who has exhausted his right of appeal under S. 32 to get a determination of a question of law by requiring the Commissioner to state a case and refer the question of law to the High Court ; and sub-S. (3) empowers the High Court to require the Commissioner to state a case if the High Court is satisfied, on the assessee's application, that the Commissioner should have referred the question of law which the assessee required him to refer. But clearly the time limit imposed by sub-S. (2) is intended to qualify the assessee's right to require the Commissioner to refer a question of law ; and it seems to me equally clear from the language of sub-S. (3) that the question of law which the Commissioner has refused to refer is the only question of law which the High Court can require him to refer on the assessee's application. The Commissioner cannot be called upon under sub-S. (3) to state a case in respect of a question of law which the assessee has not required him to refer to the High Court under sub-S. (2). If, therefore, the assessee fails to require the Commissioner to refer a particular question of law within the prescribed period of time he cannot after the expiry of that period apply to the High Court to call upon the Commissioner to refer it. Any other construction would, in my judgment, render the one month limit imposed by sub-S. (2) meaningless. I agree with the proposed answers to the questions.

P.R.S./V.B. *Reference answered.*

** A. I. R. 1930 Madras 457
Special Bench

BEASLEY, C. J. AND RAMESAM, PANDALAI, EDDY AND CORNISH, JJ.

S. A. S. Subbiah Iyer—Petitioner.

v.

Commissioner of Income-tax, Madras—Respondent.

Original Petn. No. 263 of 1928, Decided on 20th January 1930.

*** (a) Income-tax Act (11 of 1922), S. 4(2)—Remittance from assessee's foreign business—Presumption—Onus.**

If there are profits in an assessee's foreign business sufficient to cover remittances to British India during the year of assessment the presumption is that the remittances were from profits and not from capital and that the onus of showing that they were from capital and not from profits lies upon an assessee and also the onus of showing that they were profits earned more than three years before the date of the remittance or remittances. [P 458 C 1]

**** (b) Income-tax Act (11 of 1922), S. 4 (2)—Assessee carrying on money lending business outside British India and foreign business having debtor unable to repay—If land in British India taken in satisfaction land is not taxable.**

Where an assessee carries on money lending business outside British India, if it can be shown that the foreign business has a debtor and that debtor is unable to repay the foreign business debt and the assessee takes the debtor's land in British India in satisfaction of his claim against his debt, the land so taken in British India is not taxable as foreign profits under S. 4 (2). [P 458 C 2]

V. V. Srinivasa Iyengar and *P. R. Srinivasan*—for Assessee.

M. Patanjali Sastri—for the Crown.

Beasley, C. J.—Two questions have been referred to the High Court, viz.:

"(1) Whether in the computation of foreign profits assessable under S. 4 (2), Income-tax Act, there is any presumption in law available to the Income-tax authorities entitling them, in the absence of any specific facts or evidence to appropriate the remittance of a sum of money as one made successively from out of the assessee's profits in the first, second or third year of the period of three years specified in the section and whether such allocation of the remittances to the earliest year of the said period based entirely on such a presumption of law is legal or whether the remittance in any year should first be set against the profits of that year, the balance against the unassessed profit of the immediately preceding year and so on"

and

"(2) Whether a purchase of lands in British India by the assessee carrying on a money lending business outside British India in satisfaction or part satisfaction of a loan advanced out of British India by the business amounts to a receipt or bringing in of foreign

profits from British India assessable under S. 4(2), Income-tax Act."

Mr. Sreenivasa Ayyangar stated that he was not in a position to argue the first question because the remittances from Quilon to the assessee are not shown in the assessee's books to be remittances of capital. There were profits of a greater amount than the remittances from Tinnevelly to Quilon earned in the Quilon business. The facts of this case are different to those in O. P. No. 180 of 1928 but the assessee is the same and in view of our observations during the course of the argument Mr. Sreenivasa Ayyangar has accepted the position that the burden of showing that the remittances were not from profits but from capital is upon him and he is unable in this case to contend that he had discharged that burden. Here again we think that the question referred has not been properly framed and we content ourselves with saying that if there are profits in an assessee's foreign business sufficient to cover remittances to British India during the year of assessment the presumption is that the remittances were from profits and not from capital and that the onus of showing that they were from capital and not from profits lie upon an assessee and also the onus of showing that they were profits earned more than three years before the date of the remittance or remittances.

With regard to question (2), what happened was that the assessee in satisfaction of certain debts due to his Quilon shop took over lands of debtors in British India. The Income-tax Commissioner held that this money had come into his possession in British India in the shape of land and could only be construed as a remittance. With this contention we do not agree. In one case a mortgage had been taken as security for a loan to a debtor and the mortgage was granted more than four years previous to the year of account. Clearly the interest received within the three years previous to the year of account and remitted to Brttish India is assessable to income-tax. It is the profit earned by the loan and lending money is the assessee's business. The interest earned previous to the three years is not liable to income-tax at all and the repayment of the loan and its remittance to British India in that shape is a remittance of a repaid loan, namely, capital. Instead of remitting the repaid loan in the shape of money the assessee was forced to take in satisfaction of his debt instead of money the lands of his debtors in British India. In our view, by so doing he did not convert what, if it had been in the shape of cash, would have been a remittance from capital into a remittance of profits by taking lands in satisfaction instead of cash. The position is very different when an assessee invests profits made in the foreign business in lands or securities in British India. That is an investment of profits but that is not this case. If it can be shown that the foreign business has a debtor and that debtor is unable to repay the foreign business debt and the assessee takes the debtor's land in British India in satisfaction of his claim against his debt, the land so taken in British India is not taxable as foreign profits under S. 4(2), Income-tax Act, and this answers the second question referred to us.

No costs allowed to either party. Refund of Rs. 50 deposit.

Ramesam, J.—In O. P. No. 263 of 1928 I concur with my Lord's order and have nothing to add.

Pandalai, J.—I agree.

P.R.S./V.B. *Reference answered.*

A. I. R. 1930 Madras 458

RAMESAM AND CORNISH, JJ.

F. H. Wilson and *another*—Defendants—Appellants.

v.

Nathmull—Plaintiff—Respondent.

Original Side Appeal No. 16 of 1928, Decided on 8th November 1929, against judgment of Beasley, J., D/- 15th December 1927.

(a) Decree—Construction—Two constructions possible—Construction consistent with judgment must be accepted.

Whenever it is possible to construe a decree in two ways, one way consistent with the judgment and the other inconsistent with it, it is the duty of the Court to construe it in a way consistent with the judgment. [P 460 C 2]

(b) Presidency Towns Insolvency Act, S. 98—Insolvency of one partner — Official Assignee is not entitled to take possession of partnership property without consent of other partners.

Though the insolvency of a partner does not in India ipso facto terminate the partnership the Official Assignee of the insolvent cannot take possession of the goods of the partnership without the consent of the other partner or partners in whose possession they may happen to be. [P 461 C 1]

(c) Presidency Towns Insolvency Act, S. 86—S 86 relates only to validity of acts and decisions of Official Assignee and not to claim for damages against him—Insolvency Court has no jurisdiction to consider such claim—Withdrawal of such claim does not amount to giving it up.

Section 86 relates only to the validity of the acts and decisions of the Official Assignee and does not relate to a claim for damages against him for wrongful trespass to goods. The insolvency Court has no jurisdiction to entertain a claim for damagestand if a party making such a claim before it withdraws it he cannot be said to have given it up for all time. [P 461 C 2]

(d) Civil P. C., S. 80—Official Assignee purporting to act legally though action not strictly legal—Suit against him for damages—Notice is necessary.

An Official Assignee purporting to act legally in taking possession of certain goods believing them to be the insolvent's property which ultimately turns out not to be his property does not act strictly legally, all the same he is acting as an Official Assignee and in a suit against him for damages notice under S. 80 is necessary : *A. I. R* 1924 *All.* 851; *A. I. R.* 1924 *Cal.* 145 ; 26 *Bom.* 803, *Foll. (English cases considered).* [P 463 C 2, P 464 C 2

(e) Presidency Towns Insolvency Act, S. 59—S. 59 is only enabling section and does not prohibit Official Assignee from obtaining possession in other ways.

An Official Assignee on apprehending trouble may approach the Court and obtain a warrant under S. 59 which would be issued to an officer of the Court or to a police officer, but it is only an enabling section and not a prohibiting section and the Official Assignee may obtain possession in other ways. [P 463 C 2]

(f) Tort—Trespass— Inducing another to commit trespass—No damages are claimable.

A person is not liable to damages in tort for inducing another to commit trespass to goods or premises. [P 465 C 1]

S. K. Krishnaswami Iyengar —for Appellant.

Nugent Grant—for Respondent.

Ramesam, J.—This appeal arises out of a suit, C. S. No. 543 of 1926, on the original side filed by the respondent Nathmull originally against three defendants. Later on the suit proceeded against defendants 1 and 3 only. A decree was given against those defendants by the learned trial Judge, and defendants 1 and 3 are the appellants before us.

The facts out of which the suit arose may be shortly stated as follows : Defendant 3 Maharaj Sowcar and his partner Surajmall Sowcar filed a suit against Chunilal Omaidmull Sowcar and another for dissolution of partnership, for taking of accounts and for recovery of a certain sum of money—C. S. No. 261 of 1923. On 17th September the suit was decreed by our brother Waller, J. The plaintiffs applied on 24th September 1924 for attachment of the defendant's interests in the business of Nathmull and Chunilal which had been carried on at No. 99 D'Mellows Road, Choolai, Madras and for the appointment of a commissioner to take an inventory of articles jewels cloths, and vessels, etc., pledged with defendant land to be found in the same premises and to initial the books of account. On the same day notice was ordered and one Mr. C. Deorajan was appointed commissioner. On the 25th September the defendants were ordered to admit the commissioner for the purpose of initialling the accounts and taking an inventory. On 14th October notice to Nathmull and Chunilal was ordered. On 17th Nathmull's counsel asked for time. Meanwhile on 17th October Chunilal was declared insolvent and on 22nd October the matter having become known to the appellants the application of 24th September was not pressed. The order on that day contained the note :

"the question of alleged partnership with Nathmull is left open."

In the affidavit accompanying the application of 25th September 1924 it was stated that the business in Nos. 98 and 99. D'Mellows Road, was carried on under the name and stayle of Nathmull Chunilal. The petitioner's case was that Chunilal was the sole proprietor. The commissioner made a report on the same date that when he went to the premises he found a piece of paper affixed on the door bearing an inscription:

"To

Kasthurichand Nathmull Sowcar,
95. De'Mellows Road, Perambore
Barracks"

He also states in his report that neither the defendant Chunilal nor Nathmull's brother Mothichand would give the keys of the premises and they also refused to produce the account books. After the adjudication of Chunilal his property vested in the Official Assignee and Meghraj moved the Official Assignee for taking steps to reduce to his possession the property of Chunilal. Accordingly on 2nd November the Official Assignee sent his searcher Kuppuswami with Meghraj to the premises in ques-

tion. He addressed a letter Ex. B to the insolvent Chunilal in which he requested the addressee to permit the searcher along with Megraj to take an inventory of all the articles in the house. The letter then says :

"should you raise any objection whatsoever he is authorised to bring in police assistance."

On 2nd November the searcher and Meghraj went to the shop, Nos. 98 and 99 De'Mellows Road. The evidence shows that a policeman was also taken who was standing on the verandah. Meghraj also was standing aside. There was at first some oral protest but ultimately probably on account of the presence of the policeman without any disturbance the account-books in the shop were removed and the shop was sealed. The list of account books is Ex. B 1. It contains a note that Nathmull claimed these books. The Official Assignee immediately applied to the Court for an order to attach the goods in the premises on the ground that the business carried on in those premises was the business of the insolvent himself. That is, he practically adopted the case of Meghraj when he applied for attachment in C. S. 261 of 1923. Nathmull himself also applied by petition No. 355 of 1924 for a declaration that the goods belonged solely to himself and not to the insolvent. The petition is Ex. 1 and the affidavit accompanying the said petition is Ex. 1-A. These two petitions came on for orders before Srinivasa Iyengar, J. His judgment in the said matter is Ex. 1-B and the order is Ex. B-3. As is seen from the above narration of facts the case of the Official Assignee before Srinivasa Iyengar, J. was that the goods solely belonged to the insolvent and Nathmull's case was that the goods in the shop belonged solely to himself. There is of course an intermediate case possible that the shop belonged to a partnership consisting of Nathmull and Chunilal and not wholly to Nathmull and nor wholly to Chunilal. This case of partnership was suggested before Waller, J., as the note in the order dated 22nd October 1910 shows, but who alleged it is not clear. Before Srinivasa Iyengar, J., the burden of proof was placed on the Official Assignee (vide note dated 23rd February 1925) and the learned Judge in his judgment says that he was not considering any question as to whether Chunilal had any interest in the business short of total ownership. The only question he considered was whether Chunilal was the sole proprietor of the shop or not. On this matter he found against the Official Assignee that is, he found that Chunilal was not the sole proprietor of the shop. This finding of course does not mean that Nathmull was the sole proprietor of the shop for the finding that Chunilal was not the sole proprietor is consistent with Chunilal and Nathmul being partners in the shop. But this possible alternative case was not considered by the learned Judge. On his finding Chunilal was not the sole proprietor it followed that Nathmul had either a partial interest or sole proprietorship in the shop and therefore he directed that the goods should be delivered to Nathmull. The order Ex. B-3 is worded as follows :

"It is declared that the properties attached and sealed by the Official Assignee at premises Nos. 98 and 99 De Mellows Road, Choolai, Madras, belong to the said Nathmull and not to the insolvent herein and it is ordered as follows : (1) that the application, taken out by the said Official Assignee do stand dismissed of this Court . . . . etc."

If this order is read solely by itself and without the light afforded by the judgment it certainly means that it was declared that the goods belonged solely to Nathmull ; but it is equally clear from the judgment that the learned Judge never decided such a thing. If it is impossible to construe the decree consistently with the judgment it would be a matter for the amendment of the decree and if it is a matter of any importance to set the matters right, we would adjourn the appeal to enable the appellants to apply for amendment of the decree, and, if the amendment is refused, to file an appeal against such order refusing amendment and such appeal and this appeal might be posted together. But it is possible to construe the decree in the light of the judgment and whenever it is possible to read the decree in two ways, one way consistent with the judgment and the other inconsistent with it, it is our duty to construe it in a way consistent with the judgment. Though read by itself the order implied that the goods solely belonged to Nathmull we think that the proper construction of the order is that the

goods belonged at least to some extent if not wholly to Nathmall also but are not the sole property of the insolvent. This matter does not seem to be of great importance now, though before the learned Judge this was one of the points very much debated. The defendants sought to cross-examine the plaintiff for the purpose of showing that Nathmull and Chunilal were at least partners in the shop. But the learned trial Judge holding that the order of Srinivasa Iyengar, J. constituted the matter res judicata, disallowed such cross-examination and would not permit the defendants to adduce further evidence. It seems to us that in the way we construe the order in the light of the judgment the matter is not res judicata and that the evidence of the defendants to show that Nathmull and Chunilal were partners ought not to have been shut out. But even then it is doubtful whether the Official Assignee could have directly removed the goods from the shop or sealed the premises. The present action is filed for damages for trespass by sealing the premises and by the removal of the account books. Under the English Law the bankruptcy of one of the partners seems to put an end to the partnership. (vide Lindley, p. 800), but under the Indian Law this does not seem to be the case. The bankruptcy affords a ground for the other partners to go to Court and obtain a dissolution: vide S. 254 (2), Contract Act. Under S. 98, Presidency Towns Insolvency Act the Court may authorise the Official Assignee to continue or commence any suit or proceeding in his name and that of the insolvent's partner and any release by the partner is void. But it does not appear that the Official Assignee can take possession of the goods of the partnership without the consent of the other partner or partners in whose possession they may happen to be. Still one would have thought that if the insolvent was a partner in the shop the action of the Official Assignee and Megraj had more justification than if the business belonged wholly to Nathmull and Chunilal had no interest in it at all. Except from this point of view, namely, whether the action of the Official Assignee may be more wrongful in one case than in another, the question of the interpretation of Srinivasa Iyengar, J's order does not seem to be of any importance.

The appeal of the Official Assignee was argued on two grounds: (1) that notice under S. 80, Civil P. C. was necessary before suing and (2) that the plaintiff abandoned his claim for damages for what the Official Assignee did on 3rd Novemher 1924. To support this case of abandonment Exs. 2 and 2-A were relied on. Ex. 2 was the petition and Ex. 2-A was an affidavit filed along with it. The petition was for leave to sue the Official Assignee for certain action taken by him on 18th May 1926, Official Assignee on that occasion being Mr. Albuquerque, defendant 2 in the present suit. This application, was dismissed on the ground that no leave of the Court was necessary before the suit is filed, and in the affidavit it was stated in para. 9 referring to the incidents of 3rd November 1924:

> "I was advised in the circumstances by my counsel not to press for damages and therefore I gave up my claim for damages."

The petition No. 355 of 1924 not only contained a prayer for declaration that the goods belonged to Nathmull but also a claim for damages. At the time of the argument the counsel thought that no claim for damages for trespass can be properly made before the insolvency Court, and therefore it was not pressed and we think this is all what was meant by para. 9 of the affidavit. Mr. Krishnaswami Iyenger, the learned advocate for the appellant, relied on S. 86 of the Act and argued that the claim for damages can be made before the insolvency Court and having been made and withdrawn the present suit does not lie. But it seems to us that S. 86 cannot relate to claim for damages. It relates only to the validity of any act or decision of the Official Assignee. On appeal under S. 86 the Court can set aside any such decision or act. The words "as it thinks just" merely refer any incidental or consequential order necessary for giving effect to the rest of the order but cannot refer to a claim for damages for wrongful trespass to goods. The insolvency Court has no jurisdiction to entertain a claim for damages and when the plaintiff resolved not to press the claim before Srinivasa Iyengar, J., he was not withdrawing any claim which was cognizable by the

insolvency Court; nor can it be said that he gave up his claim for damages for all time. All that he meant by para. 9 was that he did not press his claim at that stage. This argument of the learned advocate for the appellant therefore fails.

We now come to the second ground, namely, that notice is necessary. A number of English cases were cited before us. It seems to me that most of these cases are not of any help in the present case. Some of them related to the question whether a public officer was protected from being held responsible for his acts under the Public Authorities Protection Act or similar enactments and not to the question whether notice was necessary. One of the decisions, namely, *Selmes* v. *Judge* (1) related to the question whether notice of action was necessary. The question there arose under 5 and 6, Wm. 4, C. 50, S. 109, which runs as follows:

"No action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this Act, until 21 days' notice has been given, therefor, in writing . . . ."

There notice was necessary for a suit in respect of anything done "in pursuance of or under the authority of this Act." Still, Blackburn, J., and two other Judges held that the defendant was entitled to notice.

Blackburn, J., said:

"I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute."

He then proceeds to observe that in that case there was nothing to show that the defendants when they made the rate in question knew that it was not allowed by the statute under which they were appointed. He then observed:

"The only illegal act done by the defendants was to make an informal rate; they proceeded to collect it, and received from the plaintiff the amount assessed upon him; in these transactions it is clear that the defendants intended to act according to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention. Neither in *Hermann* v. *Seneschal* (2) for in *Roberts* v. *Orchard* (3) was it decided that a defendant would not be entitled to notice of action, because he had been mistaken in the law. In *Hardwick* v. *Moss* (4) Surveyors had obstructed a highway without any statutory authority, but the Court of Exchequer held that as they intended to act pursuant to the Highway Act, they were entitled to notice of action."

This decision and the last decision quoted in it show that, even where public officers were not acting strictly according to the duties of their office and provided they did not know that they were committing mistakes, they would be entitled to notice even if they were really acting somewhat illegally. It is unnecessary to discuss the question whether the Official Assignee knew that he had no power to seize the goods of a partnership when only one of the partners had become an insolvent, for it is clear that when the Official Assignee was moved in the matter he acted on the supposition that the goods in the shop belonged solely to Chunilal though the business was carried on in the name of Nathmull and Chunilal. In fact the case of Megraj in C. S. No. 261 of 1923 and the Official Assignee at that time was that Nathmull was brought in merely as a cloak to shield Chunilal from the creditors. In the deposition of Nathmull before the trial Judge it is admitted that Chunilal was carrying on business in the premises Nos. 98 and 99 up to 15th December 1923 and it is only from the beginning of 1924 that Nathmull who was previously carrying on business at No. 95 De' Mellows Road began to carry on business also at No. 99. The business at one place was looked after by Chunilal and at the other place by a partner named Rajmal. It is also admitted that in 1926 he got income-tax notice and that it was sent in the name of Nathmull Chunilal. Practically he never took any steps to get the notice corrected. It is also admitted that he sent certain jewels pledged with him by one Chengayya Naidu for sale and these jewels were sold under instructions from a firm called Nathmull Chunilal. He also admits that at the end of September 1924 his business was being carried on in the name of Chunilal Nathmull. He says that he protested against his name being used but did not dispense

(1) [1871] 6 Q. B. 724.
(2) [1862] 13 C. B. (N.S.) 392=11 W. R. 184 =32 L. J. C. P. 43=6 L. T. 646.
(3) [1863] 2 H. & C. 769=12 W. R. 253=33 L. J. Ex. 65=9 L. T. 727.
(4) [1861] 7 H. & N. 136=4 L.T. 802=31 L.J. Ex. 205=7 Jur. (n. s.) 804.

with Chunilal's services. The whole of this part of Nathmull's cross-examination shows that the plaintiff is not a man to be trusted, but that certainly the business in the shop did not solely belong to him, that Chunilal had a good deal of interest in the business, that either he and Chunilal were partners or that the business wholly belonged to Chunilal and that Nathmull was lending his own name to shield him from creditors. The latter alternative, it is true, was ruled out by the judgment of Srinivasa Iyengar, J., but there is a very strong suspicion that the plaintiff was colluding with Chunilal in some manner for the purpose of shielding him from the creditors. To what extent the collusion has gone it is difficult to say. There is a strong suspicion that the whole business is Chunilal's, Nathmull merely associating his name for the purpose of shielding him; but even if this surmise is not correct, at least both were partners and Chunilal had some interest in the business and certainly the case of Nathmull that he is the sole proprietor is absolutely false. However, as I have already said, the Official Assignee thought that the goods belonged solely to Chunilal. When he wrote the letter Ex. B and when he sent his searcher he simply intended to exercise the powers given to him under S. 58 of taking possession of the insolvent's properties. But it is said that a policeman was brought and this at least constituted a show of force. This may be so. It may be that because of the policeman the searcher got possession of the account books easily; but it is also clear that there was no disturbance and no force is used. When Nathmull was asked: "What do you mean by forcibly?" He said:

"I mean that though I protested that the shop belonged to me and that the property in the shop was also mine, in spite of it they did not believe me and they sealed the shop."

This answer shows that no actual force was used. There might have been some oral protest. Now it is contended by Mr. Grant that the powers of the Official Assignee are merely those of receivers and receivers have no power of dispossessing forcibly persons in possession, that if they find any resistance in taking possession, they ought to apply to the Court for a warrant under S. 59 of the Act and the Court may grant a warrant to any officer of the Court or a police officer and that it is not the business of the Official Assignee to seize the goods. It is true that when the Official Assignee apprehends any serious resistance he may seek the help of the Court under S. 59 and under that section the Court issues warrants to any officer of the Court or any police officer and not to the Official Assignee. But S. 59 does not involve any prohibition to the Official Assignee to obtain possession in any manner he likes. It is only an enabling section and not a prohibiting section. Nor does Cl. 2, S. 58, prohibit the Official Assignee from taking a police officer as protection for himself in obtaining possession of insolvent's goods. I do not think it can be said that a receiver can never take a police officer with him in the course of his duties. The distinction drawn by Mr. Grant between taking possession of goods and seizing goods is rather subtle. In either case certainly the Official Assignee is taking possession. If he forcibly seizes the goods he may take the risk of getting into trouble and it may be prudent for him to obtain possession through Court under S. 59. But all this is different from saying that he can never seize the goods and he ought not to be accompanied by a policeman to over-awe any resistance in obtaining possession.

In the present case, no force was actually used. The presence of the policeman avoided any disturbance and the possession of the goods was obtained practically in a peaceful manner. I do not mean to say by this last observation that the Official Assignee is immune from liability for it turns out that he is not entitled to take possession of the goods found not to belong solely to Chunilal. It may therefore be that he is liable for some damages. But to say that he is liable is one matter and to say that he was not acting as Official Assignee is another. In my opinion, even if it turned out ultimately that he was not acting strictly legally in taking possession of the goods which he believed to belong to Chunilal but which did not really belong to him, he was certainly purporting to act as Official Assignee within the

meaning of S. 80, Civil P. C. I am unable to agree with the view taken by the learned trial Judge that

"it is only if the acts done by a public officer is in law entitled to do that he can be said to be acting or purporting to act as such public officer; he cannot do or purport to do an act which the statute which casts upon him certain duties and defines such duties does not enable him in that capacity to do."

So far as the acts done in a public capacity are concerned, it may be that the acts should be strictly according to law. But as to acts purporting to be done in a judicial capacity to say that they should be strictly according to law is to make the word 'purporting' nugatory. It seems to me that the decision in 6 *Q. B. cases* 724 (1) and the cases cited in it are inconsistent with such a view. The word "purporting" means intending to seem. This almost implies that, though it is a case of not being strictly according to law one may still intend it to appear as if it is according to law : vide *Kotireddi* v. *Subbiah* (5) *Abdul Rahim* v. *Abdul Rahman* (6) and *Dakshina Ranjan Ghosh* v. *Omarchand* (7) The first of these is a decision of a Full Bench. The Village Munsif's act in that case was apparently according to practice and was one which he would ordinarily do, but in that particular case it was wrongful for he paid the balance of the sale proceeds to the owner though there was an attachment. He did it mala fide. The learned Judges held that the mala fides had nothing to do with the case and he was entitled to notice. Wallis, C. J. observed that the "words purporting to be done" are wider than "done or intended to be done" under the provisions of this act, in S. 264, Public Health Act and that they also include "acts intended to seem to be done in his official capacity." This last observation shows that even where an act is not strictly according to law S. 80 may apply. The following observations of Sadasiva Iyer, J. at p. 811 support the same view:

"In the present case, the appellant's act in paying over the balance of the revenue sale-proceeds to the defaulter was an act falling within the ordinary duties of his office as Village Munsif and he clearly professed to do it in execution of that duty and it would be quite reasonable on the part of an ordinary third person who becomes aware of the Village Munsif's act in so returning the balance to the defaulter to receive the impression that the act was done by the Village Munsif in his official capacity."

In the present case, it is the ordinary duty of the Official Assignee to take possession of the insolvent's goods. When he proceeds to the shop, removes the account books and seals the premises, it is quite reasonable on the part of an ordinary person to receive the impression that the act was done by the Official Assignee in his official capacity and the Official Assignee is himself professing to do it in the execution of his duties. Though the whole thing turns out to be wrongful because the goods did not solely belong to the insolvent wherever the Official Assignee is honestly mistaken and takes goods not belonging to the insolvent in the belief that they belong to him, he is certainly acting in his official capacity. A simple case of that kind is *Joosub Haji* v. *N. W. Kemp* (8). In that case the timber taken possession of belonged to a third person and not to the insolvent. It was held that notice was necessary. In *Abdul Rahim* v. *Abdul Rahman* (6) a police officer entered a person's name in the history sheet and it was held that S. 80 applied. That was a case of an act which is in the ordinary duty of the official though in the particular case he did it with improper motive. In 50 *Cal.* 992 a police officer arrested a person whom he knew to be innocent. He also extorted some money. It was held that so far as the first act was concerned notice was necessary but not as to the second. I agree with these decisions. I admit that it is very difficult to describe in abstract language where exactly to draw the line. But I should say that in the practical application I should scarcely feel any difficulty. It is more a question of fact with reference to the surrounding circumstances and with reference to the ordinary duties of the official and not whether every part of his conduct is strictly according to law. In my opinion the Official Assignee was acting in his official capacity and he was entitled to notice under S. 80. The suit, so far as he is concerned, is not maintainable. The appeal must be allowed

(5) [1918] 41 Mad 792=34 M. L. J. 494=7 M.L.W. 586=46 I. C. 86=(1918) M.W.N. 414.
(6) A. I. R. 1924 All. 851=46 All. 884.
(7) A. I. R. 1924 Cal. 115=50 Cal. 992.
(8) [1902] 26 Bom. 809=4 Bom. L. R. 929

and the suit dismissed with costs throughout as against him.

We now come to the case of defendant 3. It is true he is a creditor who was instructing the Official Assignee and moving him to take the account books. He certainly believed that the goods in the shop belonged to Chunilal, but this belief does not save him from liability if as a matter of fact he is guilty of any trespass. But the person who actually committed trespass is a searcher of the Official Assignee. The evidence shows that Meghraj merely stood by and took no part in the proceedings. Of course he pointed out the shop to the searcher leaving to the Official Assignee and his subordinate to carry on the proceeding whether it amounted to trespass or not. The person who actually trespassed is certainly the Official Assignee's assistant and he would be certainly formally liable, provided the action was brought in the proper form. But I do not see how Meghraj is liable for the trespass. Inducing a peason to trespass is scarcely a ground of action. There is no analogy between such an act and abetment under the criminal law, nor does the principle of procuring a breach of contract extend to other torts. The result is that Meghraj cannot be held liable for moving the Official Assignee, himself nct having committed any trespass to goods or premises. The appeal is, therefore, also allowed in his favour and the suit is dismissed with costs throughout. We certify for two counsels. It is agreed that, in appeal, the costs will be taken by the Official Assignee.

Cornish, J.—I have come to the same conclusion. In my opinion the forcible entry by the Official Assignee into the plaintiff's premises without a warrant under S. 59, Insolvency Act, was a tortious Act. But I do not think it follows that, because the Insolvency Act does not sanction what the Official Assignee did, his act cannot be regarded as purporting to be done by him in his official capacity.

The principle to be derived from the reported cases on the subject appears to be, that if the act of the officer is one which was ostensibly done by him in the performance of his duties the act will be deemed as purporting to be done by him in his official capacity, even though he has acted mala fde. This is the test applied by Wallis, C. J. in *Kotireddi* v. *Subbiah* (5) in the case where a village Munsiff, knowing that the debtor's property had been attached by the plaintiff, fraudulently paid to the debtor the balance of moneys realized from the sale of his property under a distraint of revenue. At page 809 Wallis, J. said:

"In the present case there were facts justifying the Village Munsiff in acting in his official capacity, and there was no occasion for him to retort to the defence that he bona fide though erroneously, believed in the existence of such fact.,'

Similarly in *Dakshnia Ranjan* v. *Omarchand* (7) where the question arose out of the act of a police officer in making a wrongful arrest, Sanderson, C. J. holding that the suit for false imprisonment brought by the aggrieved party was not maintainable without the notice required by S. 80, Civil P. C. observed (p. 99) :

" On the facts of this case there is no doubt that the defendant was a public officer, and on the facts which I have already stated, in my opinion, there is equally no doubt that the act, namely, the arrest of the plaintiffs, was an act purporting to be done by the defendant in his official capacity,"

The same test was applied in *Abdul Rahim* v. *Abdul Rahman* (6) and *Joosub Haji* v. *B. W. Kemp* (8), where it seems to have been assumed that the act of the Official Assignee in seizing somebody else's property in mistate for the insolvent's property was an act purporting to be done by him in his official capacity, for there was no argument on the point. On the other hand, this test would clearly not cover such acts as the act of the police officer in *Narain Hari* v. *Yeshwant Rao* (9) in assaulting a person in his custody, the reason being that it cannot be regarded as coming within the functions of a public officer that he should commit an offence under the Penal Code.

Applying these considerations to the facts before us it appears to me that what was done by the Official Assignee falls within the test laid down in *Kotireddi* v. *Subbiah* (5) and *Dakshina Ranjan* v. *Omarchand* (7). Admittedly the Official Assignee took away the account books and sealed up the shop of the plaintiff intending as assignee of the insolvent Chunilal's estate to take

(9) A.I.R. 1928 Bom. 352=52 Bom. 832 (F.B.).

possession of Chunilal's property. The plaint makes no suggestion to the contrary. It is equally indisputable that the act of the Official Assignee in writing the letter (Ex. B) threatening the insolvent that police assistance would be called in if the searcher was obstructed and the calling in of a policeman by the searcher when admission was refused to him, had no other purpose than to ensure the searcher's performance of his duties without obstruction or molestation. I think it very probable that when the Official Assignee wrote Ex. B he did not appreciate that if the threat were put into force it might involve him in an action for trespass. However that may be, I do not see how the circumstances of a trespass resulting from what the Official Assignee did, can make his act any the less an act purporting to be done in his official capacity. For the reasons I think that the failure of the plaintiff to give the required notice is fatal to his suit, and that his suit must be dismissed.

With regard to the case against the other defendant, Meghraj, I agree with what has been said by my learned brother in his judgment.

P.R.S./J.M. *Order accordingly.*

A. I. R. 1930 Madras 466

RAMESAM AND JACKSON, JJ.

(*Komminedi*) *Kotayya* and *another*—Appellants.

v.

(*Manuri*) *Venkata Gopala Rao Pantulu Garu* and *others*—Respondents.

Appeal No. 321 of 1924, Decided on 19th April 1929, from decree of Sub-Judge, Guntur, D/- 6th March 1924, in Original Suit No. 3 of 1923.

(a) Religious Endowment—Provision for definite purpose connected with temple and rest to be appropriated with discretion to archakas for other purposes not made definite — After meeting first purpose rest of produce of grant has to be utilized equally for other purposes.

Where in a grant of inam for the worship of a deity, there is a provision for a definite purpose connected with the temple and then a number of purposes which are not made definite but in respect of which some latitude is left to the archakas, the presumption is that what remains of the inam produce after providing for the first purpose, is to be divided equally between the rest of the purposes : *A. I. R.* 1927 *Mad.* 599, *Ref.* [P 468 C 2]

(b) Religious Endowment—Archakas—So long as archakas perform duties they ough not to be ousted from possession of inam and even if there is general trustee, archaka is trustee for daily worship and specified services.

So long as the archakas are properly performing the duties, they ought not to be ousted from the possession of the inam, and even if there is a general trustee looking to the general interests of the temple, there is no objection to the archakas being regarded as trustees for the specific purpose of daily worship and the specified service. [P 469 C 2]

A. Ch. Raghava Rao—for Appellants.

Advocate-General and *K. Kameswara Rao*—for Respondents.

Ramesam, J.—This appeal arises out of a suit by three plaintiffs under S. 92, Civil P. C., for a scheme respecting the temple of Sri Sitharamaswami Varu at Koritepad formerly a village but now a flourishing suburb of Guntur included within its municipal limits. There are eight items of lands in the plaint schedule. The Subordinate Judge held :

"that items 1 to 7 of the plaint schedule do not constitute a grant to the suit deity as its absolute property, but they are inams granted in favour of the defendants' ancestors to be held by those grantees and their heirs burdened with the trust of doing the specific services mentioned in Ex. 4(a) for the benefit of the deity."

He similarly found on issue 8 that item 8 of the plaint schedule was not an endowment to the suit deity. He therefore thought that a scheme was not necessary and dismissed the suit. The plaintiffs appeal.

The history of the connexion between the suit lands and the suit temple may now be discussed. First we have got two documents, Ex. 4 and 4(a). These documents are dated 20th October 1822. Both were addressed by Raja Manuri Venkatarayanimgaru. The Manuri family were at that time owners of a zamindari in the Kistna district. Some time afterwards the zamindari was sold for arrears of revenue and the zamindars are now in receipt of a pension from Government. The present representative of the family is defendant 1. The zamindari was not lost at the time of Ex. 4 and Ex. 4(a). Ex. 4(a) was a letter by the Rajah to Peddinti Ratnamacharyulu and Paruchuri Appalacharyulu. Their description in Ex. 4(a) shows that they must have been learned Vaishnavite Brahmins. The former is the ancestor of defendants 2 to 11 and the latter was the ancestor of defendant 12. The letter Ex. 4(a) says that four kuchallu of land was allotted for the purpose of the daily worship of the

temple and a certain scale on which the worship is to be conducted is given in the letter. Then the letter concludes thus :

"With the money remaining after spending for the Nitya Nivedya (daily worship) in the said manner (you) should perform the Friday sevas (services) Punarvasu sevas (services) and festival sevas (services). We would ourselves perform the annual utsavams (festivals)."

The heading in the document describing it as a "sanad" does not appear in the document itself. One would think that this is at least a document providing for the daily worship in the temple on a definite scale. It leaves no discretion to the worshippers or archakas to reduce the scale. As to the manner in which the surplus should be spent while it refers to services on Fridays, Punarvasu days and festivals it fixes no definite scale. Ex. 4 is a letter addressed to the karnams and ryots. It says :

"We have granted four kuchallu of land (as) manyam for meeting the expenses of the daily offerings, Friday sevas and Punarvasu sevas."

This sentence shows that the other document which was executed simultaneously with Ex. 4 was really intended to be a grant at least of the income required for the daily worship and this letter directs the karnams to measure off the land and mark it with boundaries according to the practice in those days. Both these documents are very old. They bear the zamindar's seal in Nagari characters. It has been urged before us by the learned advocate for the appellants that the inam statement for these lands, namely Ex. A, says that the sanad is lost (vide Col. 6) and therefore Ex. 4(a) cannot be genuine. But whether the statement in the inam statement that the document is missing is true or whether the document was then suppressed by the archakas for some purpose of their own, it seems to me that Ex. 4(a) is genuine. It provides for the daily worship of the temple on a definite scale. Five days after this document the Rajah addressed another letter Ex. 5 to the former of the two archakas namely Peddinti Rathnamacharyulu. It is dated Friday the 10th Aswija Suddham of Chittrabhanu. The translator of the document has converted this into an English date 27th September 1822, but 27th September 1822 corresponds not to the 10th day but to the 11th day of Aswija Suddham which was intercalary or Adhika. But the 10th Aswija Suddha proper was a Friday and corresponds to 25th October 1822. Ex. 5 is five days later than Exs. 4 and 4(a). That this is also the correct date is seen from the fact that the Rajah in this letter is giving further directions as to the mode of enjoyment of the land as I will presently show. The Subordinate Judge has also read it as five days later than Exs. 4 and 4(a). This document says that the addressee should enjoy one-half share and the other archaka Parasuri Appalacharyulu should enjoy the other half share of the archaka inam of Sitharamaswami Varu :

"Whose samprokshana (purification ceremony) was caused to be performed by our mother Rukmayamma Garu in Koritepad of our zamindari."

It then proceeds to say that all the other functions of the archana shall be discharged and the money derived from the various services shall be enjoyed half-share each from son to grandson. The document then finally winds up thus :

"So you shall, in the said manner, enjoy the same happily from son to grandson and so on in succession so long as the sun and moon last."

It is true that the first words "from son to grandson" refer only to the enjoyment of the perquisities derived by the archakas from the services of the temple and cannot indicate the interest of the archakas in the archaka inams, though they may indicate that the office of the archaka is to be hereditary. But the last sentence in the document which must be taken to cover the whole of the arrangement referred to in it refers to enjoyment from son to grandson. The first question that arises in connexion with this document is whether the archaka inam referred to in it is the same as that in Ex. 4 (a). The fact that this is written five days after the other suggests it, but beyond this there is nothing in the document to describe or identify the inam. To clear up this point we called for the diglot register of the village. It was obtained from the Revenue Board's office and we now directed it to be exhibited as Ex. 8. This document is the survey and settlement register and describes all the holdings in the village. Among the inams there, the suit lands are all described. But there is no other inam described as archaka inam. I therefore infer that

Ex. 5 relates to the same inam as Ex. 4 (a). Seeing that Ex. 4 (a) was primarily a document providing for the daily worship in the temple and the meaning of the word "archaka" is worship, I think the words "archaka inam" in Ex. 5 mean the inam providing for the daily worship of Seetharamaswami and that inam must be the same as that of Ex. 4 (a). Still we have the words that "the archaka should enjoy from son to grandson in this manner." These words mean that the archakas were intended to have some beneficial interest in this archaka inam. How much it is, it is not stated, and it is left indefinite. The net result of these three documents Exs. 4, 4 (a) and 5 is that this inam provides first, for the performance of the daily worship on a definite scale which the archakas have no discretion to reduce; secondly, conducting the Friday service, .Punarvasu service and festival services and thirdly their own enjoyment. Items 2 and 3 are left indefinite showing that some latitude was intended to be given to the archakas as to the manner in which they should apportion these two inams. If they conduct item 2 in an economical scale more will be left for their own benefit than when the services are conducted on an extravagant scale. What they should do seems to be left to their discretion. If they are otherwise well off they may be extravagant in the performance of the services. But if they have no other means of livelihood they may conduct the service more econcmically, provided they are performed in a reasonable manner.

The lands must have been yielding a very small income in 1822 leaving a very moderate surplus for the other services and for the livelihood of the archakas. Even by 1860 when Ex. A inam statement, was filed and Ex. C, inam register was prepared, the income was only Rs. 135-8-0 though the extent was 81 acres and 80 cents and one-fourth of the income namely Rs. 34 was fixed as the quit-rent. In Col. 15 of the inam register "Rs. 4" is a mistake for "four kuchallas." After conducting the daily worship according to the fixed scale during all the 365 days a very moderate amount would be left for the other services and for the benefit of the archakas. Recently the income of the inams has increased. According to the evidence of D. Ws. 1 and 8 it is now about Rs. 1,600. Some five years back it was Rs. 800; vide P. W. 2, who says that the lands were yielding 10 an acre; ten years ago it was Rs. 400; vide para. 10 of the Subordinate Judge's judgment. We know the income in 1860 was only Rs. 135. The question now is, who should take the beneficial interest of the surplus? The archakas say that the grant is a grant to the archakas burdened only with the duty of rendering the daily worship and service to the temple and therefore they should get all the benefit of the surplus.

The appellants say it is a grant to the temple and only reasonable remuneration should be given to the archakas and after the reasonable remuneration all surplus should again go to the temple. I think the proper legal inference lies midway between these two extreme contentions. We note first that there is a provision for a definite purpose connected with the temple and then two purposes which were not made definite but in respect of which some latitude was left to the archakas, namely services connected with the temple and the archakas' enjoyment. Whatever may be spent for the definite purposes mentioned in item 1, that is, the daily worship, the rest should, I think, go equally to the benefit of the temple and the archakas. If the income is increased both would participate in the increase, and if the income is diminished both would suffer the loss. No one is entitled to say he should take all the surplus.

Thus I would say that the inam is not purely an archaka inam in the sense of a grant to the archakas only burdened with their doing duty in the temple; nor is it also an inam entirely belonging to the temple but it is an inam a definite portion of the income of which was specially allotted to the temple and the rest of the income is again allotted in two shares, one to the temple and one to the archakas and is liable to increase or decrease according as the lands yield a higher or a lower income. In this respect it is somewhat different from the many cases that have come up before the Courts. Most of the cases in this Court were examined by me in a judgment of myself and Cornish, J., reported in *A. I. R.* 1928 *Mad.* 282. Most of the cases discussed therein proceeded on the

footing of only two alternatives either a grant to the archakas or a grant to the temple. But on the construction of Exs. 4, 4 (a) and 5 in this case I would say that the present is an intermediate case. Before referring to the English cases cited by the learned advocates, I would say one word about the inam statement and the register.

The learned advocate for the appellants strenuously contended that these documents show that the grant must be treated as a grant to the deity only. No doubt, where the grant itself is not forthcoming, utmost importance must be attached to the inam statement and register as evidence of later conduct. But where the original grant is forthcoming later conduct cannot affect their proper construction: vide *A. I. R.* 1927 *Mad.* 599. The fact that the land is described as "devadayam" in these documents does not necessarily show that the grant is to a temple, but merely that it is connected with a religious purpose; and such a description is consistent with being a grant to the archakas also. This I pointed out in the case already referred to. Seeing that in 1860 the income was very small and a large portion of it was to be spent for the daily worship and even out of the remainder a portion went for the temple service and the other portion only for the maintenance of the archakas, the land might have been described as belonging to Seetharamaswami Varu in the inam documents. But in the face of Ex. 5, I do not think it can now be said that the land was wholly an inam to the deity. In *Attorney-General* v. *Sidney Sussex College* (1) the two colleges were appropriating all the rents and profits not spent for the specific trusts in favour of the testator's descendants. It corresponds to the specific trusts of daily worship in the present case and the College's right to the surplus corresponds to the right of the temple for the services and the right of the archakas. In *Attorney-General* v. *The Grocers' Co.* (2) the surplus after the expenses for the charity are met was held to belong to the company though there is no express beneficial gift. In *Attorney-General* v. *The Cordwainers' Co.* (3) it was held that the company took a beneficial interest in the rest of the estates, subject to the payment of the specified sums for charitable purposes. In the present case both the temple and the archakas take the surplus after the specific bequest. The same principle is laid down in the *Attorney-General* v. *Trinity College Cambridge* (4) and in *Attorney-General* v. *Windson* (5). In the present case it cannot be said that the whole of the income was to be spent in one way or the other and only for the purpose of the temple as Ex. 5 says that the archakas were to enjoy the inam. The case of *Attorney-General* v. *Corporation* (6) may be mentioned as an application of the principle. The principle itself is clear from these cases though there is some difficulty in the application of the same to the particular facts of each case. In *Srinivasacharyulu* v. *Pratyanga Rao* (7) (not discussed by me in the decision referred to already) the deed of gift itself was to the deity. In the view I have taken above, the Subordinate Judge is not right in dismissing the suit. The temple is so much interested in the income that it cannot be left to the total discretion of the archakas and a scheme is necessary to safeguard the interests of the temple.

The Subordinate Judge has found that the archakas have so far not been guilty of any serious breach of duty (vide finding on issue 3), and the finding on this issue has not been attacked before us. So long as the archakas are properly performing the duties, they ought not to be ousted from the possession of inam. Even if there is a general trustee looking to the general interests of the temple, there is no objection to the archakas being regarded as trustees for the specific purpose of the daily worship and the specified services on Fridays, etc. We frame the following scheme for the purpose of ensuring the proper performance of the duties of the daily worship, etc.:

(1) As defendant 1 is reported to be dead, the Court will appoint his nearest

(1) [1839] 4 Ch. A. 722=38 L J. Ch. 656.
(2) [1842] 6 Beav. 526=8 Jur. 115=12 L. J. Ch. 195.
(3) 3 Myl. & K. 534.
(4) [1857] 24 Beav. 383.
(5) [1860] (Dean. & Cannons), 8 H. L. C. 369 =8 W. R. 477=30 L. J. Ch. 529=6 Jur. (n.s.) 833=2 L, T. 578.
(6) 2 J & W 294=22 R. R. 136.
(7) A. I. R. 1921 Mad. 467.

heir in the line for succession who is willing to be trustee or if there is no heir any other suitable person, as the trustee for all the general purposes of the temple and for supervising the work of the archakas in connexion with the daily worship and the services on Fridays, etc.

(2) The archakas will continue to be in possession of the suit lands and will lease them out to tenants but on each occasion of leasing they will take written leases or muchilikas from the tenants. Drafts of the muchilikas shall be submitted by them to the trustee before execution for his suggestions and approval. The leasing may whenever possible, be effected by auction.

(3) The archakas will maintain accounts showing how much gross income has been derived from the lands, any incidental expenses and the net income and how the net income of every year has been spent. In particular, they will show first how much has been spent for the Nithya Nivedya, etc., required for the daily worship according to the scale in Ex. 4 (a). They shall spend the amount required for the service on Fridays, etc., out of half the surplus. But how much the surplus amounts to will be shown in the account and the other half of the surplus will be taken as remuneration by the archakas themselves. The trustee shall frame a scale for the Friday service, festival service and Punarvasu service so as to be within half of the surplus after paying the expenses of the daily worships and any balance, after the expenses of the services are met, should be invested in the name of the trustee in a local Bank; and if the amount exceeds Rs. 100 or more, it may be invested in Government promissory notes. To explain my meaning, I would give an arithmetical illustration. The Subordinate Judge finds that about Rs. 100 a month will be required for the daily worship. Taking Rs. 3 a day tentatively as the expense of the daily worship this item requires Rs. 1,095 or Rs. 1,100 annually. If the income is Rs. 1,600 this leaves a balance of Rs. 500. Half of this would be Rs. 250. Towards services on Fridays, etc., Rs. 150 may be spent and Rs. 100 shall be invested as the property of the deity so that it may be useful for the repair of the temple or its accessory buildings or repairing the vahanams or other similar purpose. Rs. 250 will be taken as the remuneration of the archakas.

No question inter se between the archakas' families which now seem to consist of five or more branches has been raised before us and is not intended to be decided. Once every quarter the trustee will be entitled to call for the accounts from the archakas for inspection.

Issue 8 relates to item 8 of the plaint schedule. It is in a different village called Pasumaru and only defendant 12 is interested in it. Issue 6 relates to this inam and it is dated 13th September 1833. This shows that an inam for the archakas was originally allotted to them. But they afterwards surrendered that deed and Parasui Appalacharyulu wanted his archakas' inam should be given to him, in Pasumaru. So one kochulu and nine pagodas were given to him. It appears that there is no other inam belonging to Peddinti people as purely archakas' inam and it also appears that Paruchuri people are not interested in the other inam in Koretipad already discussed. It may be that by some arrangement prior to Ex. 6 between 1822 and 1832 the archaka inam of Peddinti people is somehow included in items 1 to 7 which contain perhaps 4 kochulu in Ex. 4 and also the archaka inam of Peddinti people. This of course is a conjecture. If it is true our earlier conclusion is still more justified. Anyhow, so far as the Pasumaru inam is concerned, it is a grant to the archakas only. The inam statement connected with this, Ex. D is entirely in favour of the archakas and is in contrast with the inam statement of the other land. This land, therefore, belongs solely to the archakas and is not subject to any specific trust in favour of the temple and any scheme we can frame ought not to include this land.

So far as the appeal against defendant 12 is concerned, it is dismissed with costs. As between the plaintiffs and defendant 11 each party will bear his own costs. The appellants will be entitled to get the costs of both Courts from the surplus income of the inam earmarked for the temple if any.

Jackson, J.—I agree.

P.R.S./V.B. *Order accordingly.*

A. I. R. 1930 Madras 471

ANANTAKRISHNA AYYAR, J.

Pichai Konar — Defendant—Appellant.

v.

Narasimha Rama Iyer—Plaintiff—Respondent.

Second Appeal No. 693 of 1926, Decided on 18th October 1929, from decree of Small Cause Court Judge, Kumbakonam, in Appeal Suits Nos. 18 and 15 of 1925.

(a) Interest—Person while purchasing property in auction-purchase paying all amount of prior mortgage—He is entitled to interest on amount paid—Civil P. C., S. 534.

Where a person discharges in good faith a prior mortgage in respect of the properties which he had purchased in Court auction, that person is entitled to interest on the amount of the prior mortgage. The accidental circumstance, that he became the purchaser in Court auction by payment of money, and as compensation therefor, he happened to be in possession, does not in any way prejudice his right as a person entitled to the rights of the prior mortgagee whom he paid up: 12 *M. L. W.* 101; 41 *Mad.* 513 and *A. I. R.* 1924 *P. C.* 36, *Rel. on.* [P 472 C 1]

(b) Civil P. C., S. 11—Portion of decree becoming res judicata not having been appealed against—Rest of decree taken up in appeal but based on same reasoning becomes also res judicata—Practice.

If a portion of a decree has become res judicata, then the rest of the decree based on same reasoning would also become res judicata even with reference to the other portion of the decree which alone is brought for review before the appellate Court, Where, therefore, it is decided that a plaintiff is entitled to subrogation and there is no appeal to the lower appellate Court from that portion of the decree of the trial Court, it is not open to the defendant appellant to appeal against some portion only of the decree in so far as subrogation is allowed and thus call in question the decision of the trial Court: 28 *Mad.* 67, *Rel. on.*; 9 *Cal.* 635 and 6 *C. L. R.* 267, *Ref.* [P 473 C 1]

K. Ramanatha Shenai—for Appellant.

C. A. Seshagiri Sastri—for Respondent.

Judgment.—Defendant 1 is the appellant before me in this second appeal. The plaintiff filed a suit, as originally framed, for a declaration of the invalidity of a mortgage decree obtianed by defendant 1 in O. S. No. 53 of 1918 on the file of the Sub-Court, Kumbakonam. The plaint underwent three processes of amendment and, finally, the plaint, as amended, contained a prayer for subrogation inasmuch as the plaintiff on 29th March 1919 discharged in good faith a prior mortgage in favour of one Doraisami Padayachi by Veerbhadra Padayachi in respect of the properties which the plaintiff alleged he had purchased in Court auction. At the trial of the suit before the first Court this question of the plaintiff's right to subrogation was a material question discussed. The trial Court decided: vide para. 17 of its judgment, that the plaintiff was entitled to be subrogated to the rights of the prior mortgagee and, consequently, it gave the plaintiff a decree for the amount prayed for with interest. The plaintiff was also given costs in respect of the said relief granted to him. Appeals were preferred to the lower appellate Court by the plaintiff and defendant 1. The plaintiff's appeal was dismissed and I have no further concern with the same for the purpose of this second appeal. On defendant 1's appeal, the learned Subordinate Judge, after noticing that the plaint was amended thrice and that the materials before the Court were not as satisfactory as one would wish, proceeded to discuss the question whether the plaintiff was entitled to interest as costs decreed to him by the first Court. There was discussion before the lower appellate Court whether defendant 1 was entitled to raise the further question whether the plaintiff was entitled to subrogation or not.

The learned Subordinate Judge pointed out that, though the grounds of appeal raised the question, the subjcet matter of the appeal was confined to interest and costs allowed to the plaintiff. Defendant 1's pleader then took refuge under the power of the Court under O. 41, R. 33, Civil P. C., to do justice in the matter. The lower appellate Court accordingly proceeded on the footing that the appeal before it was confined to the question of interest and costs. It followed the decision of this Court in *Malireddi Ayyareddi* v. *Gopalakrishnayya* (1), and held that the plaintiff was entitled to the interest that was awarded to him and that defendant 1 was not right in saying that the plaintiff should not have been awarded interest for the period during which he was in possession of the properties as purchaser of the equity of redemption. Defendant 1 has preferred this second appeal. (His Lordship after considering the pleadings in the lower appellate

(1) [1919] 12 M. L. W. 101=53 I. C. 493.

Court concluded that the appeal to the lower appellate Court was only in respect of interest and costs allowed to the plaintiff). The second point argued by the learned counsel for the appellant was with respect to the interest decreed to the plaintiff for the period during which he was in possession. The learned Subordinate Judge relied on a decision of this Court in *Malireddi Ayyareddi* v. *Gopala Krishnayya* (1), and held that the plaintiff was entitled to interest on the amount of the prior mortgage. He, in fact, decreed it with interest thereon. The accidental circumstance, that the plaintiff became the purchaser in Court auction by payment of money, and as compensation, therefore, he happened to be in possession, does not in any way prejudice his right as a person entitled to the rights of the prior mortgagee whom he paid up. The learned counsel for the appellant also argued that the decision in *Ibrahim Sahib* v. *Arumugathayee* (2) supported his position. To a certain extent it does; but, as was pointed out by the learned advocate for the respondent, that decision was dissented from in *Muthammal* v. *Raju Pillai* (3), the decision in *Malireddi Ayyareddi* v. *Gopala Krishnayya* (1), following the decision in *Muthammal* v. *Raju Pillai* (3). Finally, it was brought to my notice that the decision in *Malireddi Ayyareddi* v. *Gopala Krishnayya* (1), has been confirmed by the Privy Council in *Malireddi Ayyareddi* v. *Gopala Krishnayya* (1). In these circumstances, it is clear that the lower appellate Court was entitled to act on the authority of the decision in *Malireddi Ayyareddi* v. *Gopala Krishnayya* (1). It, therefore, follows that the second point raised by the appellant also fails.

The last point raised is as regards costs. It stands on the same footing as the question of interest and should along with it be held to be equally unsustainable. It was, however, sought to be argued by the learned counsel for the appellant, that though in my view of the scope of the appeal memorandum to the lower appellate Court the question of the plaintiff's right to be subrogated was not raised before the lower appellate Court, yet it was open to him to impugne the correctness of the first Court's decree relating to subrogation in so far as he claimed relief with reference to interest and costs. In other words, the learned counsel argued that, though that portion of the decree relating to subrogation became final, the finality did not attach to the portion of the relief which he claimed in second appeal relating to interest and costs. It seems to me that it is not open to the learned counsel in the circumstances to avoid the effect of the finality attaching to the plaintiff's right of subrogation. When it is said that the portion of the decree relating to subrogation has become final, it means that the plaintiff was properly held to have the right to subrogation. If that is so, how could that portion of the decree relating to subrogation be called in question in the later stage of the very same proceeding in respect of the question of interest and costs? Either the plaintiff has got the right of subrogation or he has not. If he has, not only is he entitled to the relief on the footing of subrogation in respect of the principal amount he has paid, but he is also entitled to the incidence relating to subrogation, viz., interest on the money paid by him. If, on the other hand, he is not entitled to subrogation, he could not claim any relief either with respect to principal or interest. To say that the plaintiff is entitled to subrogation in respect of the principal and to say that he is not entitled to subrogation with respect to interest, is, I think, an inconsistent positiou to take.

A similar point was sought to be argued in the case reported in *Kandasamy Chetty* v. *Annamalai Chetty* (5). The plaintiff was given a decree for money in spite of the defendant's plea that the claim was barred by limitation. The defendant did not appeal with respect to the whole of the claim decreed. He preferred an appeal only with respect to a portion of the claim decreed. On the footing that there was no basis for any distinction between the portion appealed against and the portion not appealed against so far as the question of limitation was concerned, the defendant-appellant

(2) [1915] 38 Mad. 18=16 I. C. 877.
(3) [1918] 41 Mad. 513=7 M. L. W. 420=44 I. C. 753=(1918) M. W. N. 251.
(4) A. I. R. 1924 P. C. 36=47 Mad. 190=51 I. A. 140 (P.C.).
(5) [1905] 28 Mad. 67=15 M. L. J. 402.

was met by the objection, that, if the plea of limitation was good, the whole claim was barred, and in the face of the fact that a portion of the plaintiff's claim was held to be not barred and that portion of the decree had become final, it was not open to the defendant in appeal against only a portion of such a decree to argue the question of limitation. The learned Judges relied upon two earlier cases in support of the view that they took, namely, *Rughu Nath Singh* v. *Preshram Mahata* (6) and *Alimunnissa Khatoon* v. *Syed Hossein Ali* (7). The question will be different in case the plea of limitation raised with reference to the appealed portion was different from the aspect of the question of limitation applicable to the unappealed portion.

The principle involved in the decision of this Court in *Kandasamy Chetty* v. *Annamalai Chetty* (5), that it is not open to the defendant in such circumstances to raise the plea of limitation with reference to the portion of the decree appealed against only, would apply to the present case also. That principle, as I understand it, is this. If a portion of a decree has become res judicata, then, the rest of the decree based on same reasoning would also become res judicata even with reference to the other portion of the decree which alone is brought for review before the appellate Court. Applying the principle of that decision to the present case, as it was decided that the plaintiff was entitled to subrogation and as there was no appeal to the lower appellate Court from that portion of the decree of the first Court, it is not open to the defendant-appellant to appeal against some portion only of the decree of the first Court relating to subrogation and not appeal against the other portion of the decree in so far as subrogation was allowed and thus call in question the decision of the first Court. On this reasoning, it seems to me that it is not open to the learned counsel for the appellant to raise this question of subrogation before me in whole or in part. For all the above reasons, I think the learned Subordinate Judge was right in his decision and I dismiss this second appeal with costs.

P.R.S./V.S. *Appeal dismissed.*

(6) (1888) 9 Cal. 635.
(7) 6 C. L. R. 267.

A. I. R. 1930 Madras 473

REILLY AND CORNISH, JJ.

Nedungadi Bank Ltd.—Appellants.

v.

Official Assignee of Madras — Respondent.

Original Suit Appeal No. 96 of 1929, Decided on 27th November 1929.

(a) Civil P. C., O. 6, Rr. 5 and 16 — Defendant's failure to give particulars as ordered —Court is competent to strike out his defence,

Where a defendant after being ordered to give particulars by a certain time does not give the particulars within that time or within the extended time if there is an extension the Court has jurisdiction to strike out his defence even though such penalty is not explicitly added to the order directing particulars: *Davey* v. *Bantinck* (1893) 1 *Q. B. D.* 185 and *A. I. R.* 1924 *All.* 17, *Ref.* [P 475 C 2]

(b) Civil P. C., O. 6, Rr. 5 and 16—Defendant's obstructive tactics—Defence struck out by trial Court—Appellate Court should not interfere with discretion exercised by trial Court,

The discretion exercised by the original Court in striking out a defence, owing to the obstructive tactics of the defendant in not delivering particulars when ordered to do so, and in submitting inaccurate and incomplete particulars after considerable delay, is not improper and should not be interfered with in appeal. [P 478 C 1]

(c) Civil P. C., O. 6, R. 16 — Failure to deliver particulars of defence attracts consequences of R. 16,

Cornish, J.—Failure of the defendant to supply particulars of his defence after being ordered by the Court to do so attracts the consequences of R. 16 and he runs the risk of having his defence struck out. [P 478 C 1]

S. Doraiswami Iyer, P. Govinda Menon and *K. S. Nair*—for Appellant.

Nugent Grant, K. Krishnaswami and *M. P. Sundararaja Ayyar* — for Respondent.

Reilly, J.—In this suit the plaintiff is the Official Assignee, representing the estate of Dumaine & Co., who have been adjuged insolvents. Dumaine & Co., it appears, were exporters of groundnuts and in the course of their business they pledged a large quantity of groundnuts to the Nedungadi Bank who are the defendants, received loans on these groundnuts, sold the groundnuts to various persons in other countries and had them shipped by the defendants who received the bills of lading and the bills of exchange drawn on the purchasers and applied the proceeds of the bills of exchange after getting them discounted by another bank towards the repayment of the

loans they had made to Dumaine & Co., crediting the balance to Dumaine & Co. The Official Assignee in this suit alleges that the defendants have not accounted for 7,169 bags of groundnuts and prays that they may be delivered to him or value about Rs. 1½ lakhs in the alternative that this sum of 1½ lakhs may be paid to him as damages for conversion. The defendants after some delay put in their written statement. The plaintiff applied for an order for particulars which was made by the Master. Eventually when this matter came up before the learned Chief Justice on 15th November 1929, the particulars had not been given in full and the plaintiff applied that the defendants should be dealt with for contempt or that their defence should be struck out. The learned Chief Justice made an order that their defence should be struck out. The present appeal is against that order.

Mr. Duraiswami Iyer who appears for the defendants contends first that the learned Chief Justice had no jurisdiction to make that order and secondly that it was not in the circumstances a proper order to make. It will be convenient to deal with the question of jurisdiction first.

Rule 5, O. 6, Civil P. C., provides that a further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms as to costs and otherwise as may be just. Mr. Duraiswami Iyer contends that that rule does not empower the Court to strike out the defence if the defendant does not give particulars when ordered to do so under the rule and he has asked us to contrast that rule with R. 21, O. 11, Civil P. C. which provides that where any defendant fails to comply with any order to answer interrogatories or for discovery of inspection of documents he shall be liable to have his defence struck out. Mr. Duraiswami Ayyar argues that the penalty of having the defence struck out is explicitly provided for in R. 21, O. 11 but that it is not mentioned in R. 5, O. 6, and that, he urges, is very significant. There is a contrast between the two rules. But as Mr. Grant who appears for the plaintiff has pointed out O. 11 does not deal with pleadings and therefore it may have been thought necessary that if the penalty for failure to answer interrogatories or to give discovery or inspection was to be provided in the shape of striking out pleadings it should be explicity set out though that might not be necessary in an order dealing with pleadings and their amplification by particulars. It is interesting to notice that both R. 5, O. 6, and R. 21, O. 11, Civil P. C., correspond to rules of the Supreme Court in England. There is just the same contrast between R. 21, O. 31 and R. 7. O. 19 of the Rules of the Supreme Court as there is between R. 21, O. 11 and R. 5, O. 6, of our *Code* and yet the contrast was not held by the Court of appeal to be of any significance in *Davey* v. *Bentinck* (1) which dealt with the dismissal of 1 *Q. B. D.* 185 (1) which dealt with the dismissal of the suit for failure to give particulars and is equally applicable to striking out a defence for failure to give particulars.

In that case a plaintiff was ordered to give particulars and a further order was made that if he did not do so within a certain date the suit would be dismissed. It was argued that R. 7, O. 19 of the Rules of the Supreme Court corresponding to R. 5, O. 6, Civil P. C., did not justify the dismissal of the suit because it only provided for particulars being called for upon such terms as to costs and otherwise as might be just and the contention was that the terms could only be in respect of costs or some incidental matter. The Court of appeal did not accept that contention. They held that under the Rules of the Supreme Court a condition might be added to the order for particulars that if they were not given by a certain date the suit should be dismissed. In this case it happened that when the Master made an order for particulars he fixed a date for those particulars to be given but he did not say in so many words that if the particulars were not given by that date the defence would be struck out. Does that really make any difference in the matter?

(1) [1893] 1 Q. B. D. 185=62 L. J. Q. B. 114=41 W. R. 181=67 L. T. 742.

Mr. Duraiswami Iyer's contention is that because that threat was not added to the order the defendants may take up the position that they were not warned that their defence would be struck out. But, if we examine the matter I do not think that absence of the threat or warning really makes any serious difference except in one respect. If the Master had said :

"Particulars must be given within a certain time otherwise the defence will be struck out"

except on an appeal from his order there might have been great difficulty in extending the time for giving particulars but as he fixed the time without any such penalty being explicitly added the Court of course could have extended the time. There is no doubt about that. As a matter of fact on appeal Eddy, J. did not extend the time. I understand that when the matter came up before the learned Chief Justice on 15th November 1929 an oral application was made to him that he should extend the time. Undoubtedly that could have been done. But when a time was fixed and the defendants disregarded it they knew that they did so at their peril. The time might be extended ; the time might not be extended. And if the time was not extended what would be the result ? The particulars which the Master had found necessary and which Eddy, J., on appeal had found necessary for the case would not have been given. That means that the written statement of the defendants was an incomplete, insufficient and ineffective defence and the result would simply be that the position of the defendants would be practically equivalent to that of a defendant who had put in no defence. If that is the correct way of viewing the matter when the learned Chief Justice did not extend the time any further the position was that the defendants had not put in a proper defence and the case would naturally and properly go to the undefended Board. Does it make any difference that the learned Chief Justice has added the words "I should strike out the defendant's defence" which do not appear in R. 5, O. 6 of the Code. To my mind it makes no difference whatever. There is only one Indian case which has been quoted before us dealing directly with this matter *Gouri Shankar* v. *Manki Kunwar* (2),. In that case a Bench of the Allahabad High Court considered what the procedure in such a matter should be and gave directions to subordinate Courts how they should act in connexion with orders for particulars. In the judgment of the learned Judges it is said that :

"Subordinate Judge should when ordering particulars to be given order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application such payment to be made on or before the delivery of the particulars. If the order is disobeyed and the plaintiff is in default he should have his action stayed and if the defendant is in default his defence should be struck out."

That appears pretty clear. But it has been suggested that what the learned Judges meant is only that if the order for payment of costs is disobeyed the defence of the defaulting party should be struck out. Let us examine that for a minute. What is contended is that should the Court order particulars to be given and also order the defendant to pay costs at the time of filing his particulars if he gives the particulars only but does not pay the costs then his defence is to be struck out. Surely a fortiori if he does not give the particulars at all the learned Judges would be of opinion that his defence should be struck out. I have no doubt that the learned Judges held the view that when a defendant has been ordered to give particulars by a certain time and does not give them by that time or within the extended time if there is an extension his defence should be struck out. With that opinion I agree. That being so it appears to me that the learned Chief Justice certainly had jurisdiction to make the order which he has made in the case.

There remains the question whether it was an appropriate order or rather whether it was an order with which there is any sufficient reason for us to interfere in appeal. (His Lordship after examining the record and evidence fully came to the conclusion that the defendants adopted obstructive tactics and proceeded).

I realize, as Mr. Duraiswami Iyer has urged, that it is very heavy penalty on

(2) A. I. R. 1924 All. 17=45 All. 624.

the defendants to refuse them further time in a serious case like this and strike out their defence; but surely their conduct has been very extraordinary. And how can we say in the face of that conduct that the learned Chief Justice was not justified in making the order which he has made? In my opinion there is no sufficient reason for us to interfere with that order and this appeal should be dismissed with costs.

Cornish, J.—I agree that this appeal should be dismissed. It has been contended that when an order is made under R. 5, O. 6, Civil P. C., for delivery of particulars, the Court has no jurisdiction to strike out the defence unless it has been made a term of the order that party on making default shall be liable to have his defence struck out. No doubt R. 5, O. 6 contains no provision similar to the provision in R. 21, O. 11 that a defendant who does not comply with an order for discovery shall be liable to have his defence struck out. But no similar provision in R. 5, O. 6 is necessary, because R. 16, O. 6 (and O. 6 is the order governing pleadings generally) contains the appropriate provision. R. 16, O. 6 says that :

"the Court may at any stage of the proceedings order to be struck out any matter in any pleadings which may tend to prejudice, embarrass or delay the fair trial of the suit."

Now the whole object of obtaining particulars is to get a clearer or fuller statement of the opponent's case, so that the party applying for particulars shall not have to go to trial embarrassed by the obscurity or incompleteness of the case which he has to meet upon the pleadings. It seems to me, therefore, that the party who has been ordered to deliver particulars of his defence within a given time, and fails to do so comes within the reach of R. 16, O. 6, and runs the risk of having his defence struck out unless he is able to satisfy the Court that he has some good excuse for not having complied with the Court's order. I think that in this case the more correct form of application would have been to strike out paras. 4 and 8 of the written statement. But this is not a point of substance, for it happens that the effect of striking out the pleas in those paragraphs is to leave the defendants with no defence, so that the result is the same. In my view, therefore, the Court had power under O. 6, R. 5 to make the order striking out the defence. The power to strike out defence is a discretionary power. On the materials placed before us I am not prepared to say that the learned Chief Justice did not exercise his discretion rightly. But this aspect of the case has been fully dealt with by my learned brother and it is not necessary for me to add anything to what he has said.

P.R.S./J.M. *Appeal dismissed.*

A. I. R. 1930 Madras 476

SUNDARAM CHETTY, J.

Sultan Mahomed Rowther—Defendant—Appellant.

v.

Muhammad Esuf Rowther and *others*—Plaintiffs—Respondents.

Second Appeal No. 1776 of 1925, Decided on 16th August 1929.

Contract Act. Ss. 197 and 199—Implied ratification by principal—Agent exceeding his power in mortgage transaction—Principal not repudiating agent's action—Principal is bound by mortgage.

Where an agent does an act exceeding his authority and the principal on being apprised of the fact fails to communicate to the agent his determination not to be bound by it within a reasonable time, it must be presumed that there was implied ratification.

An agent under a power of attorney to raise money by mortgaging the principal's lands borrowed money on a mortgage of the principal's lands and houses and communicated the same to the principal.

Held : that in the absence of any repudiation by the principal, the mortgage was valid in respect of the houses as well : 9 *L. W.* 251 and 29 *M. L. J.* 551, *Rel. on*; 10 *B. H. C. R.* 319, *Dist.* [P 478 C 2]

T. M. Krishnaswami Iyer and *K. S. Desikan*—for Appellant.

S. Varadachariar, V. Balasundaram Iyer and *A. V. Viswanatha Sastri*—for Respondents.

Judgment.—This second appeal arises out of a suit filed by the plaintiffs, for the recovery of a sum of Rs. 2,999-0-0 (Rupees two thousand nine hundred and ninety-nine) alleged to be due under a mortgage bond (Ex. A) dated 10th July 1929 (after relinquishing a large portion of the sum due for the reason that the hppotheca would not be worth more than the suit amount). Ex. A was executed by defendant 1 through his agent under a power-of-attorney viz., defen-

dant 3 in favour of the deceased Shaik Dawood Rowther for Rs. 2,500 (Rupees two thousand five hundred). The mortgagee died in December 1909. He was the brother of plaintiff 1 and defendant 2, and a cousin of defendant 1. Plaintiffs 2 to 5 are the children of Shaik Dawood Rowther whose widow is plaintiff 6. The claim was resisted by defendant 1, on the ground that Ex. A was executed nominally, without any consideration, for the purpose of defrauding the creditors. The first Court dismissed the plaintiff's suit accepting defendant 1's plea as true, whereas, the lower appellate Court disagreed with the District Munsiff's view and found that Ex. A was executed by defendant 1, not as a benami or colourable transaction, but for real consideration, on account of the share of profits due to Shaik Dawood's branch in the partnership business at Moulmein, which was made over to defendant 1 solely on the occasion of Shaik Dawood going away to India.

In this second appeal, the correctness of the finding arrived at by the lower appellate Court is challenged. Is that finding which is substantially one of fact, vitiated by any flaws, which afford reasonable grounds for interference under S. 100, Civil P. C.? The learned Subordinate Judge has dealt with the evidence (oral and documentary) in a careful manner, pointing out the errors and misstatements which have crept in some portions of the District Munsiff's judgment: vide paras. 3 and 10 in the judgment of the lower appellate Court.

It is urged by the learned advocate for the appellant that the plaintiff's case sought to be proved at the time of trial was at variance with the plaint allegations as to how the consideration passed for Ex. A, and this change of front must be taken to militate against the truth of the plaintiffs' claims. Any variance between the pleading and the proof, would no doubt be a good ground for rejecting the case. The lower appellate Court has given prominent attention to this objection, and observed that there is really no variance, and that the District Munsiff is not correct in his assumption. Turning to the recitals in Ex. A itself, it is extremely difficult to hold that it recites an actual cash loan of a sum of Rs. 3,000 (Rupees three thousand) by defendant 1 from Shaik Dawood Rowther. On the other hand, reference is made to the partnership business at Moulmein, and to the fact of defendant 1 having taken the sum of Rs. 3,000 (Rupees three thousand) out of the profit due to Shaik Dawood Rowther, when he left Moulmein for India enabling defendant 1 to do the whole business solely at Moulmein. If due regard be had to the particulars of consideration set forth in Ex.A, it cannot be construed as a document reciting the advance of a cash loan to defendant 1, but the reasonable inference is that the share of profits due to Shaik Dawood Rowther in that partnership business, was treated as the sum borrowed by defendant 1, as the latter was taking over the whole business for himself, on the departure of Shaik Dawood for India. Nor is the allegation in para. 4 of the plaint materially different from the recitals in Ex. A. It is alleged in that paragraph that Ex. A was executed in accordance with the letter Ex. B written by defendant 1 to defendant 2. Defendant 1 was deemed to have become indebted to Shaik Dawood in connexion with some arrangement effected as regards the partnership business at Moulmein and that the suit bond (Ex. A) happened to be executed later on for that liability is in my opinion fairly established in this case. As pointed out by the lower appellate Court, it was defendant 1 who fought shy of admitting the existence of of the said partnership, lest it should cut the bottom out of his plea. There is ample proof as to the alleged existence of the partnership.

It is next contended that the lower appellate Court was wrong in having directed the taking of defendant 2's evidence, during the pendency of the appeal. It has, in my opinion, given adequate reasons, for exercising the discretion vested in it, in that manner, under Rr. 27 and 28, O. 41, Civil P. C. Both sides were given full opportunity for cross-examining this witness. The learned Subordinate Judge thought the evidence of this witness was necessary for a satisfactory decision in this case. There is no irregularity or flaw in the procedure adopted by it.

In para. 4 of its judgment, the Subordinate Judge has stated that defendant 1 would not produce the partnership accounts. Exception is taken to

this observation and it is argued that the lower appellate Court seemed to have been led, to some extent, to discredit defendant 1's plea by reason of the non-production of accounts. It appears from the evidence of P. W., that defendant 1 was summoned to produce these accounts in the connected partition suits, which was understood to be tried along with this suit and therefore no summons was taken out to him in this suit for their production. The accounts must have been in the possession or power of defendant 1, and if produced they would throw considerable light on the question at issue. It would not be wrong to draw an adverse inference from the non-production, but the lower appellate Court simply referred to the circumstance in considering the evidence as to the existence of the partnership.

The burden of proving that the suit bond (Ex. A) was executed nominally and without consideration is on defendant 1. He was failed to discharge that burden. He cannot succeed on the strength of one or two slightly suspicious circumstances. They have also been duly considered by the lower appellate Court in weighing the evidence and the probabilities of the case. The finding of the lower appellate Court is correct and is accordingly confirmed.

A new objection has been raised by defendant 1 in this second appeal, which is covered by the last three grounds in appeal memorandum. It is urged that in executing the mortgage deed (Ex. A) defendant 2 has exceeded his authority and in the absence of clear and unequivocal evidence of ratification by defendant 1, the whole mortgage should be held to be not binding on him. This plea is a mixed question of fact and law and is certainly not a pure question of law. It was nowhere set up in the written statement, nor was it urged in the trial Court and no issue has been framed in respect of it. There is no justification for allowing the appellant to raise this new contention in the second appeal and I should disallow it.

It is curious, that the lower appellate Court observed in para. 15 of its judgment that defendant 2 should be deemed to have exceeded his authority by mortgaging under Ex.A the houses also (items 1 and 2), besides the lands as defendant 1's letter Ex. B, authorized him to mortgage the lands only. On this ground, he disallowed the plaintiff's claims over items 1 and 2. He did not pause to consider whether there was any express or implied ratification by defendant 1 and whether such ratification has cured the defect. In the first place, he should not have raised this point in his judgment in the absence of any plea, and in the second place, he ought not to have decided this point so summarily. This has given rise to the memo of objections filed by the respondents.

I am clearly of opinion that the Subordinate Judge was wrong in introducing a contention not set up or pleaded. Defendant 2 has a general power-of-attorney, authorising him to effect sales and mortgages (Ex. J). But the special authority given to him for the suit mortgage is under Ex. B. In view of the directions given in Ex. B, the mortgage of the houses also, is in excess of the authority. But by a subsequent letter of defendant 2 (Ex. V-a) the principal (defendant 1) was clearly apprised of the fact of the houses also having been mortgaged under Ex.A. But there is nothing to show that defendant 1 ever repudiated it. Where an agent does an act exceeding his authority and the principal on being apprised of the fact fails to communicate to the agent, his determination not to be bound by it within a reasonable time, it must be presumed that there was implied ratification: *Lakshmanan Chetty* v. *Chidambaram Chetty* (1) and *Ramasami Chetty* v. *Karuppan Chetty* (2). In the decision in *Premabhai Hemabhai* v. *T. H. Brown* (3) relied on by the appellant there was no question of ratification and the principal had no knowledge of the agent having acted in excess of the authority. The view of the lower appellate Court that the suit mortgage cannot be enforced on items 1 and 2 is unacceptable.

In the result, in dismissing the second appeal with costs of respondents 1 to 7, and allowing the memo of objections, the decree of the lower appellate Court is modified by directing the inclusion of items 1 and 2 in the properties to be sold for the realization of the amount due to plaintiffs under the mortgage de-

(1) [1919] 9 M.L.W. 251=49 I. C. 758=(1919) M. W. N. 72.
(2) [1915] 29 M. L. J. 551=31 I. C. 216.
(3) 10 B. H. C. R. 319.

cree. In the circumstances set forth above, I think fit to direct the parties to bear their own costs in respect of the memorandum of objections. Time for redemption is extended by three months from this date.

P.R.S./V.S. *Appeal dismissed.*

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* A. I. R. 1930 Madras 479

ANANTAKRISHNA AYYAR, J.

(*Kethireddi*) *Kodandarami Reddi*.—Defendant—Appellant.

v.

(*Kethireddi*) *Chenchamma*—Plaintiff—Respondent.

Second Appeal No. 449 of 1926, Decided on 11th October 1929, from decree of Sub-Judge, Nellore, in Appeal Suit No. 30 of 1925.

*** (a) Hindu Law—Widow—Maintenance—(Madras Presidency)—Joint Hindu family possessing more than sufficient property for maintenance of its members—Maintenance should be granted irrespective of private funds yielding income.**

Under the Hindu Law as administered in Madras Presidency in cases where a joint Hindu family possesses properties the income from which is not only enough but more than enough for the purpose of paying maintenance to all the members depending upon the same, the fact that one is in possession of private funds which also yield an income should not be taken into account for such purposes : 38 *Mad.* 153, *Expl.* 2 *Bom.* 573, *not Appr*; 21 *All.* 232, *Doubted*; 4 *Mad.* 171; 5 *Mad.* 71; 41 *Mad.* 1075 and 36 *Mad.* 203, *Ref.* [P 482 C 2]

(b) Civil P. C., S. 35—Costs in maintenance suits—Court should see whether claim was prima facie exaggerated.

It is not possible to foretell or predict accurately the amount of maintenance that a person will be entitled to in the opinion of the Court. What the Courts therefore have to look into in such circumstances, while awarding costs, is to see whether there was any prima facie excessive or exaggerated claim made in the plaint. [P 483 C 1]

M. Venkatasubbiah—for Appellant.

B. Somayya—for Respondent.

Judgment.—This second appeal preferred by the defendant arose out of a suit for maintenance filed by his stepmother against him, a minor. The plaintiff and the defendant's mother are co-widows and they were married on the same day to Chinna Subba Reddy who died on 16th April 1918. The plaintiff filed her suit for maintenance on 12th April 1923 and she claimed future maintenance from April 1923 at Rs. 40 per mensem and also Rs. 120 for arrears of maintenance for January, February, and March 1923. The main plea of the defendant was that there was a will executed by the defendant's father under which the plaintiff was entitled to only the income from the two acres of wet land mentioned in the will, and that in any event she had jewels to the extent of Rs. 800 and also moneys to the extent of Rs. 2,000 and consquently she was not entitled to the maintenance claimed in the plaint. The District Munsiff held that the plaintiff was entitled to maintenance, since the question relating to the will set up by the defendant was withdrawn by him at the time of the trial. As regards the jewels, the District Munsiff found that plaintiff was in possession of jewels worth Rs. 800 but that no account could be taken of them in calculating the amount of maintenance awardable to plaintiff, as they are her stridhana and are of an unproductive character. As regards the sum of Rs. 2,000 which the defendant alleged that the plaintiff had, the District Munsiff held that the plaintiff had this amount of Rs. 2,000 at the time of her husband's death, but that :

"the same should be taken to have been set off against her for her past maintenance, since the plaintiff did not claim maintenance from 1918 to 1923."

In the result, the trial Court granted the plaintiff a decree for her maintenance, at the rate of Rs. 36 per mensem. The defendant thereupon preferred an appeal, and the learned Subordinate Judge agreed with the District Munsiff that the plaintiff had Rs. 2,000 with her at the time of her husband's death. He also reiterated the argument advanced by the learned District Munsiff that the plaintiff did not claim any maintenance for the period from April 1918 to January 1923 and that he would take that circumstance also in fixing the rate of maintenance. On the merits, the learned Subordinate Judge held that the plaintiff was entitled to maintenance at the rate of Rs. 25 per mensem in respect of food and clothing and sundry amenities, Rs. 3 per mensem for a servant and Rs. 3 per mensem for house rent. He modified the decree of the District Munsiff by reducing the amount of maintenance from Rs. 36 to Rs. 31. The defendant has preferred this second appeal.

The learned advocate for the appel-

lant argued that both the lower Courts having found that the plaintiff had Rs. 2,000 at the time of her husband's death, and no claim being made in respect of the arrears due to her from 1918 to 1923, the lower Courts were not right in ignoring the possession of the said sum of Rs. 2,000 in fixing the rate of future maintenance. In support of his contention, the learned advocate relied on a passage in Mayne's Hindu Law, para. 459 which runs thus :

"In calculating the amount of maintenance to be awarded to a female, her own stridhana is not to be taken into account, if it is of an unproductive character, such as clothes and jewels. For, she has a right to retain these, and also to be supported, if necessary, by her husband's family. But if her property produces an income, this is to be taken into consideration. For her right is to be maintained, and so far as she is already maintained out of her own property, that right is satisfied."

The learned author proceeds to state in the next sentence as follows :

"The right to maintenance is an absolute one and the consideration of her private means is primarily only a means for fixing the quantum of maintenance to be assigned to her; but if those means were shown to be sufficient in themselves to support her adequately in her station of life, her right to maintenance would be wholly in abeyance, though it might revive on a change in her circumstances."

With reference to this argument, the learned advocate for the respondent contended that (with all respect to the learned author) the statement should be taken with necessary qualifications in the circumstances of each particular case. No doubt in cases where the income from the joint family property is not sufficient to maintain properly all the members who are entitled to maintenance out of the same, it would be proper that the private properties of any particular member and the income thereof should be taken into account in fixing the amount of maintenance due to such member having private means. But the learned advocate argued, in cases like the present where the income from the joint family property is not only enough to provide decent maintenance for all those who are entitled to maintenance out of the same, but there is also surplus left, it is not right, and there is no law which would compel the Court, to take into account the income from the private properties of a person when awarding her maintenance. It would appear that in Bombay the rule enunciated by Mr. Mayne prevails. But so far as this presidency is concerned, the learned Judges Benson and Sundara Ayyar, JJ. in the case reported in *Lingayya* v. *Kanakamma* (1) have not followed the principles of law followed by the Bombay High Court. The learned Judges observed as follows:

"The fact that a Hindu widow is able to maintain herself out of other property is no ground for not giving her some maintenance out of her husband's estate but it is a factor to be taken into account in determining the the quantum of maintenance to be decreed to her."

The decision in *Ramawati Koer* v. *Manjhari Koer* (2) to the contrary is sepecifically dissented from by the learned Judge of this Court in *Lingayya* v. *Kanakamma* (1). But it was pointed out by the learned advocate for the appellant that even the decision in *Lingayya* v. *Kanakamma* (1) states that it is a factor to be taken into account in determining the quantum of maintenance to be decreed to her. It is therefore necessary to see how far the learned advocate's contention is borne out by the decision in *Lingayya* v. *Kanakamma* (1). For this purpose it is necessary to state the facts of that case. There, both the lower Courts found that the defendant was in possession of family property yielding about Rs. 100 a year. They also found that the plaintiff (widow) had private property out of which she could get Rs. 40 or Rs. 50 a year. The lower Courts in these circumstances awarded to the plaintiff Rs. 20 a year on the ground that the plaintiff's income from her own sources of Rs. 40 or Rs. 50 was not sufficient to cover her maintenance. The defendant preferred a second appeal, and on his behalf it was contended that the plaintiff (widow) having been found to be in possession of private property out of which she could get Rs. 40 or Rs. 50 a year and the defendant having been found to be in possession of the joint family property yielding only Rs. 100 a year, the lower Courts were wrong in awarding to the plaintiff Rs. 20 a year out of the joint family income. To that the learned Judges answered in effect :

"It is not so. The plaintiff's right to maintenance is to be traced to the old law under which the plaintiff was even entitled to a

(1) [1915] 38 Mad. 153=28 I. C. 200=28 M. L. J. 260.
(2) [1906] 4 C. L. J. 74.

share. The right to maintenance is an absolute right and you cannot deprive the plaintiff of her right to maintenance in the way you suggest."

To quote the exact words of the learned Judges :

"His argument is that a widow who is able to maintain herself out of the property has no right to claim out of her husband's estate anything for that purpose. In our opinion this view cannot be supported. It is based on an entirely wrong conception of the right sought to be enforced. . . . . This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves."

They therefore held that though the joint family income was not enough to maintain all the members of the family in a proper state, the plaintiff must be held entitled to some maintenance out of her husband's estate. The amount awarded by the lower Courts was Rs. 20 a year against which there was no appeal by the plaintiff and the learned Judge dismissed the defendant's appeal and declined to accede to the contention that the plaintiff (widow) was in the circumstances not entitled to get maintenance at all. As I understand that judgment, it is no authority for the position contended for by the learned advocate for the appellant in this case that even in cases where the joint family income is sufficient and in fact more than is sufficient for maintaining properly all the members depending upon it, when a widow claims maintenance, if in possession of her own property which yields some income, the Courts are bound to take into consideration the income so derived by her from her own private property. My attention has not been drawn to any case in Madras which goes to this extreme extent, and I do not understand the passage quoted from Mayne's Hindu Law by the learned advocate for the appellant as giving support for such an extreme contention. No doubt, the learned author does say that in particular cases the right to maintenance would be "wholly in abeyance." But this particular aspect of the question has not been considered by the learned author, and in any event, I am not prepared to say that any decided cases in Madras compel me not to give effect to the view that I have expressed above.

Arguments by analogy should not be pressed too far. But if one is permitted to take a somewhat analogous case, questions have arisen in Malabar where junior members of a tarwad claim maintenance from the income of the tarwad property ; and though the income from the tarwad property is enough and more than is necessary to maintain all the members decently, yet it was argued that if plaintiff, a junior member, be proved to have private property of his own which yields private income to him, the same should be taken into consideration in fixing the amount of maintenance due to him. This Court repelled that argument in the case reported in *P. Teyan Nair* v. *P. Rayavan Nair* (3), where it was held that a karnavan of a tarwad is not justified in excluding a junior member from participation of the family property, because the junior member has other property of his own and the circumstance that the junior member has other property is not an element in the consideration of his right to share in the enjoyment of the joint family funds which are enough and more than necessary for such purposes.

As I am of opinion that the principle applied by this Court in the case of maintenance claimed by junior members of a Malabar tarwad in possession of private funds should be the principle that should ordinarily be applied to cases where Hindu widows claim maintenance from the estate of their husbands or from the estate of the joint family in which their husbands had a share, I proceed to note the trend of decisions under Malabar Marumakkathayam Law. In the case reported in *P. Teyan Nair* v. *P. Ragavan Nair* (3), Innes and Farrant, JJ. held as follows :

"The circumstance that a junior member has other property is not an element in the consideration of his right to share in the enjoyment of the joint family funds. If it were, a man's own individual industry and exertion might be the means of depriving of his rights in the joint property."

A similar question arose in the case reported in *Thayu* v. *Shungum* (4), where Sir Charles Turner, Kt., C. J. and Muthuswami Ayyar, J. observed at p. 72 as follows :

"The circumstance of each member in respect of his private acquisitions would not affect his right to subsistence where the income was sufficient to provide a suitable subsistence for all the members of the tarwad ; but where the income is insufficient for this purpose, the

(3) [1882] 4 Mad. 171.
(4) [1882] 5 Mad. 71.

karnavan must, with due regard to the interests of all, look to the private means of each."

These cases were taken to lay down the law correctly in *M. Ammini Ammal* v. *N. Padmanabha Menon* (5) and *Marradi* v. *Pamakkar* (6) at p. 211. I do not understand the decision in *Mahesh Partab Singh* v. *Dirgpal Singh* (7), to lay down a different rule of law.

The question would be important in these days of social advancement when widows belonging to joint Hindu families might find themselves able to earn a part of their maintenance by doing honourable work elsewhere. If the result of their honourable activity and laudable attempts to earn a portion of their maintenance should work against them in claiming maintenance from their husband's estate, in my opinion it will be a disadvantage both to them and to the family. The interests of social advancement (if one is entitled to have regard to the same) would be in favour of allowing her claim as put forward in the present case. If the result of her activity in earning or saving money by laudable means be to deprive her of her right to receive proper maintenance from the husband's estate which is admittedly rich, such people would have no inducement to work or to save. On the other hand, it would be in the interests of the joint family also to encourage such earning and saving. It therefore seems to me that in the cases where the joint family income is sufficient to allow maintenance to all members, the possession by members of separate property yielding income or the circumstance that such members are themselves earning as a result of their activity should not be taken into account. The question will be different when the income from the joint family estate is not enough to maintain all the members depending upon it. The law as administered in Bombay would seem to be different: see *Savitri Bai* v. *Laxmi Bai* (8): see also *Shib Dayee* v. *Durga Prasad* (9). If the property in her possession be property belonging to the husband or to the estate of the joint family, then the matter might stand on a different footing. But so far as Madras is concerned, I am not aware of any decision which would prevent me from applying the principles laid down in the Madras cases referred to by me already, to cases of joint Hindu families where the income from the joint family properties is more than enough to maintain properly all members having rights to the same.

For the above reasons, I am inclined to hold that, in cases where a joint Hindu family possesses properties the income from which is not only enough but more than enough for the purpose of paying maintenance to all the members depending upon the same, the fact that one is in possession of private funds which also yield an income should not be taken into account for such purposes. In the present case the plaintiff and the defendant's mother are co-widows. The only male member of the family is the defendant who is a minor. There are also two young girls, sisters of the defendant, who have to be married in due course. The lower appellate Court in para. 6 of its judgment has taken that matter into consideration. It says in para. 5 that the family is quite in affluent circumstances and that the net income of the family may reasonably be estimated to be Rs. 3,000 per annum. Having regard to all the circumstances, I think it was open to the lower appellate Court to entirely disregard the possession of the plaintiff of the sum of Rs. 2,000 which represented her private property. If I am right in this view, the argument pressed upon me by the learned advocate for the appellant fails. It must be stated that the sum of Rs. 2,000 is plaintiff's own moneys, and not moneys belonging to the joint family.

Mr. Somayya, the learned advocate for the respondent, supported the finding of the lower appellate Court by another argument, namely, even if it be held that the plaintiff had Rs. 2,000 at the time of her husband's death, as the plaintiff had to support herself from 1918 to 1922 even calculating maintenance at the rate now decreed, there would be only about Rs. 400 left in the hands of the plaintiff. That is a small amount, and as both the lower Courts have said in their judgment that they have taken that point also into consideration in fixing the maintenance, there is

(5) [1918] 41 Mad. 1075=48 I.C. 104=35 M.L.J. 509.
(6) [1913] 36 Mad. 203=22 M.L.J. 309=14 I.C. 383=(1912) M.W.N. 109.
(7) [1899] 21 All. 232=(1899) A.W.N. 46.
(8) [1877] 2 Bom. 573 (F.B.).
(9) 4 N.W.P. 63.

no ground for interference by this Court in the second appeal. On the whole, I have come to the conclusion that the award of maintenance of Rs. 31 per mensem by the lower appellate Court is not open to attack on any legal ground in second appeal. That being so, the main ground of the appellant fails and the second appeal is dismissed with costs.

The plaintiff has filed a memorandum of objections in respect of (1) the rate of maintenance and (2) costs. As regards the former, I am not in a position to say that any legal error has been committed by the lower appellate Court in fixing the amount of maintenance. That being so, the memorandum of objections, so far as this item is concerned, fails.

As regards costs, though the plaintiff had claimed maintenance at the rate of Rs. 40 per month and though the District Munsif allowed only Rs. 36, the District Munsif did not allow any costs to the defendant in respect of the difference disallowed by him, but directed that the defendant should pay the plaintiff's costs in respect of so much of the claim as was decreed to her. On appeal, the learned Subordinate Judge decreased the rate of maintenance from Rs. 36 to Rs. 31. The learned Subordinate Judge, however, modified the decree of the first Court with reference to costs. The order as to costs passed by the lower appellate Court was that the plaintiff should pay the defendant's costs on the portion of her claim disallowed in both the lower Courts and the defendant should pay plaintiff the costs in both the lower Courts in respect of so much of her claim as was allowed. I think that this is not the proper order as to costs that should have been passed in this case. It is not possible to foretell or predict accurately the amount of maintenance that a person will be entitled to, in the opinion of the Court. What the Courts have to look into in such circumstances is to see whether there was any prima facie excessive or exaggerated claim made in the plaint. In this case the plaintiff claimed Rs. 40 and the lower appellate Court has decreed at Rs. 31 per mensem. The difference is not much, and I could not surely say that the claim was exaggerated to such an extent that the plaintiff should be directed to pay the defendant's costs on the portion disallowed. In this respect, I follow the decision of this Court in the case reported in *Rangathayi Ammal* v. *Munnuswami Chetty* (10), where the rules as to costs to be followed in maintenance suits was discussed by the learned Judges. I modify the decree of the lower appellate Court in respect of costs, and pass the following order. In both the lower Courts the plaintiff's costs on the amount allowed to her shall be paid by the defendant. The defendant will bear his own costs on the excess portion disallowed. In second appeal, the appellant will pay the respondent's costs. I make no order as to costs in the memorandum of objections, which I have allowed in part.

P.R.S./V.S. *Appeal dismissed.*

(10) [1911] 21 M.L.J. 706=10 I.C. 110=(1911) 1 M.W.N. 322.

A. I. R. 1930 Madras 483

BEASLEY, C. J. AND PANDALAI, J.

V. Seeniah Naidu — Complainant — Petitioner.

v.

Abdul Wahab Sahib — Accused — Respondent.

Criminal Revn. Case No. 156 of 1929 and Criminal Revn. Petn. No. 135 of 1929, Decided on 25th October 1929, against judgment of Sub-Divisional First Class Magistrate, Chittoor, D/- 13th August 1928.

(a) Criminal P. C., S. 250 (3) — Appeal against order for compensation — Forum indicated in Chap. 31 — Appellate Court competent to record additional evidence under Criminal P. C., S. 428.

Though S. 250 (3) gives the complainant a right to appeal against an order for compensation in certain cases the section does not indicate a forum, which has to be found out by reference to Chap. 31. The appeal would therefore lie under S. 250 (3) coupled with the relevant section in Chap. 31, viz. S. 407 and all the provisions in that chapter including the power to take additional evidence given by S. 428 apply: *A. I. R.* 1928 *Mad.* 331 and 33 *Mad.* 90 *Dist.* [P 484 C 2]

(b) Criminal P. C., S. 428 — Additional evidence taken—Reasons not recorded — No failure of justice—Proceedings not vitiated.

Where the omission of the appellate Court to record reasons for taking additional evidence under S. 428 does not cause a failure of justice the proceedings are not vitiated. [P 484 C 2]

S. Nagaraja Ayyar—for Petitioner.

K. Venkataragavachari — for Respondent.

Pandalai, J. — This is a petition to revise the order of the Sub-Divisional Magistrate of Chittoor dis-

missing the appeal to him from an order of the Stationary Sub-Magistrate of Chittoor whereby the petitioner who was the complainant in a case of assault before that Magistrate was ordered to pay under S. 250, Criminal P. C., Rs. 100 by way of compensation to the accused as, in his opinion, the complaint was false and vexatious.

Two points are taken in this petition, viz., (1) that the appellate Magistrate acted without jurisdiction in taking further evidence purporting to act under S. 428, Criminal P. C., because, according to the appellant's advocate, the appeal was not one under Chap. 31, Criminal P. C., to which alone S. 428 applies and (2) that the appellate Magistrate acted illegally in omitting to record reasons for taking further evidence as he was required to do under S. 428.

As to the first objection reliance is placed upon the decision of Devadoss, J. in *Sami Vannia Nainar* v. *Penaswami Naidu* (1), in which that learned Judge held that in an appeal under S. 476 (b), Criminal P. C., the appellate Court has no jurisdiction to take additional evidence whether the party objected to the reception of such evidence or not. I do not think that that decision is applicable to this case. The ground of that decision was that an appeal under S. 476(b), Criminal P. C., was not one under Chap, 31 of that Code. That decision was itself based upon an earlier decision in *Krishna Reddi* v. *Emperor* (2) to the same effect. The reason of that decision is seen from the terms of S. 476(b) itself which says that any person on whose application a Court has refused to make a complaint under S. 476 or against whom such a complaint has been made may appeal to the Court to which such Court is subordinate. Upon the terms of that section it is clear that not only the right of appeal but the forum to which the appeal should be preferred are clearly prescribed. That section is in other words self-sufficient and any appeal under that section is not one under Chap. 31.

In this case, however, that is not so. S. 250 (3) says that a complainant or informant who has been ordered by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding Rs. 50 may appeal from that order as if such complainant or informant had been convicted on a trial held by such Magistrate. Now it is contended on those words that the appeal is under that section on the analogy of the decision above referred to. But the analogy is not complete because all that S. 250 (3) says is that a complainant against whom an order for compensation is made is, so far as the right to appeal is concerned, put on the same footing as if he had been convicted and sentenced to pay a fine, by that Magistrate. To find out to what Court the appeal is to be filed, we have to resort to the general chapter on appeals and that is Chap. 31 and the section applicable to this case is S. 407. It follows, therefore, that it is incomplete to say that an appeal from an order under S. 250 is an appeal under that section; for, to make the statement complete it must be said that the appeal is by virtue of Ss. 250 and 407. I am, therefore, of the opinion that this particular appeal was none the less under Chap. 31, Criminal P. C., because the right of appeal was generally conferred by an earlier section not within that chapter. If the appeal was in the terms of S. 428 "under this chapter," all the powers conferred by that section were immediately attracted to this appeal and the Sub-Divisional Magistrate had ample power to take additional evidence. That disposes of the first contention.

The second objection is also not supportable. It is no doubt the case that the Sub-Divisional Magistrate omitted to record reasons as he ought to have done when he thought it necessary to take further evidence but that by no means invalidates his proceedings because by S. 537, Criminal P, C., an omission of that character will invalidate the proceedings only if the omission has occasioned a failure of justice. There is nothing to show that any failure of justice was caused in this case by the omission to record reasons by the Sub-Divisional Magistrate. Both the objections in this petition, therefore, fail and the petition must be dismissed.

Beasley, C. J.—I agree.

P.R.S./J.M. *Petition dismissed.*

(1) A.I.R 1928 Mad. 391=51 Mad. 603.
(2) [1910] 33 Mad. 90=5 I.C. 881=20 M.L.J. 102.

* A. I. R. 1930 Madras 485

PANDALAI, J.

V. R. Rakkappan Ambalam—Plaintiff—Petitioner.

v.

C. Suppiah Ambalam — Defendant—Respondent.

Civil Revn. Petn. No. 180 of 1928, Decided on 1st November 1929, from decree of Tempy. Sub-Judge, Devakottah, D/- 26th October 1927, in Sm. C. Suit No. 153 of 1927.

*** Stamp Act (1899), S. 35 — Promissory note as such though inadmissible is yet admissible to prove acknowledgment under Limitation Act, S. 19.**

Where an instrument, instead of merely saying that the promisor promises to pay to the promisee a certain sum of money to order or to bearer, also adds that the amount for which it was given was due in settlement of a previous account, the instrument, even though inadmissible as a promissory note for want of insufficient stamp, yet is admissible to prove an acknowledgment under Limitation Act, S. 19, for what is shut out by S. 35, Stamp Act (1899) is the instrument and not collateral matters connected with the instrument which may be mentioned in the same paper or in the same writing : 3 *All.* 581 (*FB*). *Rel. on.* : *A.I.R.* 1926 *Mad.* 1148, *Expl.* 30 *Mad.* 386 and 18 *Bom.* 369, *Dist.* [P 486 C 1]

V.C. Seshachariar and *N.R. Raghavachariar*—for Petitioner.

T. M. Krishnaswami Iyer — for Respondent.

Judgment —In this case the learned Additional Subordinate Judge dismissed a suit upon a promissory note as being barred by limitation, and the only question in this petition is whether that decison was right. The suit as originally framed was on a promissory note for Rs. 540 dated 11th May 1926. This was admittedly insufficiently stamped and, therefore, inadmissible as a promissory note. When this was discovered the plaintiff asked for leave and was granted leave to amend his plaint, as one on a previous promissory note of which the one dated 11th May 1926 was a renewal. The suit thus became one on a promissory note dated 22nd May 1923 which was properly stamped. On the date of the suit the note of 22nd May 1923 would be barred if it were not saved by some intervening acknowledgment and the plaintiff purported to use the contents of the promissory note dated 11th May 1926 as an acknowledgment to save limitation. The learned Subordinate Judge held that it could not be so used and hence dismissed the suit. The note which is in the Tamil language when translated is in the following terms :

"The sum due to you on looking into accounts of a promissory note given for money borrowed from you is Rs 540. On demand I promise to pay you, or to your order, this sum of Rs. 540 with interest at 12 per cent and get back this promissory note."

The learned Subordinate Judge has held that by virtue of S. 35, Stamp Act, this was an instrument chargeable with duty and not being so stamped should not be admitted in evidence for any purpose by any person having authority to receive evidence or be acted upon by any such person. For this opinion he relied upon a decision of Jackson, J., in *C. R. P.* 835 of 1925 which is later than another decisionof Wallace, J. reported in *Gopala Padayachi* v. *Rajagopala Naidu*, *A. I R.* 1926 *Mad.* 1148 to the contrary effect. He also relied upon two cases *Thaji Beebi* v. *Tirumalaiyappa Pillai* (1) and *Chenbasappa* v. *Lakshman Ramachandra* (2). I may at once say that these two latter cases have no bearing upon the question here. The decision of Jackson, J., is very brief and simply says that having regard to S. 30, Stamp Act, of 1899, the Subordinate Judge was right in not admitting the unstamped promissory note in evidence for any purpose. The decision of Wallace, J., in *Gopala Padayachi* v. *Rajagopala Naidu*, *A.I.R.* 1926 *Mad.* 1148, though favourable to the petitioner does not mention S. 35, Stampt Act, and was given in a case in which the learned Judge had himself previously held that the question of admissibility of the instrument could not be raised. There is a decision of five learned Judges of the Allahabad High Court in *Kanhaya Lal* v. *Stowell* (3) under the Stamp Act of 1869. In that case an instrument in the following terms was held to be inadmissible as a promissory note for want of proper stamp :

"Due to Kanhaya Lal, Cloth Merchant, the sum of Rs. 200 only, to be paid next January, 1878".

This was a promissory note under the Stamp Act though not one under the Negotiable Instruments Act ; but the learned Judges held that though the

(1) [1907] 30 Mad. 386=17 M. L. J. 303.
(2) [1894] 18 Bom. 369.
(3) [1881] 3 All. 581 (F.B.).

promissory note was inadmissible as a promissory note it was still admissible as an acknowledgment of liability. It has been pointed out that in the later Stamp Act of 1899 the words "for any purpose" have been introduced into S. 35 which were not found in the corresponding S. 18 of the Act of 1869. It seems to me that the decision of this question really depends upon the terms of the present S. 35; and, as far as I am able to see, it does not present much difficulty. What this section, in my opinion, says is this: no instrument chargeable with duty shall be admitted in evidence for any purpose or be acted upon by any Court. I have set out the note in the present case. It contains a great deal more than a promissory note. A promissory note, as is well known, need only say that the promisor promises to pay to the promisee a certain sum of money to order or to bearer. But this instrument does say that; and in addition to saying that, it says that Rs. 510 for which it was given was due in settlement of a previous account. I see nothing in the Stamp Act which shuts out this part of the document; in other words, what is shut out by S. 35 is the instrument and not collateral matters connected with the instrument which may be mentioned in the same paper or in the same writing. The confusion that has been made in the case is that the learned Subordinate Judge thought what he was excluding was the promissory note, whereas he was really excluding the recital in it.

For the purpose of the plaintiff it was quite enough to rely upon the recital because that was an ample acknowledgment. He need not have the promissory note admitted at all. When the instrument itself is excluded by S. 35, there is still in the case a distinct and independent acknowledgment of liability which was admissible. The judgment of the Subordinate Judge is set aside and the case will go back to the lower Court for disposal according to law. The petitioner will have his costs of this petition from the respondent.

P.R.S./V.S. *Petition allowed.*

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* A. I. R. 1930 Madras 486

JACKSON, J.

Yenumula Akkanna and *another*—Defendants 11 and 12—Petitioners.

v.

Sri Rangaraja Bhattar Venkata Perumalla Bhattar Ayyavarulu and *another*—Plaintiffs—Respondents.

Civil Revn. Petn. No. 984 of 1929, Decided on 22nd November 1929, from order of Sub-Judge, Guntur. D/- 25th April 1929, in C. M. P. No. 244 of 1929.

*** Hindu Law—Partition—Minor—There must be unambiguous indication of intention to separate—This intention minor may express either himself or through his guardian—Court cannot then hold partition in suspense.**

In the case of adult and minor alike there must be a definite and unambiguous indication of intention to separate. If the guardian of a minor without such definite indication confines himself to praying for partition, the Court will insist upon being satisfied that it is for the minor's benefit; but if the guardian declares that there has been partition, and merely prays for allotment, the Court cannot hold the partition in suspense. For once it is assumed that the Court may act for the minor and vicariously exercise his volition, there is nothing in logic to prevent the guardian doing the same. After all under Hindu Law a minor can express either himself or through his guardian an intention to do that which is clearly not against his own interest: 39 *Mad.* 159 (*F. B.*;) 4 *Pat. L. J.* 38, *Foll. A. I. R.* 1925 *Mad.* 717; *Expl.* 41 *Mad.* 442, *not Appr.*; 3 *M.H.C. R.* 94 and 31 *Bom.* 373 (*P. C.*); *Dist.* [P 487 C 2, P 488 C 1 2]

P. Satyanarayana Rao—for Petitioner.

B. T. M. Raghavachari—for Respondents.

Judgment.—In the partition suit out of which this petition arises, there is a grandfather plaintiff, a son who remains ex parte, and two grandsons, the elder is ex parte. and the younger who filed a written statement claiming 1/6th share in consonance with the plaint, has died. In appointing his legal representative the learned Sub-Judge has held that there was severance in status at least from the date of filing the suit, and therefore the proper legal representative is the boy's mother. Defendants 11 and 12 seek to set aside this order, on the ground that in the case of a minor there can be no severance until the decree is passed. The point is not material, but I think the learned Judge should have said from the date of the written statement of the minor defen-

ant. Possibly in certain circumstances he grandfather might have disrupted he family by his own authority, but the present plaint does not amount to such an act. The proper view upon which the argument must proceed is that the minor's written statement is tantamount to a plaint.

The petitioners rely upon *Chelimi Chetty* v. *Subbamma* (1) where it is held that in a suit for partition instituted on behalf of a minor the filing of the plaint can effect no severance because it has been laid down that it depends upon the discretion of the Court whether to make a decree for partition or not, and, it would follow prima facie that the matter does not depend upon the option of the person acting on behalf of the minor. As authorities for the proposition that it depends upon the discretion of the Court: *Bachoo* v. *Mankorebai* (2) and *Kamakshi Ammal* v. *Chidambare Reddi* (3), are cited.

In the Madras case it was held that a minor can sue for partition, and the cause of action need not necessarily be the malversation of the defendants. But a suit will not lie unless there is something clearly indicating that the interests of the minor will be advanced by partition and the Court might of its own motion require to be satisfied that the suit was really for the minor's benefit and generally so great a change in the condition of a minor as a partition operates ought not to be allowed to take place unless it is clearly for his benefit that it should be so. In the *Bombay* case the trial Judge on the original side refused to exercise his discretion in ordering a partition, and both the appellate Bench and the Judicial Committee approved his action.

In both these cases the question is, what action should the Court take when it is asked to effect a partition of a minor from the joint family. The question whether a minor through his guardian can himself effect the severance, and then merely apply for allotment of his share by Court decree was not under consideration. No doubt these cases lay down that a Court when applied to for partition on behalf of a minor has a discretion whether to order it or not but these cases do not lay down that the application must be made to the Court or that the person acting on behalf of the minor cannot effect severance without the Court's intervention. In the case of adult and minor alike there must be a definite and unambiguous indication of intention to separate. If the guardian without such definite indication confines himself to praying for partition, the Court will insist upon being satisfied that it is for the minor's benefit; but if the guardian declares that there has been partition, and merely prays for allotment, can the Court then hold the partition in suspense? That is the question and I see no prima facie inference from these two authorities that the guardian has no option; a point which was never considered in either case. If there were a clear statement of law that in the case of a minor the Court has power to say whether there shall be a division or not, this question would present no difficulty; but such a clear statement has not been brought to my notice. The Court has power to say, no doubt, that it will not of itself order a minor's partition but where has it been given the power to say that the minor through his guardian cannot effect severance without resort to the Court?

Assuming that a Court is vested with no particular power in this respect, it remains to consider whether upon general grounds a Court can treat as void the severance of a minor by his guardian. It seems to be held in *Chelimi Chetty* v. *Subbamma* (1) that as the severance depends upon the volition of the individual coparcener, there can be no severance by a minor who is incapable of volition. That resolves itself into the question how far the minor's guardian can exercise volition on his behalf, a point not discussed in the ruling beyond stating that a guardian who so acted might cause great hardship and inconvenience. I do not think it can be said that in a matter of volition nothing can be done till the minor comes of age. If that were so, and if to claim partition were peculiarly and essentially the right of the adult, it is difficult to see how the Court could interfere any more than the guardian because the Court in this matter only acts as a super

(1) [1917] 41 Mad. 442=34 M. L. J. 213=42 I. C. 860=(1917) M. W. N. 792.
(2) [1907] 31 Bom. 373=34 I. A. 107=9 Bom. L. R. 646 (P. C.).
(3) 3 M. H. C. R. 94.

guardian. But once it is assumed that the Court may act for the minor and vicariously exercise his volition, there is nothing in logic to prevent the guardian doing the same. It would be idle for a single Judge so closely to examine the decision of the Bench in *Chelimi Chetti* v. *Subbamma* (1) were it not for the circumstance that, at least by implication, its authority is considerably shaken by other rulings. As candidly admitted in the case itself it runs directly counter to the general effect of the Full Bench ruling in *Soundara Rajah* v. *Arunachalam Chetti* (4). There a minor sued by his next friend for partition and it was held that the presentation of the plaint effected severance. The case is distinguished in *Chelimi Chetti* v. *Subbamma* (1) because the question whether a minor's guardian could effect severance was never raised; but on the other hand it may be said that what a Full Bench takes for granted in law, cannot be lightly brushed aside. The learned Judges have written most copious judgments on a point which had already been settled by the Privy Council. and there is no doubt that they explored every feature of the case. Seshagiri Ayyar, J. states in terms that if the question were not concluded by the Privy Council he would have found the other way, and it is difficult to suppose in those circumstances that if the plaintiff's being a minor distinguished the case, his Lordship would have overlooked so obvious a point.

In *Krishnaswami Thevan* v. *Pulukaruppa Thevan* (5) there is no doubt a strong affirmation of *Chelimi Chetti* v. *Subbamma* (1),

"The learned Judges were perfectly right." "There is no reason to doubt the soundness of the decision."

Yet the conclusion in this latter case is that the minor has a divided share from the date of the suit. It was a case of a minor suing for partition and a brother being born in the course of the suit. It is held that the analogy of an alienation is applicable; just as the alienee takes his share as from the date of his alienation and not from the date of the decree so too does the minor take his share from the date of his plaint.

"On the date when the plaintiff filed his suit he was entitled to a half share, and supposing several members are added to the family during the pendency of the suit, is it reasonable to hold that the plaintiff should be deprived of his share?"

An alienee gets his share from the date of the alienation because the alienation is an accomplished fact, and not a mere ground of claim; and if that analogy applies, it would seem that the plaint must also be regarded as an accomplished fact of severance. And if on the date of plaint the minor is entitled to a half share in the sense that it was his separate property and not to be shared with any after-born brother, then for all practical purposes his plaint has effected a severance. Unless there is an actual severance it is difficult to see how the minor plaintiff can have a right to exclude the after-born. Courts carry their decrees back to the date of the plaint, when upon that date the plaintiff had a present right; and if in fact there is no severance until the date of the decree, it would be hard to justify the exclusion of the after-born by any rule of equity. They too might appeal to reason, and ask, in the words of this judgment, if there is no severance at the time of the plaint, is it reasonable that we should be deprived of our share? The short way out of this difficulty is to make no distinction between minors and adults in respect of this matter of unilateral severance, the course adopted by the Full Bench in *Soundara Rajan* v. *Arunachalam Chetti* (4) and in terms by the Patna High Court in *Krishna Lal Tha* v. *Nageshwar* (6)

"We are unable to accede to the proposition that, under Hindu Law a minor cannot express either himself or through his guardian an intention to do that which is clearly not against his own interests."

It must be observed, however, that *Chelimi Chetti* v. *Subbamma* (1) was never brought to the notice of that Court, and this ruling is dissented from in *Krishnaswami Thevan* v. *Pulukaruppa Theran* (5).

The conclusion to which this examination of the authorities points is that the law is by no means so clear that the learned Subordinate Judge can be said to have acted with material irregularity in finding that there was a severance of status from the date of the suit, which is the assumption in *Soundara*

(4) [1916] 39 Mad. 159=29 M. L. J. 816=2 M. L. W. 1266=33 I. C. 858=(1916) M. W. N. 31.

(5) A. I. R. 1925 Mad. 717=48 Mad. 465.

(6) [1918] 4 Pat. L. J. 33=44 I. C. 146.

Rajah v. *Arunachalam Chetti* (4) and in my opinion the logical effect of *Krishnaswami* v. *Pulukaruppa* (5). Of course if ultimately he decrees partition (5) *Krishnaswami* v. *Pulukaruppa* (5) will be direct authority for dating the severance from the plaint; and if he does not decree partition, the present petitioners will not be affected. Anyhow, if necessary this question will be fully reconsidered in the trial itself. The learned Subordinate Judge states that his order appointing the legal representative is not res judicata in regard to the actual issues of the suit and there he is right. The matter has been decided by him almost summarily with no reference to authority, and cannot be said to have been substantially in issue. The petition for the above reasons is dismissed with costs.

P.R.S./V.S. *Petition dismissed.*

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A. I. R. 1930 Madras 439

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Meyyappan Servai—Appellant.

v,

Sellappa Chettiar and *others*—Respondents.

Letters Patent Appeals Nos. 33 and 55 of 1928, Decided on 13th September 1929, from judgment of Waller, J., D/- 21st February 1928, in A. A. A. O. 62 and 49 of 1925.

(a) Letters Patent (Madras), Cl. 15—Whether decision appealed from was revision or second appeal doubtful—Right of second appeal existing—Decision must be construed as appeal—Letters Patent appeal lies.

Where it is doubtful whether the decision appealed from was in revision or second appeal but the party aggrieved had a right of second appeal, it must be construed as an appeal and a Letters Patent appeal would lie in an appropriate case. [P 489 C 2]

(b) Civil P. C. S. 47—Application to set aside auction sale—Want of notice under O. 21, R. 66—It falls under S. 47 and second appeal lies.

An application for setting aside an auction sale on the ground that the judgment-debtor had no notice of the settling of the proclamation under O 21. R. 66, falls under S. 47 of the Code and second appeal is open to the parties: 11 *L. W.* 59 and *A. I. R.* 1925 *Mad* 1142, *Foll.* [P 89 C 2]

(c) Civil P. C. S. 103—Case remanded—Fresh finding called for but not given—Second appellate Court can deal with the issue as of fact under S. 103.

Where a Court in second appeal remands a case after vacating a finding on an issue and fresh finding is called for but is not given by the lower Court, the appellate Court is perfectly entitled to determine the issue as one of fact under S 103. [P 490 C 1]

A. V. Viswanatha Sastri—for Appellant.

V. S. Champagesa Iyengar—for Respondents.

Venkatasubba Rao, J.—A preliminary objection has been taken that this Letters Patent appeal does not lie. The decision depends upon the question:

"Was it a second appeal or a civil revision petition that was disposed of by the judgment of Waller, J."

If the party aggrieved had a right of second appeal, we must hold that the learned Judge disposed of that appeal by his judgment. The facts are these: The judgment-debtor applied to the District Munsiff's Court for the setting aside of a sale. He urged various grounds, one of them being that he had no notice under O. 21, R. 66, Civil P. C., of the settling of the proclamation. It has been held that an application of that kind falls under S. 47 and not under O. 21, R. 90 and that a second appeal is therefore open to the party: see *Neelu Veithiar* v. *Subramania Moothan* (1) and *Venkataswami* v. *Nagayya* (2). The District Munsiff set aside the sale and the District Judge confirmed the order of the Munsiff. Besides two second appeals (one by the decree-holder and one by the purchaser) a civil revision petition was also filed. Waller, J., disposed of them by a single order. If initially the application of the judgment-debtor was one that fell within S. 47, second appeals were competent and it must be deemed that Waller J's., judgment disposed of those second appeals. If that be so a Letters Patent appeal lies and the preliminary objection fails.

Now, coming to the merits, the question is one of construction of Waller, J.'s order calling for a finding. Did he or did not set aside the finding of Mr. Stodart, the District Judge, that the auction purchaser was not a party to the fraud? If the District Judge's observation amounted to a finding, we must take it that Waller, J., intended to vacate it. If it did not, there was no need to set it aside.

(1) [1920] 11 M. L. W. 59=53 I. C. 809=(1919) M. W. N. 897.

(2) A. I. R. 1925 Mad. 1142.

Then, let us see what happened when the case was sent back to the lower Court. Mr. Narayana Pantulu gave no finding in regard to the fraud alleged on the part of the auction purchaser. Waller, J., construes his order calling for a finding as one which required the lower Court to deal with this question also. We are prepared to accept the learned Judge's construction of his own order. Now in the absence of a finding in regard to the auction-purchaser's participation in the fraud, the learned Judge was perfectly entitled to determine that issue as one of fact under S. 103, Civil P. C. In this view, it is conceded, no further question arises and the appeal is dismissed with costs.

P.R.S./J.M. *Appeal dismissed.*

A. I. R. 1930 Madras 490

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

(*Karanna, Vana, Ena*), *Swaminathan* —Appellant.

v.

Lakshmanan Chettiar and *another*— Respondents.

Appeal No. 260 of 1928, Decided on 26th November 1929, against order of Sub-Judge, Sivaganga, D/- 2nd August 1928.

(a) Registration Act, S. 73 (1)—Sub-Registrar's order refusing registration— Appeal to District Registrar or suit filed within 30 days of communication but beyond thirty days of order—Appeal or suit is not barred.

An appeal to the District Registrar or a suit is not barred by statute if it is filed within thirty days of the date of communication of the order of the Sub-Registrar or District Registrar refusing registration even though it is filed beyond thirty days of the date of that order : 28 *Bom.* 8 ; 6 *Mad.* 189 ; 12 *Mad.* 1 ; 34 *Mad.* 151 and 24 *Bom.* 426, *Rel. on.* (*English cases discussed*). [P 495 C 2]

(d) Registration Act, S. 77 — Order dismissing appeal as time barred erroneous—It is an order of refusal and civil suit lies.

An order dismissing an appeal as time barred is as much an order of refusal as one passed on different grounds. Though it is a condition precedent to a civil suit that the party must appeal to the District Registrar within a stated time, where the decision of the District Registrar is erroneous on the point of limitation, a civil suit does lie : 7 *Mad.* 535 ; 9 *Cal.* 150 ; 40 *Mad.* 759 and 24 *All.* 402, *Dist.* [P 496 C 1]

Advocate General and *V. Ramaswami Iyer*—for Appellant.

T. R. Ramachandra Iyer and *S. R. Dikshit*—for Respondents.

Venkatasubba Rao, J.—The question we have to decide is: What is the meaning of the expression "making of the order" in Ss. 73 and 77, Registration Act ? The plaintiff on 28th September 1926 presented to the Sub-Registrar for registration, Ex. A, the sale deed executed in his favour by defendant 1. The latter, in spite of notices served upon him, failed to appear before the officer in question and on 16th October the plaintiff filed a statement requesting the Sub-Registrar to make an order refusing registration. After making an order to that effected on 18th October the Sub-Registrar sent a post card, Ex. B to the plaintiff informing him of the order and it reached him on 19th October. The plaintiff on 18th November applied to the Registrar under S. 73 to establish his right to have the document registered. That section enacts that the application should be made within thirty days after the making of the order of refusal by the Sub-Registrar. If the terminus a quo is the date when the order was communicated to the plaintiff, the application is in time ; but if the thirty days should be computed from the date of the order, the application is a day too late.

The District Registrar rejected the application on the ground that it was barred by time. He made his order on 16th December and forwarded it to the plaintiff on 20th and it reached him on 23rd. The plaintiff filed the suit from which the present appeal arises on 19th January 1927. S. 77 enacts that the party desiring to impeach the order of the Registrar, should file a suit within thirty days after the making of an order of refusal. If the starting point is the date of the District Registrar's order, the suit is out of time by four days : If it is the date when the order reached the plaintiff, the suit is well within time. The District Munsif dismissed the suit, holding that it is time barred. The lower appellate Court took the opposite view and remanded the suit for further trial.

I shall now notice briefly the various sections that have a bearing on the point to be considered. S. 35 provides that if any person by whom the document purports to be executed denies its execution, the Sub-Registrar shall refuse to register the document. It is conceded that failure of the executant to appear

amounts to a denial of execution by him: see *Sivarama Pattar* v. *Krishna Ayyar* (1), and *Chotey Lal* v. *Collector of Moradabad* (2), at p. 517 (*of* 44 *All.*)

Section 71 says that when the Sub-Registrar so refuses, he shall make an order of refusal and record his reasons for such an order in his book No. 2 and endorse the words "registration refused" on the document.

Section 73 (1) enacts that when a Sub-Registrar has refused to register a document on the ground that the alleged executant denies its execution, the person against whom the order is made, may, within thirty days after the making of the order of refusal, apply to the Registrar in order to establish his right to have the document registered.

Section 76 says that every Registrar refusing to direct the registration of a document shall make an order of refusal.

Lastly, S. 77 enacts, that any person claiming under such a document may within thirty days after the making of the order of refusal, institute a suit for a decree directing the document to be registered.

I have now referred to the relevant sections of the Act and shall proceed to consider the points raised. Apart from authority, it seems to me that there can be no valid order unless it is made after notice to the parties affected by it, or, it is communicated to them in the absence of such notice. To take a contrary view seems oppposed to reason and principle. The learned Advocate-General, for the defence contends that we must have regard to the express wording of the Act and that the words 'making of the order' are too distinct to admit of any liberal construction. The answer is: no two constructions are possible, the meaning I have suggested being the only reasonable construction of the words. The very word "order" by necessary implication means in law that the party affected has had reasonable notice of it. Not a single case in India has been brought to our notice which takes a different view. On the contrary, every decision on the point seems to recognize the principle I have stated. That any particular ruling proceeds on the special provisions of any Act makes, in my opinion, no difference. *Abdul Ali* v. *Mirja Khan* (3), is a case under S. 77, Registration Act and is directly in point. The same rule has been laid down without equivocation in *Annamalai* v. *Cloete* (4), *Seshamma* v. *Sankara* (5), *Secretary of State* v. *Gopisetti Narayanaswami* (6) and *Mahipat* v. *Lakshman* (7). The essence of the rule is, that the decision should be passed in such circumstances that the parties should have reasonable notice of it. If when a petition is presented or a case is heard, the order is then and there made in the presence of the parties, no further question arises; if the making of the order is postponed, the parties should be given notice of the adjourned date, so that they may be present and hear the decision when passed. If, in these two cases, the party owing to his own fault, does not become aware of the order, it nevertheless takes effect at once. If an order is made without previous notice, it does not become operative until it is communicated. These, in my opinion, are rules which are in conrformity with justice and common sense.

In the present case, the allegation in the plaint has not been challenged, that the Sub-Registrar neither fixed a date for pronouncing his order, nor gave notice of any day having been fixed. The same remark applies to the order made by the District Registrar.

The learned Advocate-General for the defence relies upon certain English cases; but if properly examined, they support my view rather than establish the contrary. The first case relied on is: *King* v. *Justices of Staffordshire* (8) Lord Ellenborough in that case no doubt says:

> "It is, however, a case of great grievance and hardship where the interests of parties are thus invaded by an order made behind their backs; and may be a good ground to apply to Parliament for a revision of the clause of appeal; but we cannot remedy the abuse,"

These observations are apt to mislead if regard be not had to the facts of the case. Under the statute, any resident of the locality aggrieved by the order had a right of appeal, the party that

(1) [1914] 26 M. L. J. 307=23 I. C. 23=15 M. L. T. 233.
(2) A. I. R. 1922 P. C. 279=44 All. 514=49 I. A. 375 (P.C.).
(3) [1904] 28 Bom. 8=5 Bom. L. R. 622.
(4) [1883] 6 Mad. 189.
(5) [1889] 12 Mad. 1,
(6) [1911] 34 Mad. 151=8 I. C. 398=(1911) 1 M. W. N. 28.
(7) [1900] 24 Bom. 426=2 Bom. L. R. 223.
(8) 3 East 151=102 E. R. 554.

preferred the appeal was a member of the public and was not a person directly concerned with the proceeding. It was such a party that urged that he had no notice of the order. In refusing his contention, Le Blanc. J., points out, that if the right of appeal were to depend, in the case of a public highway, in which all the King's subjects are interested, on personal notice of the order in respect of each subject, there never would be an end of the time for appealing. This case, therefore, does not support the view urged for the defence.

The next case relied on by the learned Advocate-General, is *Queen* v. *Justices of Derbyshire* (9). This does not help him, as there is nothing in it to show that the surveyor referred to in the judgment did not have an opportunity of knowing the order, when it was made.

The *Queen* v. *Barnet Sanitary Authority* (10), is a very instructive case on the point. Under the Act, a rate as well as an order may form subjects of appeal In the former case, the time counts from the date when the party has notice of the rate ; in the latter, from the date the order itself is made. Why is this distinction made? Blackburn, J., points out, that a person may be rated behind his back, but, prima facie an order is not so made. Meller, J., even more pointedly observes :

"The local authority had, under the Act, an opportunity to show cause and unless they chose not to appear, the order could not have been made in their absence."

I may lastly refer to *Ex Parte Johnson* (11), which recognizes the anomaly involved in the position, that a party is bound by an order which he has no reasonable opportunity of knowing. It is therefore clear that the view contended for by the learned Advocate General is opposed to the English and the Indian cases alike.

A feeble attempt has next been made to show that the order of the District Registrar rejecting the application as time barred is not an order of refusal under S. 77. This contention is clearly opposed to S. 76, which makes no distinction between one kind of refusal and another. Whatever be the ground of his decision, the order is one of refusal. What significance can possibly attach to the fact that the ground of refusal was that the application was barred? No case has held that rejection of an application on the ground that it is barred, is not an order of refusal. Before a party can come to a civil Court, he is bound as a condition precedent, to apply to the Registrar within a stated time. If the Registrar rightly holds that the application made to him is barred, it is obvious that the condition precedent has not been fulfilled. The civil suit in such a case is clearly incompetent and no more is the effect of the cases to which we have referred, namely, *Kunhimmu* v. *Vijyathamma* (12), (at p. 537) ; *Edun* v. *Mahomed Sidd k* (13), (at p. 154); *Gangadhara* v *Sambasiva* (14) (at p. 766); *Udit Upadhia* v. *Imam Bandi Bibi* (15), (at pp. 413 and 416).

In the result, the appeal fails and is dismissed with the costs of respondent 1.

Madhavan Nair, J. — This civil miscellaneous appeal arises out of a suit instituted by the plaintiff under S. 77, Registration Act, for getting a decree directing the sale deed dated 4th January 1926 executed to him by defendant 1 to be registered in the Sub-Registrar's office at Sivaganga.

The facts are briefly these: The plaintiff presented the sale deed for registration before the Sub-Registrar of Sivaganga on 28th September 1926. That officer declined to register the document on 18th October 1926 as the executant failed to appear before him to admit registration. It is conceded that his failure to appear amounts to 'denial of execution' under S. 35, Registration Act see *Radha Kissen Rowra Dakha* v. *Chooneolall Dutt* (16), *Sivarama Pattar Kariakar* v. *Krishna Ayyar* (1), *J. D. Ezekiel* v. *Annada* (17) and *Chhotey Lal* v. *Collector of Moradabad* (2). The Sub-Registrar's order was despatched to the plaintiff and he received it on 19th October 1926. Thereupon he made an application under S. 73 (1), Registration Act, to the District Registrar at Ramnad to establish his rights to have the docu-

(9) [1881] 7 Q. B. 193=115 E. R. 461.
(10) [1876] 1 Q. B. D. 559.
(11) 3 B & S 946=122 E. R. 354,

(12) [1884] 7 Mad. 535.
(13) [1883] 9 Cal. 150=11 C. L. R. 440.
(14) [1917] 40 Mad. 759=40 I. C. 192 = 33 M. L. J. 51.
(15) [1902] 24 All. 402=(1902) A. W. N. 99 (F. B.)
(16) [1880] 5 Cal. 445=5 C. L. R. 172.
(17) A. I. R. 1923 Cal. 35=50 Cal. 180.

ment registered. Applications to the Registrar under this section should be made " within 30 days after the making of the order of refusal " by the Sub-Registrar. The plaintiff's application was presented on 18th November 1926 i. e., after 30 days from the date of the order of refusal by the Sub-Registrar on 18th October 1926, but within 30 days after the order was communicated to him. The District Registrar held that the application was out of time and rejected it on 16th December 1926. This order was communicated to the plaintiff on 20th December 1926. Thereupon the plaintiff instituted this suit under S. 77, Registration Act. A suit under this section should be instituted ' within 30 days after the making of the order of refusal " by the District Registrar. The plaint in the present suit was filed on 19th January 1927, i. e., after 30 days from the date of the order of the District Registrar but within 30 days after it was communicated to him.

It was contended by defendants : (1) that the suit having been presented more than 30 days from the date of the order of the District Registrar rejecting the application, was barred by limitation and (2) that the plaintiff has no right to institute the suit under S. 77, Registration Act, as it was not brought on any " order of refusal " by the Registrar, as the application to the Registrar was thrown out as time barred. The District Munsif upheld these contentions and dismissed the suit without going into the merits. On appeal the learned Subordinate Judge overruled them and remanded the suit to the lower Court for disposal. This appeal is by the defendants against the order of remand and the above contentions urged by them before the lower Courts are again pressed before us with great force by the learned Advocate-General

The provisions of S. 73 (1) and 77 (1), Registration Act are as follows :

Section 73 (1) :

" When a Sub-Registrar has refused to register a document on the ground that any person by whom it purports to be executed, or his representative or assign, denies its execution any person claiming under such document, assign or agent authorized as aforesaid, may, within 30 days after the making of the order of refusal, apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered."

Section 77 (1):

" Where the Registrar refuses to order the document to be registered, under S. 72 or S. 76, any person claiming under such document or his representative, assign or agent, may, within 30 days after the making of the order of refusal institute in the civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered in such office if it be duly presented for registration within 30 days after the passing of such decree."

The first question for consideration is whether the suit is time barred under S. 77, Registration Act. As already observed a suit under this section will be within time if it is instituted

" within 30 days after the making of " the order of refusal " by the District Registrar."

It is argued on one side that the expression ' making the order of refusal ' in S. 77, Registration Act, means only recording the order of refusal in writing and that the time should be calculated from the date of the ' order of refusal ' in which case the plaintiff's suit will be out of time ; while on the other side it is contended that the expression means not merely the recording of the order in writing by the Registrar but communicating it to the party concerned and that in this case time should be calculated from the date when the order was communicated to the plaintiff in which case his suit will be in time. The answer to the question must depend on the special circumstances of each case. If the order of refusal is pronounced in the presence of the parties immediately after inquiry by the Registrar, so that the person concerned knows that his request has been refused, then there can be no doubt that time should be calculated from the date of the order but if the order was not so pronounced and the person concerned does not know that his request has been refused, then it would not be just to hold that time should be calculated from the date of the order. How is an aggrieved party to take any action unless he knows that an adverse order has been passed by the Registrar ? If the construction contended for by the appellant is accepted, then it is clear that in cases of this kind the party aggrieved may be altogether deprived of the privilege of taking proceedings under S. 73 (1) and S. 77 of the Act. It is not contended that the Sub-Registrar and the Registrar pronounced their orders in the presence of the

parties after the inquiry was over, or that these officers fixed any day for pronouncing their orders or gave notice fixing any date for pronouncing them. In these circumstances it seems to me that in this case time should be calculated only from the date when the order was communicated to the parties. An order to be valid under S. 77 of the Act should be passed in the presence of the parties ; or after notice to them ; if no notice has been given, then it should be communicated to them ; in other words, the order to be a valid one must be brought to the knowledge of the party against whom it has been passed. It is conceded that there is no provision in the Act for communicating the orders of the Registrar and Sub-Registrar to the parties concerned. It seems to me therefore that the intention of the Act is that the officers should pronounce their orders in the presence of the parties after the inquiry is over, or should do so, after giving the parties notice.

This very question arose for decision in the Bombay High Court in *Abdul Ali* v. *Mirza Khan* (3) and it was held in that case by Chandavarkar and Ashton, JJ., that the expression 'making an order in S. 77, Registration Act (3 of 1887)," means not merely the recording of the order of refusal in writing but communicating it to the party concerned so as to bind him by it. The Punjab Chief Court also decided the question in the same way following: *Abdul Ali* v. *Mirja Khan* (2): see *Kirpa Ram* v. *Asa Singh* (18). In our own Court, this particular point has not been considered in any case under the Registration Act, but attention may be drawn to cases under the Madras Survey and Boundaries Acts (Act 28 of 1860 and Act 4 of 1897) which contain an analogous provision limiting the period allowed for the institution of suits in which it has been held that time does not begin to run until the date on which the decision sought to be set aside is communicated to the parties: see *Annamalai* v, *Cloete* (4); *Seshamma* v. *Sankara* (5) and *Secy. of State for India* v. *Gopisetti Narayanswami* (6): see also *Mahipat* v. *Lakshman* (7), a decision under the Khoti Act. The correct principle is there pointedly stated in 34 *Mad.* 151:

"A decision cannot properly be said to be passed until it is in some way pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing what it contains. Till then, though it may be written out, signed and dated, it is nothing but the decision which the officer intends to pass. It is not passed so long as it is open to him to tear up what he has written and write something else."

In support of his contention that the time for the suit should be computed from the date of the order, the learned Advocate-General mainly relied on three English cases: *King* v. *The Justices of Staffordshire* (18); *Queen* v. *The Justices of Derbyshire* (9) and *Queen* v. *Barnet Sanitary Authority* (10). These cases appears at first sight to support his contention but when read in the light of their circumstances these will not be found to be inconsistent with the view which I have expressed above.

In 102 *Eng. Rep.* 554, an order was made under Stat. 13, Geo. 3, Chap. 78 for stopping part of a highway. By S. 29 of that statute, an appeal is given to

"the party aggrieved by any such order or proceeding at the next Quarter Sessions after such order made or proceeding had etc."

it was held that the appeal must be made to the Quarter Sessions next after the order made, without reference to any notice received by such appellant. The reason why the learned Judges arrived at this conclusion appears in the following observations of LeBlanc, J.:

"In the case of a public highway, all the King's subjects may be said to be interested, and to have a right of appeal against an order for stopping it up; and, therefore, if the right of appeal were to depend on personal notice of the order to the appellant, there never would be an end of the time for appealing."

In commenting on this case, in 115 *Eng. Rep.* 461, which will be referred to presently, the Judges refer to these remarks of Le Blanc, J. From this we may infer that the literal construction contended for, was put upon the words of the statute as there would be no end of appealing if such a construction was not adopted. Having regard to these observations which give the reason for this decision, I do not think the case can be understood as, laying down any general rule of interpretation. In 115 *Eng. Rep.* 461 an order was made under Statute 4 and 5 Vic. Chap. 59 requiring

(18) [1917] 41 P. R. 1917=41 I. C. 76=55 P. W. R. 1917.

a surveyor of highways to pay money out of the highway rates in aid of turnpikes fund. By S. 3 of that statute a right of appeal is given to the person aggrieved "within six days after such order shall be made or given." It was held that the time for appeal runs from the making of the order not from the service. It may be gathered From the following remarks of Lord Denman, C. J., appearing in the judgment that in cases under the statute the parties interested would have opportunities to know about the order at the time when it is made. The learned Judge says:

"We may add that the Act provides some means for giving notoriety to the proceeding at the Petty Sessions, and even notice to the parties directly interested in opposing such an order."

It would appear (see Maxwell's Interpretation of Statutes, p. 11) that the order appealed against in this case must have been verbally pronounced by the Justices. If so, we may presume that it was pronounced either in their presence or after notice to them. In 1 *Q. B. D.*, 558, it is clear from the report, the arguments (see p. 561) that the order was made in the presence of the person affected by it. It also appears from the judgment of Blackburn, J., and Meller, J., that the person affected by the "order," "conviction" in such cases always have opportunity of being present, at the time when the orders affecting them, are made. Blackburn, J., observes thus:

"Where the appeal is against a rate, the "cause of appeal" would prima facie be upon notice of the rate, but where the appeal is from any order or conviction, one would certainly, prima facie, say that as soon as the order is made the party has a right to appeal, and is not bound to wait until the order is served."

The point is more explicitly stated by Meller, J., who observes thus:

"Here the local authority had, under the Act, an opportunity to show cause, and unless they chose not to appear, the order could not have been made in their absence. . . . . The cause of appeal begins from the time the order is pronounced. The order is not required to be in writing, it may be a verbal and informal decision, and the party convicted, either does know or ought to know the grounds on which the Justices have proceeded."

In this view, this case also does not support the appellant's contention. Attention may also be drawn to the decision in *Ex parte Johnson* (11), where it was held that under 7 and 8 Vict. Chap. 101, S. 4 which enacts that "within 24 hours after the adjudication and making of an order" in bastard, the putative father may give notice of appeal to the Quarter Sessions, that the time must be counted from the oral adjudication of the Justices in the Petty Sessions and not from the time when the formal order is signed by them. On the whole I do not think that these English cases compel us to hold that the time for instituting the suit under S. 77, Registration Act, must always be calculated from the date of the order of the refusal made by the Registrar irrespective of the question whether the party concerned had notice of the order or not.

It follows from what I have said that since the plaint in this case was filed within 30 days after the order of refusal by the Registrar was communicated to him, the suit under S. 77, Registration Act, is not time barred. For the same reasons I must hold that the application to the Registrar under S. 73 (1) of the Act was also made in time and that the rejection of it by the Registrar as time barred was wrong.

The next argument of the appellant is that the suit is not maintainable as the Registrar rejected the plaintiff's petition on the ground that it is time barred without going into the merits. It is argued that such orders are not "orders of refusal" as contemplated by the section. I do not think that this contention is well founded. No authority has been cited in support of it. An order dismissing a petition on the ground that it is time barred is as much an "order of refusal" within the meaning of the section as an order dismissing the petition on the ground that it has no merits. The Act does not make any distinction between those two kinds of orders. One of the conditions that should be complied with by a person instituting a suit under S. 77, Registration Act, is that he must show that he applied to the Registrar within the time allowed by law. If the Registrar rightly rejects the petition on the ground that it is time barred, then it means that the plaintiff did not comply with this condition precedent to the maintenance of the suit under the section; and a suit under S. 77 of the Act will not therefore lie. This was all that was decided by the Allahabad High Court in *Udit Upadhia* v. *Inam Bandi Bibi* (14),

where it was held that Registrar's order in that case rejecting the application as filed beyond time cannot be considered as a "refusal to register" within the meaning of the Act. The other decisions referred to by the appellant: *Kunhimmy* v. *Vijathamma* (11), at p. 537, *Edun* v. *Muhammad Siddick* (12) at p. 154 and *Gangadhara* v. *Sambasiva* (13) at p. 766, do not advance his case any further. In this case I have shown that the Registrar's order rejecting the application made by the plaintiff as time barred is wrong i. e., that the application was made in time: in other words, that the plaintiff has complied with the condition precedent to the maintenance of the suit. It, therefore, follows that the plaintiff's suit is maintainable

This civil miscellaneous appeal fails and must be dismissed with costs of respondent 1.

P.R.S./J.M. *Appeal dismissed.*

A. I. R. 1930 Madras 496

KUMARASWAMI SASTRI AND WALSH, JJ.

Rajah Somasekhara Royal and *others* —Defendants—Appellants.

v.

Sreeman Rajah Sugutoor Immedi Mahadeva Royal Yesovantha Baha ur Varu and *others*—Plaintiffs—Respondants.

Appeal No. 354 of 1926, Decided on 5th December 1929, from decree of Sub-Judge, Chittoor, in Original Suit No 14 of 1919.

(a) Hindu Law—Adoption of married man, even though Sudra, is invalid except in Bombay.

Except in the Bombay Presidency where Mayukha prevails, in all the other provinces in India, the adoption of a married man, even though he happens to be a Sudra, is invalid. In the portion of Bombay Presidency where the Mayukha is followed, such adoption is held valid: *A. I. R. 1925 Mad.* 272; 33 *Bom.* 669 and *A. I. R. 1925. Bom.* 363, *Ref.* [P 499 C 2]

(b) Hindu Law — Applicability — Person migrating, or territory transferred to another province—He is presumed to have carried his personal law with him.

Whether it is case of an individual migrating from one province to another, or a case of territory where he resides being transferred from one province to another, the presumption until contrary is shown is that he carries his personal law with him. Where, therefore, North Kanara District of Madras is transferred to Bombay Presidency, Mayukha cannot be said to apply to it simply because of such transfer: 13 *W. R.* 47 and *A. I. R.* 1921 *P. C.* 59, *Rel. on.* [P 500 C 1]

(c) Hindu Law—Applicability—Lingayats are governed by Hindu Law except as modified by custom.

Lingayats whose only God is Shiva and who acknowledge the authority of the Vedas are bound by Hindu Law except in so far as it is modified by custom: *A. I. R.* 1927 *Mad.* 228, *Ref.* [P 501 C 1]

(d) Hindu Law — Adoption — Lingayats—Fifth year is age fixed for adoption but rule has been relaxed and adoption can be made before Deeksha.

Vethulagama, one of the Agamas which are of primary authority among Lingayats, deals with adoption and fixes the fifth year as the proper age for adoption. This has been relaxed by custom and adoption can be made before Deeksha ceremony which takes place before marriage: 8 *Mad.* 440, *Ref.* [P 500 C 2]

(e) Hindu Law — Adoption Lingayats—Custom allowing adoption of married man has not obtained judicial recognition.

No custom that a married man may be taken in adoption has obtained judicial recognition among the Lingayats. Such adoption is invalid even if law governing Sudras be applied to them: 16 *Mad.* 334, *Ref.* [P 499 C 2]

S. Varadachariar, *P. Kameswara Rao* and *E. Krishna Murthi* —for Appellants.

Advocate-General and *B. C. Seshachala Ayyar*—for Respondents.

Judgment. Defendants 2, 4 and 6 are the appellants and the facts which led up to this appeal are as follows:

The parties to the suit who belong to the Lingayat community are members of the Punganur zamindar's family. Punganur was permanently settled in 1861. It is an impartible estate governed by the law of primogeniture.

On 22nd November 1896 the zamindar, Raja Immadi Sankara Royal Yasavantha Bahadur, executed a will marked as Ex. Y in the case. It recites that he transferred the estate to his eldest son Raja Immadi Veera Basava Chikkarayal Varu, and that he the eldest son should be the head of the Samasthanam and after him his eldest son and so on in succession After giving certain directions and after giving certain legacies, he gave monthly allowonces to his second and third sons. Para. 6 of the will runs as follows:

"In case our second son Komara Chikka Royal Varu and our third son Mahadeva Royal Varu should get themselves separated, on account of dislike for remaining in the fort castle with our eldest son Raja Veera Basava Chikka Royal Varu, our eldest son Raja Veera Basava Chikka Royal Varu must be paying them a monthly allowance of Rs. 100 each,

from such date, out of the income of the Samasthanam, and similarly an allowance of Rs. 40 per mensem to our Queen Savitri Ammanni Garu for her life from the time of our decease."

Paragraph 12 of the will runs as follows:

"We have given away landed estates to our second and third sons, Raja Komara Chikka Rayal Varu and Raja Komara Chikka Mahadeva Rayal Varu; detailed lists thereof were prepared and kept. In respect of these estates, they must pay a reasonable cist to the Samasthanam and enjoy them, but they should be entitled to the whole of the other landed property. They must be owned and enjoyed by eldest son Raja Veera Basava Chikka Rayal Varu."

On 2nd May 1898 a release deed Ex. W was executed in favour of the then Zamindar of Punganur the mother of plaintiff 1 as his guardian. It refers to the will dated 22nd December 1896, and recites that her son plaintiff 1 was about 14 years old. It says that the legacy due to plaintiff 1 should be deposited either in Messrs. Arbuthnot and Co, or in the Madras Bank and that interest on the deposit should be given to her for the use and benefit of the minor. It also says that the allowance of Rs. 100 a month should be continued to be paid. Then it refers to certain rights of hunting, grazing, etc. As regards the lands given to the plaintiff 1 under the will it recites that they should be under the supervision of the zamindar till plaintiff 1 attained majority.

In 1901 plaintiff 1's sister's husband acting as his next friend filed O. S. No. 10 of 1901 in the Chittoor District Court for a partition of the zamindari. The plaint in that suit is filed as Ex. P in this case and it claimed a partition of the zamindari and the moveable properties attached to it and prayed for a declaration that the release deed dated 2nd May 1898 was invalid as against the plaintiff and for other reliefs. In the atternative the plaintiff claimed maintenance. The defendant filed a written statement pleading that the zamindari was an impartible estate held by the ancestors from time immemorial as a palayam on the tenure of military service, and that the plaintiff was not entitled to a partition. He denied the other allegations in the plaint and pleaded that the will of the father and the release by the mother were binding. The District Judge of Chittoor held that the estate was impartible. As regards the claim for maintenance the Judge thought that Rs. 700 a month claimed was high and that the sum of Rs. 100 given under the will was adequate. As regards the lands referred to in para. 12 of the will he thought that it did not appear what the lands were but relying on the release deed he decreed to the plaintiff lands of the value of Rs. 35,950 out of the properties in Sch. B and mesne profits. Against this decree an appeal (83 of 1906) was filed by the plaintiff.

That appeal was compromised by a rajinama (Ex. U) dated 29th January 1907. The material clauses run as follows:

"Raja Immadi Veerabasava Chikka Rayal Varu of us, who is the present proprietor of Punganur Samasthanam, and those who succeed him to the Punganur Samasthanam, should, as provided for in para 6 of the will dated 22nd December 1896 left by the late Raja Sankarayal Varu, be paying Thevvajji (allowance) to Mummadi Mahadewarayal Varu of us and his male descendants hereditarily at the rate of Rs. 100 every month, paying the same before the 10th of the succeeding month, from 1st January 1907. The said Rajah Mahadewarayal Varu or after him his male descendants shall never either on the ground of largeness of family or for any other reascns, claim more than Rs. 100 a month as Thevvajji (allowance).

(2) As Rajah Mummadi Mahadevarayal Varu represented that he did not want the lands mentioned in the decree passed in O. S. No, 10 of 1901 on the file of the North Arcot District Court, but that instead of them, he might be given, as provided for in the decree, Rs. 1,500 every year at the rate of Rs. 125 per month, the said Rajah Veerabasava Chikka rayal Varu and his successors to the Punganur Samasthanam should accordingly be paying to the said Rajah Mahadevarayal Varu and after him his male descendants from January 1907 at the rate of Rs. 125 per month paying the same before the 10th of the succeeding month."

By the time the appeal was filed, the appellant had become a major and he filed the appeal. After the execution of this agreement, the appellant put in a petition to withdraw the appeal and on 5th December 1907 the following order was made:

"Ordered that this appeal be and it hereby is struck off the file as withdrawn; and it is further ordered that each party do bear his own costs."

The upshot of these proceedings was that the plaintiff and his descendants were to get Rs. 100 a month as thavajji or allowance as provided for in the will of his father and that in lieu of the

lands referred to in the will and the decree of the District Judge giving him lands of the value of Rs. 35,950, he was to get a sum of Rs. 125 a month.

The decree of the High Court was in 1906. About September 1907 the first plaintiff and his mother went to North Kanara and were staying in the house of one Subhadrammayi who was a relation of the first plaintiff's mother and, according to the appellants, plaintiff 1 was taken in adoption by that lady and a regular deed of adoption (Ex. 17) was executed and registered, plaintiff 1 himself presenting it for registration. Ex. 17 is a registration copy of the deed of adoption. It is executed by Subhadrammayi who was the widow of one Basavalinga Raja of Biligi, Siddapur taluk, in favour of plaintiff 1 who is respondent 1 before us. It recites that respondent was taken in adoption. This document was executed in North Kanara and it is not disputed that the properties which are referred to in this document as having passed to the adopted son are situate in North Kanara. Though the factum of the adoption seems to have been disputed in the lower Court, the Judge finds that the adoption was made in fact. We shall assume without deciding the point that the adoption was as a matter of fact made. Its validity, however, is disputed on the ground that respondent 1 the adopted son was then a married man and that consequently the adoption is invalid. And in fact the whole of this appeal practically turns on the invalidity of the adoption owing to the adopted son being a married man at the time of adoption.

Though plaintiff 1 was taken in adoption by the deed dated 19th September 1907, the parties seem to have changed their minds probably because the Biligi Samasthanam did not turn out to be as valuable as it was supposed to be.

In 1908 plaintiff 1 and his mother again went to Biligi and a release deed Ex. CC dated 28th November 1908 was executed by the first plaintiff the adopted son in favour of the adoptive mother. The deed states that when plaintiff 1 and his mother went to see the waterfall during the Bhadrapada month of the Plavanga year, the adoptive mother learning of the arrival of the son (plaintiff 1) and the mother sent for them and on account of the old relationship and on account of emotion executed a document on 13th Bhadrapada, Suddha corresponding to 19th September 1907 and had it registered and that plaintiff 1 and his mother went away to their native place Punganur. It states that nothing took place according to the usage and law as stated in the document, that the adoptive mother herself has been managing the properties and that the climate of Biligi does not suit plaintiff 1. It winds up by saying:

"we with your consent have hereby relinquished to you our ownership etc., rights passed to us under the aforesaid document."

Then the property is described.

In 1912, i. e., about 5 years after the adoption and 4 years after the relinquishment, plaintiff 1 filed a suit (O. S. No. 46 of 12) for arrears of maintenance. The plaint in that suit is marked as Ex. C. It sets out the rajinama already referred to giving him Rs. 100 a month for allowance and Rs. 125 a month in respect of the lands relinquished and claimed Rs. 6,695-13-4 after giving credit for the amounts plaintiff 1 had received. In the meantime the Zamindar of Punganur who was a party to the agreement died and his son was brought in as the defendant. He filed a written statement stating that the agreement made by his father was not binding on him and setting up various other defences. His defence was not accepted and a decree for the arrears of maintenance was passed. In that suit there was no defence raised that the plaintiff having been adopted into another family ceased to be entitled to any maintenance even if the agreement of compromise giving him the rights claimed was valid and binding on the defendant. There was an appeal (No. 325 of 1913) against this decree but it was dismissed by the High Court. The decree was executed and the plaintiff got his money.

Suit No. 14 of 1919 out of which the present appeal (No. 354 of 1926) arises was filed on 1st March 1919 by plaintiff 1 to whom under the rajinama Rs. 100 a month for allowance and 125 in respect of lands was agreed to be paid and by the widow of the late Zamindar who

claimed Rs. 40 a month payable to her. The amount claimed was for the period subsequent to the period covered by the previous suit for the recovery of arrears of maintenance which was decreed. There were various defences raised but the main defence with which we are concerned in this appeal is that the plaintiff having been adopted by the Rani of Biligi is not entitled to claim anything from the Zamindar either under the deed of rajinama arrangement or otherwise. To this the answer was that there was no adoption as a matter of fact and secondly the adoption, even if it was true, is invalid in law because plaintiff 1 was at the date of the adoption a married man about 23 years of age.

The suit was originally laid against defendant 1 only, the Zamindar, but pending the suit he died and defendants 2 to 6 were brought on record as his legal representatives and they adopted the written statement of defendant 1. A plea was raised by defendant 4 that the maintenance should be reduced to Rs. 70 and Rs. 75, as the income of the estate had considerably fallen.

The Subordinate Judge decreed the plaintiff's suit. As regards the factum of adoption he held that the adoption was in fact made. He was of opinion that evidence oral and documentary in support of the factum of adoption amply supported the factum of adoption. As in our view the adoption even if true is invalid it is unnecessary to give a finding on this point.

As regards the validity of the adoption, two questions arise: namely, (1) whether the plaintiff was married at the time of the adoption and (2) whether the adoption of a married man among Lingayats is valid.

It is admitted that plaintiff 1 was a married man at the time of the adoption. The parties are Lingayats and the question is whether the adoption of a married man by a Lingayat is valid.

The Subordinate Judge held that as the adoptive mother belongs to North Kanara which was a part of the Madras Presidency before it was transferred to the Bombay Presidency in 1861 the law applicable to the parties is the law as applied in the Madras Presidency, that as the adoption of a married man has been held to be invalid plaintiff 1's adoption was invalid and inoperative and that he therefore remained a member of his natural family and was entitled to the rights conferred on him by the rajinama.

North Kanara originally formed part of the dominions of Hyder Ali and his son Tippu, who were the Rulers of Mysore and in 1799 on the fall of Tippu Sultan, North Kanara and other territories were ceded to the East India Company and formed part of the Madras Presidency till 1861 when for administrative purposes, the administration of that district was transferred to the Bombay Presidency.

So far as the Presidency of Madras is concerned the law has already been that the adoption of a married man is invalid. The latest decision of this Court is *Lingiah Chetty* v. *Chengalammal* (1).

Except in the Bombay Presidency where the Mayukha prevails it has been held by the Courts in all the provinces in India that the adoption of a married man even though he happens to be a Sudra is invalid. The decisions are referred to in *Lingayya Chetti* v. *Chengal Ammal* (1). It is argued for the appellants that the decisions to the effect that in the case of Sudras the adoption of a married man is invalid are wrong. We see no reason to differ from the current of authority which so far as we can see is uniform and is also supported by Smriti Chandrika and other texts.

So far as the Bombay Presidency is concerned in the portion of the Presidency in places where the Mayuka is followed as the paramount authority it has been held that the adoption of a married man is valid. We may refer to *Kalganda Tavanappa* v. *Somappa* (2) and *Manik Bai* v. *Gokuldoss* (3). This is not by reason of any custom in derogation of the law but by reason of the express text in the Mayuka to the effect that a married man may be adopted.

It is argued for the appellants that as North Kanara has been incorporated in the Bombay Presidency from 1861 the law as administered in the Bombay Presidency should be the law to be administered to Lingayats in the Bombay

(1) A. I. R. 1925 Mad. 272=48 Mad. 407.
(2) [1909] 33 Bom. 669=8 I. C. 809=11 Bom. L. R. 797.
(3) A. I. R. 1925 Bom. 363=49 Bom. 520.

Presidency where the adoption of married men has been held to be valid. An alternative ground has been taken that among the Lingayats wherever they are, whether in the Madras Presidency or the Bombay Presidency, the adoption of a married man is valid by custom, that evidence of such a custom has been adduced in this case and that the Judge was wrong in holding that the custom has not been proved.

When the North Karnara District formed part of the Madras Presidency, the law as administered by the Madras High Court was that the adoption of married men was invalid; and it would have been necessary for a person there who sets up a custom to the contrary to prove it. The transfer of North Kanara to the Bombay Presidency for administrative purposes would not by itself change the personal law of persons residing in the North Kanara District. Whether it is a case of an individual migrating from one province to another or a case of territory where he resides being transferred from one province to another, the presumption until the contrary is shown is that he carries his personal law with him, and it is difficult to see how the Mayuka can be said to apply to the North Kanara District, simply because it was transferred to the Bombay Presidency. We may in this connexion refer to *Huro Pershad Roy* v. *Shibo Shunduree* (4), *Balwant Rao* v. *Baji Rao* (5).

Turning to the custom set up, the custom alleged is a custom among the Lingayat community to which the parties belong permitting the adoption of married men. It is a general custom alleged that the Lingayats wherever they are permitted to make adoptions of married men.

Before dealing with this question it is necessary to refer shortly to the Lingayat community. The Lingayats who were originally Hindus are a body of dissenters and the founder of their religion was one Basava who was born 1100 A. D. Their religion is correctly summaried by Thurston in his Castes and Tribes of Southern India, Vol. 4, at p. 236 as follows :

"Their religion is a simple one. They acknowledge only one God, Siva, and reject the other two persons of the Hindu triad. They reverence the Vedas, but disregard the later commentaries on which the Brahmins rely. Their faith purports to be the primitive Hindu faith, cleared of all priestly mysticism. They deny the supremacy of Brahmins, and pretend to be free from caste distinctions, though at the present day caste is in fact observed amongst them. They declare that there is no need for sacrifices, penances, pilgrimages or fasts. The cardinal principle of the faith is an unquestioning belief in the efficacy of the Lingam, the image which has always been regarded as symbolical of the God Siva."

Mysore, the Southern Maharatta country and the Bellary District contain most of these Lingayats. Though the sacred thread is not worn by the Lingayats, a ceremony called Deeksha ought to be performed about their 18th year but as in the case of upanayanam it is often performed much later. The sacred mantra is whispered in the ear by their Guru and this ceremony corresponds to upanayanam among the Brahmins. We may also refer to *Virasangappa* v. *Rudrappa* (6) where some of the Lingayat tenets are set out.

It is conceded in this case that so far as their religious duties are concerned, the Lingayats have got Agamas or sacred books which are of primary authority. One of such books is Vathulagama which has been filed as Ex. Q in this case. It deals with adoption. These Agamas are dialogues between Siva their Chief God and his consort Parvati. As regards adoption this is what it states :

"The wise should take a boy possessing all the limbs, clean, endowed with beauty, born of the same gotra, having a liking to good conduct, aged five years excluding the eldest, of good conduct, highly intelligent, of sweet, tender hearted."

So far as the age limit is concerned, this age corresponds with the age given in Dattaka Chandrika. As regards the ceremonies of adoption which appear after this passage, homam is performed with Vedic mantras. As regards the age of five years, custom has relaxed that rule and the evidence of the plaintiffs' witnesses in this case is that adoption can be made before the Deeksha ceremony is performed. The question, however, is whether custom has relaxed the rule that an adoption can be made after a person is married.

In the case of Jains it is undoubted law that in the absence of any custom to the contrary which has to be set up

(4) 13 W. R. 47.
(5) A. I. R. 1921 P. C. 59=48 Cal. 30=16 N. L. R. 187=47 I. A. 213 (P.C.).
(6) [1885] 8 Mad. 440.

and proved they are subject to the rules of Hindu Law. We may refer to *Gateppa* v. *Eramma* (7) where the authorities are collected. The Jains do not worship Siva nor do they recognize the authority of the Vedas. But in the case of Lingayats whose only God is Siva and who acknowledge authority of the Vedas they are all the more bound by Hindu Law except in so far as it is modified by custom.

As regards the evidence of custom the Subordinate Judge is of opinion that the custom has not been made out. The custom pleaded as said before is a general custom among the Lingayats and not a special or local custom in North Kanara, or in the family of the adoptive mother. A large number of Lingayats are found in the Mysore Province, Bellary and the Southern Mahratta country. The Zamindari of Punganur is on the borders of the Mysore Province. So far as the Mysore Province is concerned it has been held by the Chief Court of Mysore that the adoption of a married Lingayat is invalid. The judgment of the Chief Court is marked as Ex. WW in this suit. The learned Judge of the Chief Court observed :

"It is, however, desirable to say a few words on the validity of Kariappa's adoption which is referred to in grounds 1 and 2 of appeal. It is found that Kariappa was married but the Courts have held that it was not a disqualification as he was a widower at the time of his adoption by defendant 1. The parties are Lingayats. Even if it be held that the law governing Sudras applied to them, according to Mr. Mayne, 'as regards Sudras, adoption could be performed effectually till marriage.' And in another place he quotes the Pandit's opinion that the period fixed for adoption is 'with respect to Sudras, prior to their contracting marriage' p. 178 (6th Edn.) See also reference at p. 179 to the case of *Papamma* v. *Appa Rao* (8), at p. 396. Though there is no express authority on the point, having regard to the fact that the questions of age, marriage etc., are determined in the texts on the consideration of certain rites, such as upanayanam, marriage etc., having to be performed to the individual to be adopted in the adopted family, there is strong reason for holding that marriage is a bar in spite of the fact that, the person concerned was a widower at the time of adoption."

So far as Bellary, which is part of the Madras Presidency is concerned, we have not been referred to any decision where the adoption of a married man among the Lingayats in Bellary was upheld. As North Kanara was part of Mysore and Madras Presidency, at least for 80 years, the presumption is that the rules as to adoption which are prevelant in the other parts of the Presidency and which are based on the Smritis are current in this Presidency and Mysore.

Though the Lingayats in the Vetulagama which as the witnesses state is binding on the Lingayats fixed the fifth year as the proper age for a boy to be adopted and though this age amongst the Lingayats and other communities has by custom been advanced, there is no reason to suppose that there is a custom among the Lingayats in the Madras Presidency or in Mysore or in North Kanara which was part of the Madras Presidency and Mysore to so advance the age as to render valid by custom the adoption of a married man. It has therefore to be proved that in North Kanara, where the adoption took place and the adoptive mother was living, there was a custom among the Lingayats by which the adoption of a married man was legal.

So far as the plaintiffs' witnesses are concerned, their evidence is that such an adoption is not valid but the defendants' witnesses speak to instances of adoption of married men and those witnesses are defendants 1, 2, and, witnesses 4, 5, 8 to 15 and 21. The difficulty in the case of some of these witnesses is that there is nothing to test their general statement that the adoption they speak to was that of a married man. There must have been deeds of adoption but no deeds are produced and such deeds, if the adopted boy was a major, would disclose the fact as there would be no guardian mentioned and generally it may be taken that any boy over 18 would be married. The cross-examination of some of the witnesses when they speak of the man adopted being married shows that they have no conception of the years which they are speaking of.

The Subordinate Judge deals with the evidence of the witnesses in detail in para. 33 and onwards of his judgment and it is not necessary for us again to refer in detail to it. He observes in conclusion :

"I have shown that the evidence adduced to establish the custom alleged is not convincing, nor clear. The custom has not obtained any judicial recognition so far either in Bombay

(7) A. I. R. 1927 Mad. 228=50 Mad. 228.
(8) [1903] 16 Mad. 384=3 M. L. J. 80.

or in Madras. In Bombay adoptions of married men have obtained judicial sanction not because they are customary but because the Mayukha Law approves of their validity. In the Mysore province such adoptions have been declared invalid by the Mysore Chief Court."

We agree with the Subordinate Judge that as a custom it has not been proved. In this view it is unnecessary to consider the argument of the learned Advocate General that as the adopted son i.e., plaintiff 1 was a resident of Punganur in the Madras Presidency, it is his personal law that should govern the adoption and that even if the adoptive mother belonged to North Kanara and if the custom as to adoption was proved the adoption would still be invalid. It is also unnecessary to consider the argument that the defence as to the validity of the adoption is res judicata by reason of the fact that it was not set up in the previous suit for recovery of arrears upon the agreement now sued on as the knowledge of the defendant would not affect the question of res judicata or the further question that even if the adoption is valid, the rights created by the agreement could still be enforced. As regards the questions raised in the memo of objections as to the amounts payable under the agreement being payable to the plaintiff's descendant also we think it unnecessary to express any opinion and leave the question open. As regards claims of hunting and forest rights it is conceded that plaintiff will be entitled to the right for them under the agreement. Plaintiff will be entitled to interest at six per cent on the amount claimed from date of suit to date of payment. No order as to costs on memo.

We think the Subordinate Judge was right in holding that the custom as to the validity of the adoption of a married man has not been proved. Plaintiff 1 therefore continues to be a member of the Punganur family and the agreement entered into is enforceable by him.

We think the decision of the Subordinate Judge is right and dismiss the appeal with costs.

P.R.S./R.M. *Appeal dismissed.*

A. I. R. 1930 Madras 502

KUMARASWAMI SASTRI AND WALSH, JJ.

(*Pazhancheri Panangat Blahayil Karnavan*) *Kunjunni Nair* and *another*—Plaintiffs—Appellants.

v.

Raman Menon—Defendant—Respondent.

Letters Patent Appeal No. 61 of 1926, Decided on 28th October 1929, from judgment of Odgers, J., in Second Appeal No. 945 of 1924.

Malabar Compensation for Tenants' Improvements Act (Madras), S. 5—"Predecessor-in-interest" means person claiming title from any other by assignment, transfer, gift etc.

The expression "predecessor-in-interest" has to be used not in a strict sense but as meaning a person who claims title from any other by assignment, transfer, gift, etc.; and in claiming compensation where one kanomdar redeemed the other, the latter should be treated for the purpose of S. 5 as the predecessor-in-interest of the former : 28 *M. L. J.* 184 and 17 *I. C.* 433, *Rel. on.* [P 504 C 2]

K. P. M. Menon—for Appellants.

D. A. Krishnavariar—for Respondent.

Kumaraswami Sastri, J.—This is a Letters Patent appeal against the decree of Odgers, J., dismissing second appeal No. 945 of 1924 with costs. The facts are shortly these: The plaintiff is the landlord of the defendant, the tenant, and the suit is to redeem the kanom for Rs. 200 evidenced by Ex. A. The plaintiff gave a kanom to one Subrahmanya Pattar and the material terms of Ex. A, which is the melkanom in favour of defendant 1, are that the kanom in favour of Subrahmanya Pattar should be redeemed by defendant 1 and that he should pay Rs. 200 towards the redemption of that kanom. As regards the value of improvements which Subrahmanya Pattar was claiming or might claim, Ex. A also says that defendant 1 should pay for those improvements, if necessary. The material clause is:

"I shall therefore pay up the edukkudi amount of Rs. 200 and also the value of the kazhikkurs (improvements) effected in the schedule mentioned properties by the said Subrahmanya Pattar although there is no necessity to pay the value of the same as they were effected without your permission, the value being paid only to avoid litigation and trouble."

Then the clause proceeds:

"It has also been settled that, if Subrahmanaya Pattar does not take the edukkudi amount as mentioned above and surrender the schedule-mentioned properties the said amount shall be

paid to you and you should pay off the edukkudi and recover possession of the properties for me, that you should directly recover the arrears of michavaram rent due from Subramanya Pattar up to 1081 (1905-06) inclusive, and when the panyam amount and the value of kazhikkurs that may be ascertained and estimated at the time of causing eviction, if kazhikkurs are raised, are given, it has been agreed that the properties would be surrendered with the receipt that may be obtained from Subrahmanya Pattar with the release deed and the document etc."

This translation beginning "and when the panyam amount" was the translation made by the Bench clerk as the parties were not agreed as to the accuracy of the translation made by the Court translation. The translation of Ex. A as translated by the Court translator is:

"and that when the mortgage amount, Rs. 200, and, if any kuzhikkur value has been paid, and that kuzhikkur value also as estimated at the time the property is recovered possession of are paid, the properties would be surrendered with an ozhimuri (surrender deed), the receipt obtained from Subrahmanya Pattar and this deed etc."

It is not very material to consider this, as the contingency contemplated did not arise. A suit was not filed by the janmi, the owner; what happened was that Subrahmanya Pattar did not consent to redemption and a suit No. 535 of 1906, had to be filed. Ex. B is the decree in the suit. The suit is by the janmi as pro forma tenant and the other parties, interested to redeem the present respondent being plaintiff 3. A decree was passed and under that decree plaintiffs 2 to 7 were directed to pay into Court the amount mentioned in the decree and the decree goes on to say that:

"the defendants do deliver up to the said plaintiffs or to such persons as they may appoint in this behalf all documents in their possession or power relating to the plaint mortgaged properties."

Then the decree goes on to say that:

"the defendants shall put plaintiff 3 into possession of items 12 and 13 of the mortgaged properties described in the schedule herewith annexed and that, if such payment be not made within the above period, the mortgaged properties be sold. It is further ordered and decreed that the defendant 1 is at liberty to remove his improvements on the said plaint items 12 and 13."

As regards the improvements what happened was that there were two commissioners appointed. The first commissioner valued the improvements at about Rs. 70 and odd, the second commissioner valued them at Rs. 83. Subrahmanya Pattar chose to remove the trees rather than receive compensation and that course was evidently agreed to by the parties interested. He did not remove the trees owing, according to him, to domestic calamities. Evidently he did not think it worth his while to do so. The improvements consequently stood on the land unpaid for. It is not disputed that the present respondent paid the Rs. 200 and redeemed Subrahmanya Pattar and he has been in possession ever since. The plaintiff now wants to redeem him and the question is whether the respondent can claim any compensation for improvements. It is contended by Mr. Menon for the appellants that Subrahmanyan Pattar did not take away the trees on the land as defendant 1 did not pay Subrahmanya Pattar anything for the improvements. The benefit of this conduct in not taking away the trees should enure to the janmi and not the defendant as he is only a kanomdar. This may be so if the law governing the case was the ordinary law of landlord and tenant or that of mortgagor and mortgagee but the question is how far the position of the parties is affected by the Malabar Tenants' Improvements Act. The relevant sections for the purpose of this appeal are Ss. 5, 10 and 13.

Section 5 says:

"(1) Every tenant shall on ejecment be entitled to compensation for improvements which have been made by him, his predecessor-in-interest, or by any person not in occupation at the time of the ejectment who derived title from either of them and for which compensation has not already been paid; and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy or the payment or tender of the mortgage money (if any), be entitled to remain in possession until ejectment in execution of a decreee or order of Court."

(2) A tenant so continuing in possesion shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage as the case may be."

Section 10 relates to trees of spontaneous growth and says:

"When the improvement is not an improvement to which S. 9 applies but consists of timber trees or of other useful trees or plants spontaneously grown during the period of the tanancy or planted by any of the persons mentioned in S. 5, the compensation to be awarded shall be three-fourths of the sum which the trees or plants might reasonably be expected to realise if sold by public auction to be cut and carried away."

Section 13 refers to maintenance of trees and the cost of such maintenance. It says:

"When the improvement consists in the protection and maintenance of timber or fruit

trees or of other useful trees or plants not sown or planted by any of the persons mentioned in S. 5, or of such trees or plants spontaneously grown prior to the commencement of the tenancy, the compensation to be awarded shall be the proper cost of such protection and maintenance ascertained as provided in S. 11."

We think that it is unnecessary in this case to invoke the aid of provisions of Ss. 11 and 13 because it is nobody's case that the trees for which compensation is now claimed were of spontaneous growth. Both in the prior litigation and in this what was claimed was compensation for trees planted or improvements made by Subrahmanya Pattar, the previous kanomdar and we agree with Odgers, J., in thinking that it is not open in second appeal to raise the question as to the nature of these improvements whether they were of spontaneous growth or whether they were trees planted. Throughout in all the Courts the case went on the footing that the improvements which were effected would come within the purview of S. 5 and the question was who was entitled to the benefit of these trees. We think the question turns on the construction of the words in S. 5 "predecessor-in-interest" whether it can be said that where one mortgagee redeems another the latter can be said to be a predecessor-in-interest of the former within the meaning of S. 5. If so, there can be no doubt that he is entitled to the benefit of the improvements. The argument of Mr. Menon is that in cases like this where the jenmi creates a kanom and a melkanom it cannot be said that the kanomdar is the predecessor-in-interest of the melkanomdar and therefore S. 5 can have no application. For the respondent it is contended that these words are to be construed in a more liberal sense and that the succeeding kanomdar redeeming the predecessor must be taken to be his successor-in-interest and that he would be so in respect of all the rights and obligations under the previous kanom.

As regards the meaning of the expression "predecessor-in-interest" in S. 5 we agree with the observations of Sundara Ayyar, J., in his "Malabar Law" that the words must be used not in a strict sense. We agree with the following observation:

"The words cannot be said to adequately describe the class of persons for whose improvements the tenant in possession is entitled to claim compensation. Unless the word "predecessor-in-interest', is understood in a somewhat loose way, the section may not include many cases which must obviously have been intended to come within it. The trouble arises largely, from the fact that in drafting this section sufficient attention was not paid to the fact that the definition of the word "tenant" in the Act is so framed as to include very varying kinds of interests, such as, mortgagees and lessee's interest and even in (sic) cases where the occupant has no lawful title to possession."

Then the learned author goes on:

"In the case of a mortgagee paying off a previous mortgagee the latter may be regarded as the predecessor-in-interest as under the law the subsequent mortgagee is subrogated to his rights. To cover obvious cases it may be necessary to understand the word "predecessor-in-interest," as the derivation of the word suggests, as meaning "one that went before him in interest." some "tenant" as understood by the Act who preceded him in occupation either immediately or mediately through others without the continuity being broken up (sic) by the intervention of the plaintiff."

The cases reported in *T. Raman* v. *K. P. Manakkal Karnavan* (1) and *Thupran* v. *Mamad Kasim Sait* (2) support the view. The former was no doubt a case of a compensation for trees of spontaneous growth but the observations at pp. 194 and 195 apply equally to cases of compensation for trees planted and the reasoning of the learned Judges applies equally to those cases. In *Thuptan* v. *Mamad Kasim Sait* (2) the learned Judges observe:

"It is immaterial whether the improvements were made by defendant 2 himself or by any other person in possession before him. It is quite sufficient if the improvements are on the land even if they are made by some previous occupant. It was not the case of either party that anybody but defendant 2 was in occupation at the time of the suit."

These decisions are authority for holding that the expression "predecessor-in-interest" has to be used not in a strict sense but as meaning a person who claims title from any other by assignment, transfer, gift, etc., and in claiming compensation we think that, where one kanomdar redeemed the other, the latter should be treated for the purpose of S. 5 as the predecessor-in-interest of the former. In the present case we see no reason why compensation should not be given as claimed by the respondent.

We think the decision of the learned Judge is right and dismiss the Letters Patent appeal with costs.

P.R.S./V.S. *Appeal dismissed.*

(1) [1915] 28 M. L. J. 184=27 I. C. 989=2 M. L. W. 433.
(2) [1912] 17 I. C. 433.

A. I. R. 1930 Madras 505

WALLACE AND JACKSON, JJ.

Krishnayya Naidu and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 672 of 1929, and Criminal Revn. Petn. 608 of 1929, Decided on 31st January 1930, from judgment of Joint Magistrate, Tirupatur, in Criminal Appeal No. 74 of 1928.

Criminal Trial—Evidence—Deposition of witnesses as prosecution witnesses in counter case admitted with consent of both parties in another case as defence evidence — Procedure is not irregular — Criminal P. C., S. 530.

If in a trial Court the depositions given by defence witnesses, when examined as prosecution witnesses in the counter case, are filed with the consent of both sides, and if these witnesses are called and examined in the presence of the accused and swear to the truth of their previous statements, which are then filed with their consent to save time, there is nothing illegal or irregular in such procedure *A. I. R.* 1923 *Mad.* 32, *Expl.*; *A. I. R.* 1927 *Lah.* 781; *A. I. R.* 1924 *Lah.* 104 and *A. I. R.* 1926 *Bom.* 231, *Dist.* [P 506 C 2]

V. L. Ethiraj—for Petitioners.

Public Prosecutor—for the Crown.

Jackson, J.—This petition raises a point of some importance. It will be seen on p. 23 that the depositions given by D. W. 2 in a previous trial were read out to him and exhibited as evidence in the present case. This is precisely what I myself did in the case which was subject of appeal in *Umar Hajee* v. *Emperor* (1) when it was ruled that my action was fatally irregular.

Of course there is no objection to a witness being led, if both sides consent and the alternative and correct procedure according to that ruling would be for the Judge to copy out the previous depositions in his own hand.

You were examined at the previous trial?

Yes.

You deposed that etc. etc.

Yes.

and then the Judge is set busily to work for a few hours committing to paper what is already on paper. With the greatest respect I can see no necessity for this deplorable waste of time. The accused is in no way prejudiced. He can ask any supplementary questions he likes. He is present when these depositions are exhibited, so the rule in 2 *Hawkins Pleas, Chap.* 46 is not violated. As regards the implied consent discussed on p. 120 I may say perhaps that the depositions were exhibited at the express request of the defence vakil as in the present case. I have never been able to understand this ruling and think it should be examined by a Bench.

[This case coming on for hearing on Thursday the 16th January 1930, in pursuance of the above order, upon perusing the petition and the judgments of the lower Courts and the records in the case and upon hearing the arguments of Mr. V. L. Ethiraj and A. S. Sivakamina-than for the petitioners and the Public Prosecutor on behalf of the Crown and having stood over for consideration till this day. This Court made the following.]

Order.—This case arises out of a judgment in a criminal appeal in which the appellate Magistrate refused to reverse the conviction of the petitioners on the ground urged before him that the conviction was illegal because the trial Court had allowed certified copies of evidence given by the petitioners as defence witnesses in a counter case to be filed as evidence for the defence in this case. It is contended that the refusal of the appellate Magistrate is directly opposed to the ruling of a Bench of this Court in *Umar Hajee* v. *Emperor* (1).

On another ground raised it appears to us that the appellate Magistrate's judgment cannot be supported. He considered that S. 167, Evidence Act, did not compel him to order a retrial merely because these copies of depositions had been put in, since, to use his words:

"without the evidence thus admitted there is sufficient evidence to prove the charges."

He seems to have entirely overlooked the fact that the evidence thus admitted was for the defence and not for the prosecution. He has thus decided the case against the accused by the simple process of ruling out and refusing to consider the evidence for the defence. But it would not suffice for us merely to order him to re-hear the appeal, if under the law as it stands stated in *Umar Hajee* v. *Emperor* (1), he would still have to reject these depositions and order retrial. We therefore had the question argued before us whether the 46 *Madras* case applies here and if it

(1) A. I. R. 1923 Mad. 32=46 Mad. 117.

does, whether it does not lay down too strict a procedure, and whether we should not have the case posted before a Full Bench to consider whether *Umar Hajee* v. *Emperor* (1) case has been rightly decided.

We have perused the printed papers in the two cases which gave rise to the *Umar Hajee* v. *Emperor* (1) judgment. A criminal trial had proceeded for some time against two persons in part before one Special Sessions Judge. It was then split up into two. That Judge was succeeded by another, who decided on a de novo trial. At the de novo trial the second Judge permitted the depositions of the prosecution witnesses taken at the original trial to be filed as evidence for the prosecution; whether this was done at the request or with the consent of the defence is not material. The evidence of the defence witnesses was taken entirely by the second Judge. Now the judgment in *Umar Hajee* v. *Emperor* (1) proceeds on the general proposition that:

"in cases of life, no evidence is to be given against a prisoner, but in his presence"

subject to the exceptions permitted by some express provisions of law. It is clear from the facts as set out above that the Bench was dealing only with a case where previous depositions not taken in the presence of the accused were used as evidence against him. We think that the decision does not go further than to decide that such a procedure is contrary to law, and if we may say so with respect, it embodies a very salutary principle, the principle upon which *Reg* v. *Bertrand* (2) on which *Umar* v. *Hajee Emperor* (1) relies, proceeded. In the latter case there was the additional infirmity that what was read over to the witnesses was not their actual depositions but only notes of those cases taken by the trying Judge. We do not think that *Umar Hajee* v. *Emperor* (1) can be taken to having decided that evidence taken in favour of a prisoner in a counter case in which he was a witness but was not himself the prisoner cannot be put in by him on his own behalf.

In the case before us the deposition given by defence witnesses 2 and 3 when examined as prosecution witnesses in the counter case was filed with the consent of both sides. We do not think that *Umar Hajee* v. *Emperor* (1) prohibits such a procedure, which obviously saves a great deal of time which would otherwise be occupied in merely copying down previous depositions. No one is prejudiced. Obviously the prisoner is not and if the Crown had thought its case would be prejudiced, it would not have consented to the procedure.

Our attention has been drawn to a ruling of a Bench of the Lahore High Court in *Thakar Singh* v. *Emperor* (3) but, so far as we can gather the facts of the case, it appears that the defence witnesses were not summoned and examined in Court, but their previous depositions were put on the record without the witnesses coming to swear to their truth. The same procedure appears to have been adopted in the case reported in *Allu* v. *Emperor* (4). In the present case, however, the defence witnesses were called and examined in the presence of the accused and they swore to the truth of their previous statements, which were then filed with their consent to save time. In another case, *Emperor* v. *Harjivan Valji* (5) at p. 178 (*of* 50 *Bom.*) a High Court Bench held that to file for the Crown depositions taken in one case as substituted evidence in another case against the same prisoner was merely an irregularity. But it may be noted that in that case all the depositions had been taken in the presence of the prisoner.

We do not therefore think it necessary to refer this case to a Full Bench on the question of reconsidering the decision in *Umar Hajee* v. *Emperor* (1). We hold on the facts here that there was nothing illegal or irregular in the procedure at the trial Court. However, as we have already remarked the appellate Magistrate has erred in refusing to consider that evidence recorded for the defence. We must therefore set aside his order and direct him to rehear the appeal and decide it after giving due weight to the evidence recorded in the previous depositions filed as Exs. 6, 6a, 7 and 9a. We order accordingly.

P.R.S./V.S. *Order accordingly.*

(2) [1867] 1 P. C. 520=36 L. J. P. C. 51=4 Moore P. C. (n.s.) 460=10 Cox. C. C. 618 =16 W. R. 9=16 L. T. 752.

(3) A. I. R. 1927 Lah. 781.
(4) A. I. R. 1924 Lah. 104=4 Lah. 376.
(5) A. I. R. 1926 Bom. 231=50 Bom. 174.

A. I. R. 1930 Madras 507

PANDALAI, J.

Munusami Nainar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 440 of 1929 and Criminal Petn. No. 399 of 1929, Decided on 9th January 1930, from judgment of Sess. Judge, South Arcot, in Criminal Appeal No. 54 of 1928.

Penal Code, S. 409—Mere delay in payment of money into treasury entrusted to person does not amount to misappropriation.

It does not follow, merely because an instalment of an agricultural loan is not paid the very next day into the treasury, that thereupon and therefrom an inference begins to be drawn against the village Munsif that he has misappropriated the amount so omitted to be paid. Mere delay in payment of money entrusted to a person, when there is no particular obligation to pay it at a certain date, does not amount to and does not furnish by itself a sufficient proof of misappropriation : *A. I. R.* 1925 *Cal.* 613, *Rel. on.* [P 507 C 2, P 508 C 1]

K. S. Jayarama Ayyar for *S. Nagaraja Iyer*—for Petitioner.

K. N. Ganapathi for *Public Prosecutor*—for the Crown.

Order.— The petitioner was the village headman of Sirukadambur vattam in the District of South Arcot. He was convicted by the Sub-Divisional Magistrate of Tirukoilur of an offence under S. 409 I. P. C., criminal breach of trust by a public servant of a sum of Rs. 17-12-6 and sentenced to simple imprisonment till the rising of the Court and a fine of Rs. 60 or further imprisonment for 15 days in default. At the outset it does strike one that if the conviction is right the sentence is utterly inadequate. The conviction and sentence were, however, upheld by the learned Sessions Judge of South Arcot. The petitioner now applies to this Court to set aside his conviction.

The facts are, that on 19th June 1925 P. W. 1, a ryot within the jurisdiction of the village where the petitioner was the headman paid to the petitioner Rs. 17-12-6 being an instalment of an agricultural loan taken by him and which fell due on 10th April 1925. The petitioner paid this sum into the treasury on 20th July 1925, together with one rupee, in all Rs. 18-12-6. The additional sum was represented by the petitioner to be the interest levied from P. W. 1 according to the rules for takkavi loans for the delay in the payment of the instalment.

It is said that the amounts kept by the petitioner show that this additional sum of one rupee was paid by P. W. 1 and it was therewith that the ultimate sum of Rs. 18 12 6 was paid. The charge against the petitioner is that he misappropriated the sum of Rs. 17-12-6 dishonestly for his own benefit during the period between 19th June and 20th July. I have heard the learned Public Prosecutor on this point and I am unable to see that there is any evidence in the case except the delay to show that during the period between 19th June and 20th July the petitioner did dishonestly use this sum Rs. 17-12-6. The lower Court seems to be of the opinion that the delay is sufficient proof and that because the petitioner did not remit the sum of Rs. 17-12 6 immediately on receipt to the treasury he must be held or presumed to have misappropriated the amount to his own use. I do not think that there is any such pre umption which arises on facts like the present. I asked the learned Public Prosecutor to say whether there was any rule under which a sum paid as an instalment of an agricultural loan should be paid into the treasury within a particular period. There appears to be no such rule. This, of course, does not mean that an officer who receives money of that character may retain it for all time with impunity and then say that as he was not required to pay it within a certain time, he is at liberty to do what he likes with it.

On the contrary it does not follow, merely because an instalment of an agricultural loan is not paid the very next day into the treasury, that thereupon and therefrom an inference begins to be drawn against the village Munsif that he has misappropriated the amount so omitted to be paid. The inference is purely one of fact and I certainly think there are no circumstances in this case from which such an inference could be drawn. What the petitioner himself said was that as the full amount of the instalment due, namely, the amount of the principal and the interest due, was not paid, he detained the amount till the balance was brought. There is nothing to show that this was not the

case. The accounts apparently show that the interest was subsequently paid and when it was paid the total amount was sent to the treasury. P. W. 1 no doubt says that he did not pay the interest subsequently and that it was the petitioner himself, to cover up his fraud, that supplied the sum of one rupee and paid the total. But obviously the statement of a man like P. W. 1 in this case cannot be acted upon, where it turns the scale between guilt and innocence of the petitioner, because, upon his own statement, he bears some kind of grudge or ill will to the petitioner.

It seems that there was a previous case similar to the present against this petitioner and that the petitioner was acquitted on appeal. The present P. W. 1 has the effrontery to say that upon that acquittal the petitioner was restored to his office, and that if he were not so restored he would not have preferred this complaint. A man who can acknowledge such a conduct certainly does not deserve to have his words accepted as true, where the intention of it is to incriminate the petitioner whom he wishes to see out of his office. If authority were necessary for the proposition that mere delay in payment of money entrusted to a person when there is no particular obligation to pay it at a certain date, does not amount to and does not furnish by itself a sufficient proof of misappropriation, such authority will be found in *A. I. R* 1925 *Cal.* 613 at p. 615, where it is stated that :

" where there is no time fixed for the payment of the money or where no place is assigned for the keeping thereof, the accused cannot be said to have committed the offence of criminal breach of trust for merely mixing the trust money with his own, etc."

There is no question here of mixing the money with the petitioner's money because there is absolutely no proof in the case of any such conduct. As the only fact proved against the petitioner was that he paid the money only 31 days after its receipt and that fact is legally insufficient by itself to prove that the accused committed criminal breach of trust, the conviction must be set aside and the fine, if paid, will be refunded.

P.R.S./V.S. *Conviction set aside.*

A. I. R. 1930 Madras 508

CURGENVEN, J.

D. Viraswami Naidu—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 267 of 1929, and Criminal Revn. Petn. No. 238 of 1929, Decided on 2nd August 1929, from the judgment of Sess. Judge, Bellary, in Criminal Appeal No. 43 of 1928.

Criminal P. C., S. 234 (1)—Accused tried for four offences in one trial—Trial is vitiated—Criminal P. C., S. 527.

Where an accused is charged with and tried at one trial for four offences, it is not merely an irregularity but an illegality which vitiates the trial 25 *Mad.* 61 (*P. C.*), *Foll.*; *A. I. R.* 1927 (*P. C.*) 44, *Dist.*; 28 *M.L.J.* 397 and 5 *Pat. L. J.* 11, *Ref.* [P 509 C 1]

V. K. John—for Petitioner.

K. N. Ganapathi for *Public Prosecutor*—for the Crown.

Judgment.—The petitioner has been convicted under S. 19 (c), Arms Act, of exporting arms in contravention of the provisions of S. 6 of that Act. In the trial Court he was charged with and convicted of four acts of export, and on appeal the learned Sessions Judge, while holding to be inadmissible some of the evidence on which the conviction was based, found that the evidence remaining was sufficient, and upheld the conviction. No objection has before me been taken to the merits of that decision. The objection urged is that the trial offended against the provisions of S. 234 (1), Criminal P. C , which enables a person to be tried for not more than three offences of the same kind committed within the space of 12 months. The charge in the present case, as I have said, enumerates four instances of the export of fire-arms. It is somewhat obscurely worded and so far as appears quite unnecessarily opens with a recital of the dates on which the petitioner is alleged to have "imported" these weapons by land from Bombay to Hospet. "Imported," I think, is an inappropriate word when used in such circumstances. It then goes on to allege that he subsequently took or exported them to a place in the Nizam's Dominions. No dates are attached to the acts of export. Mr. Ganapathi who appears for the Public Prosecutor informs me that the dates of the receipt of the weapons by the petitioner at Hcspet were respectively 25th

May, 10th June, 13th August and 26th August, and suggests that the presumption is that he must have exported them to Hyderabad shortly after those dates of receipt. Prima facie, therefore, he exported them on different dates and the four acts cannot in any sense be said to have been committed in one transaction, nor am I asked to conclude that even any two of the weapons were exported together, so as perhaps to make three sets of offences within the meaning of S. 234 (1), Criminal P. C. It certainly lay on the prosecution to show that the terms of that section were complied with when asking the Court to entertain a complaint of these four acts of exportation. It has not been contended that all four acts constituted one "offence" as that word is used in the section.

The further question then arises as to the legal effect of non-compliance with S. 234, Criminal P. C. That has now, I think, been set at rest by the Privy Council judgment in *Subramanya Iyer* v. *Emperor* (1), which decides that it is not merely an irregularity which vitiates the trial. This ruling is in no manner affected by the later Privy Council case *Abdul Rahman* v. *Emperor* (2), which relates to the reading over of witnesses' depositions and distinguishes the earlier case. Instances in which *Subramanya Iyer* v. *Emperor* (1) has been followed by Indian Courts are supplied by *Virupana Gowd* v. *Emperor* (3) (though it does not actually cite the case *Tepanidhi Gobinda Chandra* v. *Emperor* (4).

I have accordingly no alternative but to set aside the conviction on these grounds. The petitioner besides being sentenced to six months' imprisonment in the present case, was sentenced to a prior term of six months' imprisonment in C. C. No. 61 on the file of the First Class Magistrate, Hospet, the two sentences ruuning consecutively. I understand that he has already served his first sentence and is now in course of serving his second. Inasmuch as in the other case also I have found it necessary to set aside the conviction I think there are no grounds for making any further order in the present case. The petitioner will, therefore, be acquitted and set at liberty.

P.R.S./J.M. *Conviction set aside.*

(1) [1902] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P.C.).
(2) A. I. R. 1927 P. C. 44=5 Rang. 53=54 I. A. 96 (P.C.).
(3) [1915] 28 M. L. J. 397=28 I.C. 659=(1915) M. W. N. 241.
(4) [1920] 5 Pat. L. J. 11=54 I.C. 769=1 Pat. L. T. 180.

A. I. R. 1930 Madras 509

JACKSON, J.

Nallamadan Chettiar and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 825 of 1929, and Criminal Revn. Petn. No. 739 of 1929, Decided on 19th December 1929, from judgment of Joint. Magistrate, Sivakasi, in Criminal Appeal No. 25 of 1929.

Penal Code, S. 424—Removing crop attached by Madras Village Courts is not offence under S. 424 since such Court has no right to attach it—Madras Village Courts Act (1 of 1889), S. 52.

Since a village Court cannot attach crops which are not moveables within the meaning of S. 52 by virtue of Madras General Clauses Act and S. 22, I. P. C., there is no fraud in removing such crops so as to sustain a conviction under S. 424, I. P. C. [P 509 C 2]

S. Narayana Ayyangar—for Petitioners.

Public Prosecutor—for the Crown.

Order.—The eight petitioners have been fined under S. 424, I. P. C., for removing crops attached by the village Court. Under S. 52, Act 1 of 1889, a village Court can only attach moveables. The definition of moveables must by provision of the Madras General Clauses Act, 1867, be sought for in the Penal Code; and under S. 22 moveables do not include crops. Therefore, a village Court cannot attach crops. The petitioners committed no fraud in removing them, and the conviction must be cancelled and all the fines be refunded.

Naturally it causes great confusion in the minds of simple villagers that under S. 2 (13), Civil P. C., moveable property includes growing crops, and under S. 22, I. P. C., or S. 3 (25.34), General Clauses Act, moveable property does not include growing crops. I would suggest that the legislature make it abundantly plain what a village Court can do in regard to crops as such. It might at the same time make it plain what is meant by "personal property" in S. 13 of the Act. I have held that

personal property includes crops in *Sundara Naicker* v. *Potti Naicker* (1), but I admit that it is arguable either way. If personal only means moveable as defined in I. P. C., moveable should be the word employed.

P.R.S./V.B. *Convictions cancelled.*

(1) A. I. R. 1927 Mad. 192=50 Mad. 494.

A. I. R. 1930 Madras 510 (1)

PANDALAI, J.

Public Prosecutor—Appellant.

v,

Pandaram and *another* — Accused — Respondent.

Criminal Appeal No. 643 of 1929, Decided on 21st January 1930, from acquittal order of Bench Mags., Tiruvarur, in Bench Case No. 403 of 1929

Madras District Municipalities Act, S. 182 (1)—Either owner or occupier of premises, or both, may be proceeded against.

The only object of S. 182 (1) in saying that the chairman may require the owner or the occupier to remove encroachment is to enlarge the class of persons against whom notice may be sent and not to restrict it. Either the owner may be proceeded against or the occupier or both. There is nothing in the use of the word "or" in that section which restricts the municipality to choosing one out of the two persons proceeded against. [P 510 C 2]

K. S Vasudevan—for Appellant.

P. S. Ramachandran and *K. S. Desikan*—for Respondent.

Judgment.—This is an appeal by the Public Prosecutor against the order dated 29th August 1929 of the Bench Magistrate of Tiruvarur acquitting the respondents respectively the occupier and owner of premises within the Municipality of Tiruvarur, who were charged at the instance of the municipality with having disobeyed a notice under S. 182 (1), District Municipalities Act, to remove certain alleged encroachments in front of the said premises. The Bench without going into the merits of the charge acquitted the respondents upon the ground that under S. 182 (1), District Munciipalities Act notice to remove construction or encroachment can only be given to either the occupier or the owner but not to both. The Bench further held that the municipality not having elected to proceed against the one or the other but having proceeded against both, the prosecution case failed. The only question in this appeal is whether this view is correct. In my view it is not. The only object of saying that the chairman may require the owner or the occupier to remove encroachment is to enlarge the class of persons against whom notice may be sent and not to restrict it. Either the owner may be proceeded against or the occupier or both. There is nothing in the use of the word "or" in that section which restricts the municipality to choosing one out of the two persons proceeded against. The order of acquittal of the Bench Magistrate is set aside and the case will go back to .them for disposal acorrding to law.

P.R.S./V.S. *Order set aside.*

A. I. R. 1930 Madras 510 (2)

KUMARASWAMI SASTRI, J

Alimamma - Defendant - Appellant.

v.

Amade Beari and *others*—Plaintiffs—Respondents.

Second Appeal No. 1605 of 1926, Decided on 5th December 1929, from decree of Dist. Judge South Kanara, in Appeal Suit No. 199 of 1924,

Mahomedan Law-Gift-Gift made of life-estate with remainder to another—Donee takes property absolutely—Wakf deed giving property to two minor girls from genaration to generation with direction that their descendants or husbands would have no claim over it.—One of the donees dying—Suit by her husband and son for partition—Wakf deed held to be gift deed and heirs entitled to share.

Where a gift is made by a Mahomedan of a life-estate with remainder to another person the donee takes the property absolutely, the further conditions being treated as void. [P 511 C 2]

A wakf deed while giving certain property to two minor girls recited that the two girls may enjoy the property from generation to generation according to female descent, that they should not alienate the property in any manner, that if any alienations were made, they would be void and that their male descendants and their descendants and the husbands of the female descendants shall have no reason to claim any manner of right in the property. One of the donees died and her husband and her son filed a suit for a partition.

Held, that the deed was a valid deed of gift which passed to the donee's absolute rights in the properties and that the heirs of the deceased were entitled to a share in it. 24 *M L J* 258, *Foll A.I.R.* 1929 *P.C.* 149 *Dist.* [P 512 C 2]

B. Sitaram Rao—for Appellant.

K. Y. Adija—for Respondents.

Judgment. — This second appeal turns on the construction of Ex. C which purports to be a wakf deed giving cer-

tain property to two minor girls. The deed Ex. C says that the two girls may enjoy the property from generation to generation according to female descent. Then it goes on to state that they should perform charities on the anniversary days of their ancestors in the house situated in the Bagayat of the land and that they should not alienate the property in any manner and that if any alienations were made, they would be void. It concludes that their male descendants and their descendants and the husbands of the female descendants shall have no reason to claim any manner of right in the property. One of the donee died and her husband and her son who are the plaintiffs have filed this suit for partition. The defence of the defendants was that under the wakf deed, the plaintiffs had no right to the property presumably on the ground that the donee's husband and the son were male heirs. The written statement affirmed that the document was a wakf deed and also raised other defences as regards moveables and other items of property claimed in the plaint. The District Munsiff was of opinion that though the deed purports to be a wakf deed it was really a deed of gift. The District Judge also was of that opinion. He says,

"Ex. C is described as a wakf deed but it is really a gift deed in favour of the two sisters, That the two sisters were required to perform Dana, Dharma etc. does not in any way show that they were not given absolute right in the properties. The provision in Ex. C that the properties were to descend only in the female line is certainly opposed to the rule of Mahomedan Law and is therefore invalid. It is clear from the documentary evidence that the two sisters had absolute interest in the plaint property and that the plaintiffs as the heirs of the deceased Athijamma are entitled to a share in it".

Although in the lower Court no question was raised as to the plaintiffs not being entitled to anything even assuming that it is a deed of gift, it is contended before me that the plaintiffs would have no title because the provision in the deed of gift that the property should descend only in the female line is invalid and that because of the restrictions in regard to alienations they were only entitled to life-interest at best. Reliance is placed on *Dasa Naicken* v. *Kunhah Ahmed Koya* (1) and it is argued that the whole transaction is invalid, which if pressed, would cut at the root of the both the plaintiffs' and the defendant's title. Reference is made to *Madura Hindu Permanent Fund* v. *Kanakshi Ammal*, (2) as suggesting that at least the donees will have a life-interest in the property and on the death of one of the donees, the other would get the property. Reference has been made to *Amjad Khan* v. *Ashraf Khan*, *A. I. R.* 1929 *P. C.* 149 and it is argued that the heirs of one of the donees under a deed which contains invalid clauses as to the remainder would not get an absolute estate but would get only a life-estate. It is argued that this last decision overrules the several previous decisions on the point. It has been decided in numerous cases that where a gift is made by a Mahomedan of a life-estate with remainder to another person the donee takes the property absolutely, the further conditions being treated as void. I may refer to the decision in *Meerangami Rowthen* v. *Nagur Meera Labbai*, (3) where all the authorities are collected. The learned Judges observed,

"The life-estate is granted to Ismail Amma in consideration of the Mahar and share due to her according to Mahomedan Law and the remainder is granted to Negora Meeranna in consideration of the share due to him and the release of his rights to a share in the other properties belonging to the donor. The conveyance of an interest in remainder or interests in future has been frequently held to be invalid according to Mahomedan Law. Where a life-estate is given with remainder to another person, the donee of the life-estate takes the property absolutely"

The learned Judges referred to *Casamally Jairajbhoy* v. *Currimbhoy Ibrahim* (4) *Muhammad Ibrahim* v. *Abdul Latif* (5), *Abdul Karim Khan* v. *Abdul Quasim Khan* (6), *Muhammad Shah* v. *Official Trustee of Bengal* (7), *Hemade* v. *Bulden* (8) and *Abdul Gafur* v. *Naiza Muddin* (9). Mulla in his book on the Principles of the Mohamedan Law states thus.—

(1) A. I. R. 1926 Mad. 649

(2) A. I. R. 1926 Mad. 494
(3) [1913] 24 M. L. J. 258=1913 M. W. N. 371.
(4) [1911] 36 Bom. 214=11 I.C. 225=13 Bom. L. R. 717.
(5) [1912] 37 Bom. 447=17 I. C. 689=14 Bom. L. R. 937.
(6) [1903] 24 All. 342= 3 A. L. J. 131=1902 A. W. N. 25.
(7) [1909] 36 Cal. 431=2 I. C. 292.
(8) 17 W. R. 527.
(9) [1893] 17 Bom. 1.

"When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void and the gift will take effect as if no condition were attached to it,"

He gives the following illustration.

"*A* makes a gift of a house to *B* during the life of *B*. The condition that *A* shall have the house for life is void and B takes an absolute interest in the property as if no condition were attached to the gift".

He also refers to Hedaya 489 which states

"A gift for life is nothiug but a gift and a condition; and the condition is invalid,"

. He also refers to Hedaya 488 which states,

Under the Hanafi Law a grantee of a life estate takes an absolute estate".

Similar view is taken by Tyabji in his book on Principles of Mahomadan Law. In para 444, the learned author states;

"According to Hanafi Law, where a person purports to make a 'hiba' and to restrict the donee's rights in the subject of 'hiba' for his life (or for any other limited period) the donee takes an absolute estate, and the subject of 'hiba' devolves upon the heirs of the donee after his death".

He then refers to cases on the subject. It is argued by Mr. Sitaram Rao the learned avdocate for appellant that the decision in *Amjad Khan* v. *Ashraj Khan*, *A. I. R.* 1929 *P. C.* 149 reverses the current of the authority. In that case it was held that there was an express clause giving the remainder to the heirs of the donor on the death of the donee and not merely a case of an invalid limitation being added. Possibly on that ground that decision may be distinguished. Their Lordships also held that there was distinct intention of the donor that the estate should go to the heirs of the donor on the termination of the life-estate. The question as to whether a life estate can be created under Mahomedan Law was left open. In the case referred tc in *Meerangami* v. *Nagur Meera Labbai*, (3) and in other cases, there does not seem to be any such express clause. There is merely a condition added. There is of course a clause about succession which is unknown to Mahomedan Law. I am not prepared to hold that the decision fn *Amjad Khan* v. *Ashraf Khan*. *A. I. R.* 1929 *P. C.* 149 overrules the current of the authority in the absence of any definite pronouncement by the Privy Council.

Turning to the deed Ex. C, I doubt very much whether the intention of the donors was to give only a life-estate though they clearly intended to limit the power of the donees and to direct the succession in a particular way. It is not really a case of a gift with an invalid eondition as to alienation. As I said before, the ground taken by the defendants in contesting the suit was not that the whole document is invalid. They proceeded on the footing that it was a valid wakf. The question of invalidity arose because of the finding of both the Courts below that it is really a deed of gift though in form of a wakf.

Under these circumstances, I do not think, though with some hesitation, that I should disturb tne decree of the lower Court as regards the particular items of property in dispute covered by Ex. C. The second appeal fails and is dismissed with costs.

P.R.S./v.S. *Appeal dismissed.*

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* A. I. R. 1930 Madras 512

RAMESAM AND CORNISH.-JJ.

Ahmed Sait and *others*—Defendants—Appellants.

v.

B*ank of Mysore Ltd.*— Plaintiff— Respondent.

Original Side Appeal No. 41 of 1929 Decided on 22nd January 1930, from decree of Kumaraswami Sastriar, J. D/- 7th March 1929.

*** Contract Act, S. 23 — Contract ultra vires is not necessarily illegal.**

A contract, which is ultra vires is not necessarily illegal.

A Bank lent money on mortgage to the defendant. The memorandum of association of the Bank prohibited the Bank from lending on mortgage.

Held : that the Bank could sue to enforce the contract. *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) 7 *H. L.* 653. *Sinclair* v. *Arougham* (1914) *A. C.* 398, *Dist. Ayers* v. *South Australian Banking Co.* (1869), 3 *P. C.*, 547; *Coltman* v. *Coltman* (1882), 19 *Ch. Dn.* 64; 25 *Bom.* 52 *Rel. on.* [P 513 C 2]

K. S. Krishnaswami Iyengar for *Ramesam Iyengar* and *Srinivasavardchari*—for Appellant.

C. P. Ramaswami Iyer. *C. Narsimhachari* for *Themas* and *Moresly*—for Respondents.

Judgment.—This is an appeal from the judgment of our brother Kumarswami Sastri, J. decreeing a suit by the Bank of Mysore based on a mortgage deed dated 6th May 1925, for Rs. 1,00.000. The plaint (para. 6) alleges that the defendants paid on the whole Rs. 18,672-2-0 up to 6th February 1927 which the plaintiff Bank appropriated in a particular manner. The suit is to recover the balance. The defendants admit the allegations contained in para. 6 of the plaint but plead that

"on account of the relationship existing between them and at their request the said Haji Sir Ismail Sait has paid to the plaintiff the entire amount due on the mortgages referred to in the plaint. The actual date of the payments are not known personally to these defendants but they are informed and believe the same to be true that by 3rd March 1926 or thereabouts the payments aforesaid by Haji Sir Ismail Sait were completed,"

The defendants also pleaded in the course of the trial as probabilising the above plea of discharge that Haji Sir Ismail Sait had a large sum of money amounting nearly to two lakhs belonging to them in his hands and that the payments made by Haji Sir Ismail Sait were made out of those funds. A third plea which was not raised either in the written statement or in the issues or at the trial before the Court below is that the memorandum of association of the plaintiff Bank prohibits the Bank from lending on mortgage, and the suit transaction is therefore void as being ultra vires and is not enforceable at the instance of the plaintiff.

The last point will be taken up first. The learned advocate for the appellants relied on the decision in *Ashbury Railway Carrage and Iron Co.* v. *Riche* (1) and the decision in *Sinclair* v. *Brougham* (2) which follows it. In the first case it was held that a transaction which was ultra vires of the company could not be enforced against it; in the latter case questions of priority arose between the outside creditors, the unadvanced shareholders and the depositors of a building society formed under the Building Societies Act of 1836, the assets being insufficient to pay off all the claimants and it was held that the depositors were not entitled to priority over other claimants as the contracts of loan were ultra vires.

(1) [1875] 5 H. L. 653=44 L. J. Ex. 185=24 W. R. 794=33 L. T. 451.
(2) [1914] A. C. 398=83 L. J. Ch. 465=30 T. L. R. 315=58 S. J. 302=111 L. T. 1.

The question before us is not similar to the questions raised in those two cases.

In Brice on the Doctrine of Ultra Vires it was laid down that:

"property legally and by formal transfer or conveyance transferred to a corporation is in law duly vested in such corporation was not empowered to acquire such property."

Under the Indian Law a mortgage is a transfer of interest in immovable property. The case of *Ayers* v. *South Australian Banking Co.* (3) is given as an illustration. There the transaction was ultra vires as it was prohibited by the Charter of the company. Still it was held that the company could recover and Mr. Brice observed that the reasoning applies equally to reality. Another case relied on by the learned advocate for the respondent is in *In re, Coltman. Coltman* v. *Coltman* (4), in which the Court of appeal reversing the judgment of Fry, J., held that all contracts which were ultra vires were not necessarily illegal. This was a case of the trustees of a friendly society. In *Turner* v. *Bank of Bombay* (5) it was held by Sir Lawrence Jenkins, C. J., and Tyabji, J. confirming the judgment of Russel, J. that notwithstanding S. 37, Presidency Banks Act, the Bank was entitled to relise money lent on equitable mortgages. The above mentioned decision in the *Ashbury Ry. Carriage and Iron Co.* v. *Riche* (1), was referred to by Russel, J. and the decision in *Ayers* v. *South Australian Banking Co* (3), was applied and followed by the learned Judges. For examples of the same principle. *The National Bank of Australia* v. *Cherry* (6) and *G. E. Railway Co.* v. *Turner* (7), were also relied on. Russel, J., observes that it is unfortunate that the words "ultra vires" should be used to describe two classes of cases, namely, those which are merely ultra vires and those which are also illegal. Following the above decisions we think that the Bank of Mysore is entitled to sue. It is unnecessary to describe what exact position the Bank occupies with reference to Sir Haji Ismail Sait on the facts of the case, that is, whether the Bank is a

(3) [1869] 3 P. C. 548=7 Moore P. C. (n.s.) 43=19 W. R. 860=40 L. J. P. C. 22.
(4) [1882] 19 Ch. D. 64=51 L. J. Ch. 3=30 W. R. 342=45 L. T. 392.
(5) [1901] 25 Bom. 52=2 Bom. L. R. 803.
(6) [1869] 3 P. C. 299.
(7) [1873] 8 Ch. 149=42 L. J. Ch. 83=21 W. R. 163=27 L. T. 697.

benamidar or a trustee or an agent of an undisclosed principal or does not occupy any of those positions. (The judgment then discussed the evidence and concluded:) On a proper reading of the documentary and oral evidence in the case it is clear that the defendants' plea of discharge must be found against. Agreeing with the trial Judge we dismiss the appeal with taxed costs. We certify for two counsels.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Madras 514
Full Bench

(KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

Balaraju Chettiar—Petitioner.

v.

Masilamani Pillai and *others*—Respondents.

Civil Revn. Petn. No. 1762 of 1929, Decided on 5th November 1929, against order of Sm. C. C. Judge, Trichinopoly, D/- 9th December 1926.

* **Civil P. C., O. 38, R. 9—Upon dismissal of suit attachment before judgment necessarily ceases:** *A. I. R.* 1928 *Mad.* 940=111 *I.C.* 887, *Overruled.*

Upon the dismissal of a suit, the attachment before judgment necessarily ceases under O. 38, R. 9, even though the Court did not pass an order withdrawing it: *A. I. R.* 1924 *Mad.* 494, *Expl.* and *Dist.*: *A. I. R.* 1928 *Mad.* 976; 45 *Cal.* 780; *A. I. R.* 1925 *Cal.* 1147; *A. I. R.* 1928 *Cal.* 234; 10 *All.* 506: *A. I. R.* 1928 *Bom.* 545 and *A. I. R.* 1927 *Rang.* 310, *Rel. on.*: **A. I. R. 1928 Mad. 940=111 I. C. 887, Overruled.**

[P 520 C 1]

T. V. Muthukrishna Ayyar—for Petitioner.

M. S. Vydiyanatha Ayyar—for Respondent 1.

Walsh, J. In this case the property of the judgment-debtor had been attached before judgment. After the attachment the suit was dismissed but no order was passed by the Court releasing the attachment. In appeal, the suit was decreed. The decree-holder sought to bring the property to sale on the strength of the attachment before judgment. The person who had purchased the property from the judgment-debtor after the attachment before judgment intervened with a claim. The learned District Munsif was of opinion that the attachment before judgment was not subsisting. The execution petition was accordingly dismissed. The decree-holder appealed to the Subordinate Judge who held that the attachment subsisted. Against this an appeal was filed which was allowed to be treated as a civil revision petition. It came up before Jackson, J., who referred the question to a Full Bench whether, upon the dismissal of the suit, the attachment before judgment necessarily ceases under O. 38, R. 9, Civil P. C., or whether that rule merely permits an application to be followed by the order of the Court. He points out that it has been held in *Seethai Ammal* v. *Narayana Aiyangar* (1), *Abdui Rahman* v. *Amir Sharif* (2), *Ram Chand* v. *Pitam Mal* (3) and *Maneckjee* v. *Chettyar Firm* (4) that the attachment ceases but that the opposite view that the Court's order is necessary is supported by *Namagiri Ammal* v. *Muthu Velappa Goundan* (5), *Rasappa Pillai* v. *Doraiswami Reddiar* (6) and a remark obiter by Wallace J., in *Meyyappa Chettiar* v. *Chidambaram Chettiar* (7), at p. 515 of 47 *Mad.*

We may perhaps here notice the reasons given by the Subordinate Judge for his conclusion. The learned Subordinate Judge says that the view of the Madras High Court in *Meyyappa Chettiar's* case (7), is in conflict with *Abdul Rahman's* case (2), (the reference to *Abdul Rahman's* case (2) in his judgment appears to be a mistake) but he is incorrect in saying so. As will be pointed out below, the question in *Meyyappa Chettiar's* case (7), was different. Two of the Judges specifically mentioned the present question obiter, Ramesam and Wallace, JJ., taking different views. So also the learned Subordinate Judge is wrong in his inference from the statement of Phillips, J., at p 1043 of the *A. I. R.* 1925 *Mad.*

"I may also add that, in the opinion of the Judges forming the Full Bench in *Meyappa Chettiar* v *Chidambaram Chettiyar* (7), attachment before judgment continues in force, until it is put an end to by the Court."

This is the same Full Bench case, *Meyyappa Chettiar's* case (7), and the suit had not been dismissed but decreed. The majority of the Full Bench held that the attachment which therefore re-

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(1) A. I. R. 1928 Mad. 976.
(2) [1918] 45 Cal. 780=44 I. C. 229=22 C. W. C. W. N. 927.
(3) [1883] 10 All. 506=(1888) A. W. N. 195.
(4) A. I. R. 1927 Rang. 310=5 Rang. 492.
(5) A. I. R. 1928 Mad. 940.
(6) A. I. R. 1925 Mad. 1041.
(7) A. I. R. 1924 Mad. 494=47 Mad. 483

mained in force was the same attachment under which the execution proceedings were taken and therefore, on default of the decree-holder in execution proceedings, lapsed under O. 21, R. 57. The argument which the Subordinate Judge deduces from R. 11 was argued in *Abdul Rahman's* case (2), at p. 784, and was rejected. His final argument drawn from a claim petition has also been considered in *Pratap Chandra* v. *Sarat Chandra* (8), and distinguished. The learned Subordinate Judge says :

"when a claim is allowed an attachment in execution is withdrawn. What happens when a claimant fails in the regular suit ? Is not the attachment revived ?"

In *Protap Chandra's* case (8), in which it was held that such an attachment was revived, Mookerjee, J., has distinctly distinguished that case from one where the suit has been dismissed and where therefore the attachment should have been withdrawn by the Court under O. 38, R. 9, Mookerji, J., says at p. 547 (of 25 *C. W. N.*):

"We are not unmindful that a different rule has been adopted with regard to attachments before judgment. There the view has prevailed that it is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of the suit, and the reversal of the judgment of dismissal on appeal does not operate to revive an attachment which has been cancelled. As explained in the case of *Sasirama* v. *Meherban* (9),this result follows from the provisions of O. 38, R. 9, which directs the withdrawal of attachment on dismissal of the suit and contains no provision which makes such withdrawal temporary and liable to be vacated on reversal of the decree of dismissal ; in other words, O. 38, R. 9, contains no provision corresponding to O. 21, R. 63, which makes the order in the claim case and the release from attachment thereupon subject to the result of a regular suit. Consequently, in a case of attachment before judgment, the general rule applies that a revival of execution proceedings does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property."

Order 38, R. 9, reads thus:

" Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment or when the suit is dismissed."

As regards authority on the point, until the remark which is obiter by Wallace, J. in *Meyyappa Chettiar's* case (7) the matter had never come before this Court and the decision in *Namagiri Amma's* case (5) is the first note of dissent in a decided case from a view which has been taken consistently by Calcutta beginning with *Abdal Rahman's* case (2) followed in *Sailesh Chandra Datta* v. *Joy Chandra Roy*, A. I. R. 1925, *Calcutta*, 1147, and in *Jagdish Chandra* v. *Har Chandra* (10). The latter was even a stronger case for the suit had only abated. A decree had been passed in ignorance of the fact that one of the defendants died. It was set aside two years afterwards but it was held that the attachment obtained before judgments ceased with the abatement of the suit. In *Ramchandra* v. *Pitam* (3), it was held that an attachment obtained before judgment ceased with the dismissal of the suit even though the Court failed to pass an order. In *Chinda* v. *Chhaganlal* (11) it was held that an attachment obtained before judgment must be considered to have been withdrawn when the suits were dismissed. On similar lines is the decision in *Maneckjee* v. *Chettyar Firm* (4) which held that when security is given to obtain removal of attachment before judgment under O. 38, Civil P. C., the liability of the surety ceases as soon as the suit is dismissed in the first Court. There is therefore a consensus of opinion in Calcutta, Allahabad and Bombay that an attachment before judgment ceases when the suit is dismissed, even though no formal order be passed, and that a decree being obtained in appeal does not *ipso facto* revive it. Against this, there is only the decision in *Namagiri Ammal's* case (5) by a Bench of two Judges, Devadoss and Phillips, JJ. which has not been followed in the later case in *Seethai Ammal* v. *Naraya a* (1). The consensus of authority therefore is very much in favour of the view that an attachment before judgment ceases automatically when the suit is dismissed, and where the matter is one of procedure and uniformity is desirable, it would require strong reasons to hold that this consensus of authority is wrong.

Turning to the Madras cases in question, *Mayyappa Chettiar's* case (7) decided a different point, namely, that, where property had been attached before judgment and a decree given and

(8) A. I. R. 1921 Cal. 101.
(9) [1911] 13 C. L. J. 243=9 I.

(10) A. I. R. 1928 Cal. 234.
(11) A. I. R. 1923 Bom. 545.

in subsequent execution proceedings, owing to the decree-holder's default the execution petition is dismissed, the attachment also ceases under O. 21, R. 57 that is to say, that when the attachment automatieally ceases under O. 21. R. 57. the decree-holder cannot fall back on the attachment made before judgment and claim that it still exists. There was nothing in that decision affecting the present question. But some of the learned Judges made remarks obiter on the point. Schwabe, C. J. remarks at p. 494:

"If the matter were res integra, I should without hesitation be prepared to hold that the attachment before judgment lasts until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of O. 38, but that it cannot by implication be brought to an end by an order under O. 21, R. 57."

In so far as there is anything in this remark that bears on the present question, it would rather support the view that the attachment before judgment comes to an end automatically with the dismissal of the suit even though the Court passes no order, for the words:

"until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of O. 38."

might be held to contemplate that the attachment can come to an end under some provison of O. 38 without an order of Court. However, the remark was probably made without auy reference to this matter but merely in connexion with the question then referred to the Bench to which the remark is equally apposite. Ramesam, J. at p. 509 states:

"I do not feel it necessary to discuss the interpretation of O. 38, R. 9. I agree with the decisions in *Ram Chand* v. *Pitam Mal* (3) and *Abdul Rahman* v. *Amin Sharif* (2) that when a suit is dismissed, the attachment before judgment terminates without an order of the Court. But even if the opposite view is the correct view, I do not think this has any bearing on the coustruction of O. 21, R. 57."

Wallace, J. at p. 515 says:

"Taking O. 38, Civil P. C., as it stands, it seems to me clear from the wording of R. 9 that an attachment before judgment only comes to an end by a formal order of the Court withdrawing it. This is, in my opinion, the correct way of interpreting R. 9, which applies to cases where the security demanded has been furnished, or where the suit has been dismissed. R. 6 (2) clinches this interpretation. It requires that even in the case of a conditional attachment before judgment, a formal order of withdrawal is necessary to raise the attachment. Much more must it be necessary for raising a final attachment, into which the conditional attachment has been converted. No doubt the rulings in *Ram Chand* v. *Pitam Mal* (3) and *Abdul Rahman* v. *Amin Sharif* (2) are contrary to this view, but for reasons given, I must disagree with them."

The other two Judges express no opinion on the point. As regards the argument of Wallace, J., drawn from R. 6 (2), that rule runs as follows:

"Where the defendant shows such cause or furnishes the required security and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit."

The question whether, if the Court, while accepting such cause shown by the defendant or accepting the required security, does not make an order withdrawing the attachment, the attachment automatically ceases, is precisely the same question which arises on failure to make such an order under R. 9 and therefore it is difficult to see how R. 6 can help in interpreting the meaning of R. 9. Two facts, however, may be noted which might distinguish it but in a direction opposed to the argument of Wallace, J. The initiation of proceedings to get the attachment set aside under R. 6 (2) rests with the defendant and it might perhaps be argued that he is therefore bound to see that the Court passes the proper order withdrawing the attachment. It may further be noticed that the Court has an alternative –"or make such other order as it thinks fit." We have not to decide in the present reference what the effect of the failure of the Court to withdraw an attachment order under 6 (2) is. The authority of 5 *Rangoon* 492 quoted above is against the view that a mere failure to pass such an order will continue the attachment, but R. 9 lays an obligation on the Court independently of any action by the party and allows the Court no alternative, which distinguishes it from R. 6 (2).

Coming now to *Namagiri Ammal* v. *Muthuvelappa Goundan* (5) which is the only case in this or any other Court to which we have been referred, which holds that the attachment is not withdrawn unless there is a specific order, we find that that was a case where the suit had been dismissed for default and restored to file. While we doubt whether that could make any difference

in the principle, and this seems to be the view of Phillips, J. in that case, the other learned Judge, Devadoss, J. appears in his judgment to lay some importance on it. He says:

"In my view the dismissal of a suit does not amount to the withdrawal of the attachment before judgment and, if the order of dismissal is set aside on appeal and a decree is passed in favour of the plaintiff, the attachment before judgment would enure for his benefit. Here in this case, the suit was dismissed for default of plaintiff's appearance and was restored by the Court. The restoration of a suit under O. 9, R. 9, Civil P. C., stands on a slightly different footing from the order of the appellate Court reversing the dismissal of the suit. A Court may dismiss a suit for default and may restore it to file on proper cause being shown in the course of the same day. It would work great hardship if it be held that in such a case the attachment before judgment ceased to have force because the suit was off the file for a few hours."

In giving the reasons for his decision, the learned Judge says:

"As soon as a suit is dismissed the person against whom an order for attachment was made has simply to apply to the Court for withdrawing the order. The application may be oral or in writing and the Court, when such an application is made, is bound to grant it unless there are circumstances which would justify postponing the granting of the prayer or refusing it. When a party does not choose to avail himself of a remedy which the law gives him, Courts are not justified in giving him the remedy which, owing to his carelessness or negligence, he does not choose to ask. If a garnishee pays the amount due from him into Court, can he withdraw the amount without an order of Court by reason of the dismissal of the suit? If moveable properties or negotiable instruments attached are in the custody of the Court, the dismissal of the suit in which the attachment was made would not place the person from whom the moveables or negotiable instruments were taken in possession of them. Such a person will have to apply to the Court for getting them back. I do not see why a different rule should be held to apply when property attached, whether moveable or immovable, is not in the actual custody of the Court."

We are unable to agree with the learned Judge that O. 38, R. 9, throws any burden upon the defendant whose property is attached to apply to the Court to withdraw the attachment order The duty is one thrown directly on the Court and no application from a party is necessary. As regards the second argument, it may be noticed that Devadoss, J., draws a distinction between attached property which is in the actual custody of the Court and attached property which is not. Before us it has been argued that all property attached, whether moveable or immovable, is in the custody of the Court and that therefore it cannot be released from attachment without an order of Court. No doubt in a general sense all property attached is in custodia legis, but the nature of the custody may be very different. It is argued for respondents that Form No. 7, App. F—Attachment before judgment on proof of failure to furnish security (O. 38, R. 6)—runs:

"These are to command you to attach . . . . the property of the said . . . . and keep the same under safe and secure custody until the further order of the Court."

This form, however, seems clearly to refer to attachment of moveable property for O. 38, R. 7, says distinctly:

"Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree."

Now if we turn to the form of attachment of immovable property in execution of a decree, we find Form No. 24, App. E, which says:

"To

(Defendant)

. . . . . you are hereby prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise."

In certain respects it is clear that the custody of moveable property brought to Court and of immovable property attached under Form No. 24, of App. E, is dissimilar. The Court is under no obligation to protect, nor is it responsible for, immovable property attached under Form No. 24, whereas if the property is brought to the Court, it would certainly be responsible for the loss, theft or damage of such property; and whether or not a suit could be brought against Government for such loss, it is certain that the Court officials would be held departmentally responsible. Whether a purely departmental order to hand over moveable property the custody of which has been taken by the Court would be necessary under O. 38, R. 9, before the defendant could remove the property is a question which does not arise in the present case and which we do not feel bound to discuss. Such an order might be necessary to protect the Court officers in charge of the property. The attachment would nevertheless, we think,

automatically be withdrawn by the dismissal of the suit. In the case of immovable property attached, even this difficulty does not arise. As regards the argument that in the case of a suit dismissed for default and restored in the course of the same day, it would work hardship to hold that the attachment before judgment ceased to have force, it is difficult to see how that can be a hardship which the law commands. There is much that might be said on the other side as to the consequences of holding that an attachment continues in force after a suit is dismissed. As was pointed out by Mahmood, J., in 10 *Allahabad* 506, such an attachment will subsist for ever whether there is or not an appeal until it is expressly withdrawn. As stated above, the reference before us does not deal with a suit dismissed for default and restored to file but with one where the decree dismissing the suit is reversed on appeal. To say that on a suit being decreed in appeal all the interlocutory orders passed in the course of the suit are at once revived appears to be going too far and might lead to serious difficulties. For instance, a temporary injunction might be granted against the defendant, say, prohibiting the manufacture and sale of certain goods pending the disposal of the suit. If the suit were to be dismissed and on appeal it were decreed, would the defendant be liable to be proceeded against if he had continued to manufacture the articles after the suit had been dismissed in the first Court?

Turning to the judgment of Phillips, J., he has summarised all the arguments that can be used for the contention that an attachment does not cease on the dismissal of the suit unless a specific order is passed by the Court. The first is that the words of the section contemplate an order being passed and it has been argued before us that there is some distinction in this matter drawn between Ss. 485 and 488, old Code which correspond respectively to O. 38, R. 6 and O. 38, R. 9. S. 488, old Code says "the Court shall remove the attachment." This is now changed into "the Court shall order the attachment to be withdrawn." We doubt whether there is anything in this distinction. Even when the Court removes an attachmert under the old Code, it was bound to pass some order in the matter. Then the next argument noticed by Phillips, J.—and it is perhaps the most serious one advanced before us—is the difference in the language of O. 21, R. 57, and O. 38, R. 9. O. 21, R. 57, savs: "Upon the dismissal of such application the attachment shall cease." Phillips J., says:

"The language in this section is very different from that in O. 33, R. 9, but if the Allahabad and Calcutta decisions are correct the effect of the two sections is exactly the same although the language is so very different."

This is no doubt an argument that deserves very serious consideration but we do no think that it is sufficiently strong to induce us to depart from the consensus of opinion of all the Courts which have taken the latter view. Then the learned Judge says:

"Under O. 9, R 9, when an application is made to set aside the dismissal of a suit for non-appearance of the plaintiff the Court shall make an order setting aside the dismissal. That order of dismissal having been set aside, the suit remains as it was on the day that it was dismissed and all proceedings taken up to that date must be deemed to be in force, when the dismissal is set aside, and in my opinion all interlocutory orders would be revived on the setting aside of the dismissal. Similarly, an order for attachment of property would also be revived."

As pointed out above, it is too wide a proposition to say that an appellate decree per se restores all the interlocutory orders passed in the original suit and there is ample authority for holding that if the Court does pass as the law directs, that is, an order under O. 38, R. 9, withdrawing the attachment when it dismisses the suit, such an attachment is not revived by a decree passed in plaintiff's favour in appeal: (vide *Sasiram* v. *Meharban* (9), which has been followed in Calcutta and other Courts). Finally Phillips, J. observes :

"The question of whether when a suit is dismissed in the lower Court and the dismissal is set aside in appeal the attachment must be deemed to have continued throughout is an aspect of the question which need not be decided now, but prima facie the result of the failure of the Court to pass an order withdrawing the attachment would appear to be that the attachment continues in force."

As noted above, the decision of the learned Judges in this case has not been followed in 1928 *Madras Weekly Notes* 710. It has been argued for the respondents that although the Court may be bound by law to do an act, the party can take advantage of the breach of this ob-

ligation if the Court does not do it. *Grace* v. *Clinch* (12), is quoted in support of this view. That was a case where an application for a grand jury was verbally granted by the Judge, but he did not sign the order until afterwards. It was held that as he should have signed the order at once and as he had not in fact done so, it could not be taken that the order had been passed. That case is, however, clearly distinguishable on the ground that the Judge was not bound to comply with the request to certify that the case was one which was proper to be tried by special jury. As he had a discretion in the matter to grant or refuse the request, it did not follow that the request had been granted if the order had not been signed in time. It was clearly on the party moving the Judge in such a matter to see that he obtained a proper order.

Another case quoted for the respondents, *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (13), is really not relevant. It was sought to be argued as an authority that where security is furnished, it enured even after the suit is dismissed. The decision which is one of the Privy Council does not support this view. Of course the terms of the security bond must determine the legal result following from the bond. In that case the decree-holder furnished security for any order that might be passed by the Judicial Commissioner of Oudh. A decision was given by the Subordinate Judge in favour of the plaintiff. The decision of the Subordinate Judge in favour of the plaintiff was confirmed by the Judicial Commissioner. An appeal being filed to His Majesty in Council, it was referred back to the Court of the Judicial Commissioner to ascertain, if there was any dispute, how much of the property formed part of the taluqa, and how much was the private estate of the deceased which would pass to his widow. On this remand, the Judicial Commissioner decided that all the villages claimed by the widow, except 31, belonged to the taluqa and that the suit of the widow must be dismissed except as to these 31. The question that arose was whether the security enured until the final order of the Commissioner or ceased on his first decree. Their Lordships held that it enured until his final order. They say :

"By this instrument the obligors make themselves liable to the amount of 1,00,000 as security for any order that might be passed by the Court of the Judicial Commissioner, not the first order but any order ; and the ultimate orders of the Judicial Commissioner were that of 4th March 1907, decreeing that the claim of the widow be dismissed as to all but a few villages, and that of 20th November 1916, by which, inter alia, the assessment of the Subordinate Judge finding that the mesne profits amounted to more than of Rs. 3,00,000 was affirmed."

This case therefore is no authority for the proposition that security enures even after the suit is dismissed.

On the general principle that the law presumes that to have been done which it orders to be done, it appears reasonable to hold that, when the Court is enjoined on dismissal of a suit to pass an order withdrawing the attachment but fails to do so, that attachment shall be held to have been withdrawn. If the Court had any option in the matter, it would be different. R. 5, Cl. 3, says :

"The Court may also in the order (that is the order for security) direct the conditional attachment of the whole or any portion of the property so specified."

and R. 6 (1) provides :

"Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached."

The object therefore of the attachment is to satisfy any decree which may be passed in the suit ; and if this is read with O. 9, it seems clear that so far as this attachment is concerned, the decree passed in the suit is the decree passed by the trial Court and not the appellate decree. If it were the decree which might be passed in appeal, there would be no reason why the attachment should be withdrawn merely because the suit is dismissed by the trial Court and still less would there be any reason for making it compulsory for the Court to withdraw such an attachment. Evidently therefore the attachment is for a purpose which depends on the decree of the trial Court. If the Court decrees the suit, the attachment will of course continue, but if the Court dismisses the suit, the fact that it is enjoined to withdraw the attachment shows that the attachment is

(12) [1843] 4 Q.B. 606=7 Jur. 576=12 L J. Q. B. 273=3 G. & D. 591.
(13) A.I.R. 1919 P.C. 55=42 All. 159=72 O.C. 212=46 I.A. 228 (P.C.).

not made as security for the decree which may be passed in appeal but for the decree which may be passed by the trial Court. We see no reason to depart from the consensus of opinion of all the other Courts which have dealt with this question, especially at it is a matter of procedure. Of the two cases in this Court which have resulted in conflicting decisions, the later is in favour of the view held by the other Courts.

We would therefore answer the question as follows :

Upon the dismissal of a suit, the attachment before judgment necessarily ceases under O. 38, R. 9 even though the Court did not pass an order withdrawing it.

Kumaraswami Sastri J.—I agree.

Curgenven, J.—I agree.

S.N./R.K. *Reference answered.*

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* A. I. R. 1930 Madras 520

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

M. R. M. C. L. Somasundaram Chettiar—Petitioner.

v.

P. R. S. A. R. Peria Karuppan Chettiar and *others*—Respondents.

Civil Revn. Petn. No. 876 of 1929, Decided on 13th December 1929, from order of Dist. Judge, Coimbatore, D/- 11th January 1929, in Civil Misc. Appeal 73 of 1928.

*** (a) Provincial Insolvency Act, S. 43—Insolvency continues even after annulment—Annulment can therefore be conditional or unconditional.**

The annulment of adjudication under S. 43 is merely a continuation of the insolvency in another form and it is open to the Court to pass either a conditional or unconditional order of annulment. [P 522 C 2; P 523 C 1]

*** (b) Provincial Insolvency Act, S. 37—On annulment under S. 43 vesting order in Official Assignee for benefit of creditors is valid.**

Upon the annulment of adjudication under S. 43 the Court is competent to order under S. 37 that the property shall vest in the Official Assignee or any other person for the benefit of creditors : *Case law discussed.* [P 526 C 1]

A. S. Sampath Ayyangar—for Petitioner.

T. M. Krishnaswami Iyer and *N. Sivarama Krishna Iyer*—for Respondents.

Venkatasubba Rao, J.—The question we have to decide relates to the scope and effect of S. 37, Provincial Insolvency Act (Act 5 of 1920). I shall briefly state the facts. Periakaruppan, the respondent before us, obtained a decree against Marappa (the insolvent). He then attached the latter's properties and brought them to sale. They were sold by the Court on 24th July 1923 and a sum of about Rs. 3,000 was realized.

In the meantime, Somasundaram (the petitioner before us) acting by his agent Maruda Pillai, presented on 30th June 1923 an insolvency petition against Marappa, who, thereupon, was adjudged an insolvent on 6th October 1923. The insolvency Court under Ss. 51 and 52 of the Act, directed the proceeds of the sale to be delivered to the Official Receiver. Periakaruppan, whose rights were thus affected by the order of adjudication, filed an appeal against it to the High Court. Being advised that the more proper course was to apply to the insolvency Court itself to annul his debtor's adjudication, he subsequently on 9th March 1926 withdrew his appeal. Thereupon, he presented a petition to the insolvency Court for annulling the adjudication of Marappa. He applied on two grounds, first, under S. 35 alleging that Marappa ought not to have been adjudged insolvent, as Maruda Pillai was not Somasundaram's authorized agent; secondly, under S. 43, on the ground, that the debtor had not applied for his discharge, within the period specified in the order of adjudication. The learned Subordinate Judge acting under S. 43, annulled the adjudication. It may be useful to note how this order came to be made. That the adjudication was liable to be annulled under S. 43, was admitted before the Judge by all the parties concerned. Periakaruppa then appears to have restricted his application to the ground mentioned in that section. The Court specially noted in its order:

"On this ground alone, the adjudication has to be annulled." There can be no doubt, therefore, that we must proceed upon the footing that the order of annulment was made under S. 43. As a part of the same order, the Judge directed, under S. 37, the assets of the insolvent to vest in the Official Receiver for being distributed among his creditors.

It is with this part of the order that we are concerned. Periakaruppan, being again disappointed, filed an appeal to the lower Court. The learned District Judge observing that the order under S. 37 vesting the insolvent's property in the Official Receiver was rightly made, differed from the first Court in regard to the meaning and effect of that order. The District Judge observed:

"It appears to me that the assets of the insolvent after an order of adjudication under S. 37, vest in the Official Receiver merely as a trustee. The Official Receiver as it seems to me must merely hold those assets until the insolvent or some other person proves his right to receive them,"

In the result, the District Judge modified the order of the first Court, by expunging the direction to the Official Receiver to distribute the debtor's assets amongst his creditors.

Somasundaram has filed this Civil Revision Petition attacking the order of the District Judge. Periakaruppan, as may be expected, supports the order as it revives his right to receive the sale-proceeds, unaffected by the proceedings in insolvency. The question is, which of the two views is correct?

Section 37 corresponds to an English rule which has been in force at least since the Bankruptcy Act of 1899. To deal with the point raised, one may therefore usefully turn to the English section, its history and its interpretation by the English Courts. There were three sections that dealt with annulment of adjudication in the Bankruptcy Act of 1869. S. 28 related to annulments consequent on compositions or schemes of settlement. S. 84 referred to orders of annulment to be made on failure of creditors to appoint trustee. Then there was S. 81, the important one, which ran thus:

"Whenever any adjudication in bankruptcy is annulled all sales and dispositions of property and payments duly made, and all acts theretofore done, by the trustee or by any person acting under his authority, or by the Court, shall be valid, but the property of the debtor who was adjudged a bankrupt shall in such case vest in such person as the Court may appoint, or in default of any such appointment revert to the bankrupt for all his estate or interest therein upon such terms and subject to such conditions, if any, as the Court may declare by order."

The Act of 1869 was repealed in toto by the Act of 1883. To that, there is no special need not to advert, as, in this respect, its provisions answered to those in the latter Act of 1914, which repealed and re-enacted the previous statutes. This Act contains two sections in regard to an annulment of a bankruptcy. S. 21 (corresponding to S. 23 of the Act of 1883) says, that on the Court approving a composition or scheme, it may make an order annulling the bankruptcy. This resembles the procedure under S. 28 of the Act of 1869, but it is to be observed that the power given to the Court under S. 81 of that Act, is in express terms applied under the present Act to compositions or schemes; for Cl. 2, S. 21 runs thus:

"If the Court approves the composition or scheme, it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or any such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare."

The next section that deals with annulment is S. 29 answering to S. 35 of the Act of 1883. It gives power to the Court to annul a bankruptcy, where a debtor ought not to have been adjudged bankrupt, or, where it is proved that his debts are paid in full. Under the Act of 1869, such express power had not been conferred on the Court, but it was nevertheless held that it could at any time, for good reasons annul any bankruptcy in which an adjudication had been made. Bacon, C. J. in *Ex P. Ashworth* (1). It may be noted that in this case, as under S. 21, the power conferred on the Court by S. 81 of the Act of 1869 was expressly applied under this Act to annulments made under S. 29. Cl. 2 of that section runs thus:

"Where an adjudication is annulled under this section, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Official Receiver, trustee, or other person acting under their authority, or by the Court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the Court may appoint, or in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the Court may declare by order."

To sum up, under the Act of 1869, an adjudication may be annulled under Ss. 28 and 84 of that Act, also under the general power referred to by Bacon, C. J., in *Ex. P. Ashworth* (1) already

(1) [1874] 18 Eq. 705.

cited. To every such annulment, S. 81 of that Act applied irrespective of the ground on which it was made. The Act of 1914 followed a different arrangement. Two sections in that Act dealt with annulments and each of them contained a clause reproducing the terms of S. 81 of the earlier Act. It follows from what I have stated above that, under the English Law, an order of annulment may either be absolute or conditional irrespective of the grounds on which the annulment is made.

In regard to the Indian legislation, it is unnecessary for my purpose to refer to the earlier Acts dealing with insolvency. I shall, therefore, proceed at once to examine the relevant sections of the Act with which we are concerned (Act 5 of 1920).

There are four sections in the Act which refer to an annulment of adjudication.

(1) Section 35 which says that the Court shall annul the adjudication where a debtor ought not to have been adjudged insolvent or where his debts have been paid in full (corresponding to S. 29 (1). English Act of 1914.)

(2) Section 36 which gives the Court power to cancel one of several concurrent orders of adjudication.

(3) Section 39 which enacts that the order of adjudication shall be annulled on the Court approving a composition or scheme of arrangement (answering to S. 21 (1), Bankruptcy Act).

(4) Section 43 which provides inter alia, that if the debtor does not apply for an order of discharge within a certain stated period, the order of ajdudication shall be annulled.

Now it becomes necessary to carefully follow the arrangement of the sections in this Act. Ss. 35, 36 and 37 form a group under the heading "Annulment of adjudication." S. 37, the one with which we are immediately concerned readsthus:

"Where an adiudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any, as the Court may, by order in writing, declare."

It need hardly be pointed out that every annulment made under S. 35 or S. 36 attracts the consequence of S. 37. Then comes S. 39 under a different heading which also deals with annulments. The section, after providing that the order of adjudication shall be annulled, goes on to say that the provisions of S. 37 shall apply. Similarly, S. 43, in yet another group, after saying that the order shall be annulled, adds: "the provisions of S. 37 shall apply accordingly." What is the result?

To annulment of every kind, that is, irrespective of the ground on which it is made, S. 37 is applicable. The Indian Law in thus not dissimilar to the law in England. The grounds of annulment may somewhat vary under the two systems, but the consequences are, in effect, identical.

It is further worthy of note that S. 39, which deals with approval of compositions, and S. 43 with failure to apply for discharge, both refer in identical terms to the provisions of S. 37. I wish to lay stress on this point, for S. 43 makes a departure from the English Law and we cannot, therefore, look for guidance to English precedents, whereas S. 39, as I have already pointed out, has its counterpart in the English Act and there are in consequence, decisions of English Courts throwing light on the subject. Now then, what do the English cases establish? The law is thus tersely stated by Williams in his book on bankruptcy:

Although in cases where the annulment is on the ground that the adjudication ought never to have been made the Court will in all respects try to remit the bankrupt to his original position, yet in cases where the annulment is made as it is under S. 21, after the Court had approved a schem or composition, a continuance of the bankruptcy in another form, the rights of and against the bankrupt or the person in whom the bankrupt's estate becomes vested by the order of the Court in respect of that estate will remain as they were under the bankruptcy 13th Edn. p. 135."

In other words, if the annulment under S. 39 of our Act is "continuance of the bankruptcy in another form," it follows from my analysis of the sections that the same description equally holds good in the case of annulments under S. 43. The contention of Mr. T.M. Krishnaswami Aiyar is, that with an order of annulment, the proceedings in bankruptcy close. This is oppossedto authority as I have shown in my judgment in *Jethaji*

Peraji Firm v. *Krishnayya* (2) which the long argument of the learned counsel has failed to convince me is wrong. In that case, I cited an observation of James, L. J., In *Ex Parte Lenard* (3) to the effect that a certain order was made "in what continued to be a matter of bankruptcy." Having regard to the facts of the present case that is a very useful authority but I do not wish to refer further to that ruling in this judgment. I may note in passing that the words by me in *Jethaji Peraji* v. *Krishnayya* (2) are to be found quoted in *Ex Parte Lenard* (3). (The judgment of James, L. J., is somewhat differently reported in 1 *Ch. Div.* 177 *In re, Childley* v. *In re, Lenard* (3).

West v. *Baker* (4) points to the same conclusion. The question arose in this form whether in a suit by a person in whom the bankrupt's estate was vested under S. 81 of the Act of 1869 the defendant could plead a set off for unliquidated damages which would have been proveable had the proceedings in bankruptcy continued. In giving effect to the plea, Cleasby, B., observes that the annulment of bankruptcy :

"does not take the matter out of the Bankruptcy Act, so as to prevent the general rules of bankruptcy applying."

Pollock B's observations are even more direct :

"Before this Act there were two modes of proceeding open either to go on under the bankruptcy, or to annul the proceedings altogether. Now, however, there is an intermediate course by which the control of the Court is retained and the annulling of the bankruptcy only means that there shall be no adjudication of bankruptcy in the ordinary way but the proceedings shall be moulded on the terms of the composition under the direction of the Court."

The question in each case is: is the annulment absolute and unconditional or, is it made subject to stated terms? If absolute the bankrupt is remitted to his original position; if conditional the bankruptcy continues in another form, according to the circumstances of the case.

In *Flower* v. *Lyme Regis Corporation* (5) the Court having approved the composition, made an order annulling the bankruptcy, but did not vest the property of the plaintiff in him or any other person. After the annulment, the plaintiff brought an action to recover a sum of money and it was held that upon the order of annulment the right revested in him and he was entitled to sue for the amount. This case shows by contrast as Mr. Sampath Aiyangar points out, that if the bankruptcy is unconditionally annulled the insolvent is remitted back to his original position.

Bailey v. *Johnson* (6) also adopts the same test. Cockburn, C. J., points out that the Court of Bankruptcy in that case imposed no condition. Therefore, the general provisions of S. 81 of the Act of 1869 has its full effect that is, it remits the bankrupt the moment his bankruptcy is annulled, to his original powers and rights in respect of his property. To the same group of cases belongs *Crew* v. *Terry* (7). The effect of the English authorities is thus clear and unambiguous on the point.

Now turning to the Indian cases, I have already referred to *Jethaji Peraji Firm* v. *Krishnayya* (2), decided by a Bench which follows and applies the view of the English Courts. Besides *Thimmappa* v. *Devasi Harpal* (8) which is referred to in *Jethaji Peraji* v. *Krishnayya* (2) there are further cases which lend support to the petitioner's contention. In each of them, it is expressly stated that the object of making an order under S. 37 is to protect the interests of the creditor : see *Roop Narain* v. *King King & Co.*, *A. I. R.* 1926 *Lah.* 370. *Shop Idan Lachmi Narain* v. *Bahadur Chand*, *A.I.R.* 1927 *Lah.* 914 and *Bagiram* v. *Chananmal*, *A. I. R.* 1928 *Lah.* 453. The last mentioned case is a clear authority in favour of the petitioner. It decided that when an order is made vesting the property in a receiver under S. 37 he has the power to sell it and distribute the proceeds proportionately amongst the creditors. This is the very opposite of what the respondent maintains. The only case which supports his contention is: *Arunagiri* v. *Official Receiver of North Arcot* (9). In that there is no discussien of the cases or the

(2) A. I. R. 1930 Mad. 278=52 Mad. 648.
(3) [1875] 45 L. J. B. K. 49=1 Ch. D. 177=24 W. R 1820=33 L. T. 553.
(4) [1875] 1 Ex. D. 44=45 L. J. Ex. 113=24 W. R. 277=34 L. T. 102.
(5) [1921] 1 K. B. 488.
(6) [1871] 7 Ex. 263=41 L. J. Ex. 211=20 W. R. 1013.
(7) 12 C. P. D. 403=46 L. J. C. P. 787.
(8) A. I. R. 1929 Mad. 157.
(9) [1926] M. W. N. 950.

points involved and the distinction is ignored between unconditional annulments and those made subject to stated terms. With very great respect, I feel constrained to dissent from that decision which in my opinion, is opposed to all authority, both English and Indian.

It is of course open to a Court to make an unconditional order of annulment. But if, on the contrary it makes an order vesting the property in some person, how can it possibly be contended that the vesting is for the benefit of the insolvent himself? That is negatived by the very order for, if it is intended to benefit the bankrupt, the Court unconditionally restores the property to him. The respondent's contention leads to an obvious anomaly. Suppose that while annulling the adjudication, the Court as in *Jethaji Peraji* v. *Krishnayya* (2) makes an order vesting the property in the receiver and directs him to proceed with a petition then pending under S. 53 or 54. Is it to be inferred that the Court took this precaution, for benefiting the debtor and enabling him to dispose of the same property ever again in fraud of his creditors?

I reverse the order of the lower Court and allow the petition with costs.

Madhavan Nair, J. — *C. R. P. No. 876 of 1929.*—The facts of this revision petition are briefly these: The respondent one Periakaruppan Chetty obtained a decree in O. S. No. 1991 of 1921 on the file of the Tiruppur District Munsiff's Court against one Marappa Gounden for Rs. 2,300 with interest and in execution of that decree, the properties of the judgment-debtor were attached aud sold on 24th July 1923. A sum Rs. 3,387-2-0 was realized by the sale. Meanwhile, on 30th June 1923 a petition to adjudicate the judgment-debtor as an insolvent, I. P. No. 61 of 1923 had been filed by the appellant through his agent, and he was adjudicated as an insolvent on 6th October 1923. Consequent on the insolvency proceedings the money realized in execution and which was not allowed to be taken away by the respondent was transferred to the jurisdiction of the insolvency Court and became vested in the Official Receiver. The respondent preferred an appeal to the High Court, C. M. A. No. 108 of 1924 against the order adjudicating the judgment-debtor as an insolvent that was withdrawn on 9th March 1926 and he afterwards presented on 25th February 1927 I. A. No. 115 of 1927 in the Court of the District Judge of Coimbatore under Ss. 35 and 43, Act 5 of 1920 to annul the order of adjudication. By this date, the time granted to the insolvent for obtaining an order of discharge had long gone by before annulling the order of adjudication for this reason, the learned Subordinate Judge requested the Official Receiver to submit a report regarding the administration of the insolvent's estate. He reported that :

> " but for I. A. No. 115 of 1927 which was then pending a dividend would have been distributed long ago and in his opinion the action of the respondent in filing that petition was to secure a benefit to himself exclusive of other creditors.

The avoid this result the Official Receiver requested the Court that :

> orders may be passed under S. 37 of the Act annulling the adjudication by directing the Official Receiver to make a distribution.

On the ground that the insolvent had not applied for discharge within the time specified in the order of adjudication the learned Subordinate Judge annulled his adjudication under S. 43 of the Act and in conformity with the request of the Official Receiver passed an order under S. 37 directing that ;

> " the proceeds of the sale effected by the Official Receiver before this date will vest in the Official Receiver who will distribute the assets among the creditors entitled thereto. "

I may here mention that this order, if strictly construed, will not include within its operation the amount realized in execution of the respondent's decree as the sale under which it was realized was not effected by the Official Receiver, but throughout the proceedings the order has been understood to apply to this amount also; this has not been denied before us and the case has been argued on this basis. The respondent preferred an appeal against that order to the District Judge (C. M. A. No. 73 of 1928) taking exception to the direction to the Official Receiver to distribute the assets in his hands to the creditors. The learned District Judge upheld his objection and modified the Snbordinate Judge's order :

" by expunging the direction to the Official Receiver to distribute the assets of the insolvent amongst his creditors. "

The reasoning of the learned District Judge may be stated in his own words :

" There can be no objection to his ordering that the assets should vest in the Official Receiver. But I must agree with the contention of the learned pleader for the respondent that S. 37 does not give an insolvency Court power to direct the Official Receiver to go on with the distribution of the assets among the creditors as if the insolvency proceedings were still going on . . . It appears to me that the assets of the insolvent after an order under S. 37 vest in the Officiai Receiver merely as a trustee. The Official Receiver as it seems to me must merely hold these assets until the insolvent or some other person proves his right to receive them. "

This civil revision petition is directed against the above order of the learned District Judge. Under this order the respondent's rights as execution creditor against the insolvent will survive to him which obviously will not be the case if the order of the Subordinate Judge is upheld.

It is contended on behalf of the appellant the petitioning creditor, that the learned Subordinate Judge has ample jurisdiction under S. 37, Act 5 of 1920, to pass a conditional order vesting the assets of the insolvent in the hands of the Official Receiver for the benefit of the creditors, that an order annulling the adjudication does not necessarily put an end to the jurisdiction of the insolvency Court to deal with the insolvent's assets and that the order which the learned Subordinate Judge has passed in this case is justified both under the terms of S 37 of the Act and under the decisions of this and other Courts including decisions under the English Bankruptcy Act. On the other hand the respondent contends that an order of annulment ipso facto puts an end to insolvency proceedings and that the only jurisdiction which the insolvency Court has under S. 37 to pass a vesting order is to pass such an order simply vesting the property of the insolvent in a receiver or some other person appointed by the Court merely as a trustee as held by the learned District Judge. We have now to examine which of these contentions should be accepted.

I shall first deal with the appellants' argument based on the terms of S. 37 of the Act. Cl. 1, S. 37 runs as follows :

" Where an adjudication is annulled all sales and dispositions of property and payments duly made and all acts theretofore done by the Court or receiver, shall be valid but subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint or in default of any such appointment shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may by order in writing declare. "

We are concerned only with the latter part of the section. Under this section when an adjudication is annulled the insolvency Court has jurisdiction to pass two kinds of orders regarding the property of the insolvent. It may pass an order vesting the property of the insolvent in such person as the Court may appoint or it may pass an order which will have the effect of reverting the property to the debtor on such conditions (if any) which it may by order in writing declare. If at the time of annulment no vesting order is made by the Court or conditions be imposed the bankrupt is, subject to any prior disposition made by the trustee remitted to his original position with regard to his rights over the property : see *Bailey* v. *Johnson* (6) . see also *Flower* v. *Lyme Regis Corporation* (5). The second kind of order that may be passed under the section is obviously one to the advantage of the debtor and if the Court's intention is to benefit the debtor it will be evident that the other order which the Court will pass under S. 37 will be one of this description. An order of this kind has not been passed in the present case. It will follow from this reasoning that the other kind of order which the Court may pass that is, an order vesting the property of the debtor in some person appointed by the Court can only be an order in favour of the creditors, for there is no point in passing an order in favour of the debtor under this part of the section when clearly an order of that description can be passed as I have pointed out under the second kind of order contemplated by the section. The antithesis between the two kinds of orders that may be passed under the latter part of S. 37 clearly shows that the legislature when it gave the Court power to make an order vesting the property of the debtor in a person ap-

pointed by it intended that the assets of the debtor should be administered by such a person in favour of the creditors. It is therefore clear apart from the question whether in spite of the annulment, insolvency proceedings continue or not, that under the terms of S. 37 (1), when the Court annuls the adjudication it has ample jurisdiction to make an order vesting the property of the insolvent in the hands of the receiver or any other person for distributing the assets in favour of the creditors. In this view no exception can be taken to the direction to the Official Receiver to distribute the assets in his hands to the creditors contained in the order of the learned Subordinate Judge.

The same conclusion can be based on a less narrow ground. I think S. 37 is based on the broad principle that though the annulment of insolvency puts an end to the insolvency proceedings against the insolvent, the Court should be held still to have jurisdiction over the insolvent's assets to pass the necessary orders in favour of the creditors as otherwise the insolvent will be benefited to the detriment of the creditors which is unjust. "The jurisdiction (of the Court) after the order to annul" is thus stated in Robson's Law of Bankruptcy (7th Edn. pp. 675 and 676).

"After the bankruptcy is annulled the authority of the Court will survive so far as may be necessary to complete the acts which were in complete at the date of the annulment order and to do complete justice. So also the Court has jurisdiction over the proceedings notwithstanding the annulment of bankruptcy."

Under the Provincial Insolvency Act annulment may be ordered under four Ss. 5, 36, 39 and 43. Stated concisely, S. 35 deals with the annulment where a debtor should not have been adjudicated insolvent or where it is proved that the debts of the insolvent have been paid in full ; S. 36 deals with the power of the Court to cancel one of concurrent orders of adjudication; S. 39 deals with annulment as a result of a composition or a scheme of arrangement approved by the Court, and S. 43 deals with annulment on failure to apply for discharge. Annulment under S. 43 with which we are concerned in this case, is peculiar to Act 5 of 1920. It finds no parallel either in the English Bankruptcy Act or in the Presidency Towns Insolvency Act. It is intended as a punishment to the debtor for failure to apply for discharge within the stipulated time. S. 37 applies generally to all the kinds of annulment under the Act. Orders annulling adjudication under S. 43 have been treated as standing on the same footing as orders nnder S. 36. In *Thimmappa* v. *Devasi Harpal* (8), it was held that where an adjudication of insolvency has been annulled under S. 39, Provl. Ins. Act by the Court approving a scheme of composition :

"it does not put an end to the insolvency proceedings though it puts an end to the insolvent's state of insolvency. (Per Wallace J.)."

It was accordingly decided in that case that a creditor enterd in the insolvency schedule may prove his debt even after the annulment of adjudication under S. 39 and that the insolvency Court has jurisdiction to enforce any payment it may order to be made to such creditor under the scheme of composition even after the annulment. This decision was followed and the principle enunciated in it was applied in the case of annulment order passed under S. 43 of the Act in *Jethaji Peraji Firm* v. *Krisnnayya* (2) decided by my learned borther and Reilly, J. It was held that in that case on an annulment under S. 43, Provl. Ins. Act owing to the insolvent's failure to apply for his discharge the insolvency proceedings did not necessarily come to an end and his property did not ipso facto revert to the insolvent and that the Court might in proper cases vest it in the Official Receiver or other person as provided by S. 37 of the Act. That the Court has jurisdiction to make an order under S. 37 vesting the property of the debtor in a receiver for the purpose of realisation and distribution amongst his creditors was conceded in that case and this is specifically referred to by both the learned Judges. Decisions of the Lahore High Court: see *Roop Narain* v. *King & Co.* (10) and *Shop Idan Lachmi Narain* v. *Bahadur Chand* (11) cases of annulment under S. 43 and *Bagi Ram* v. *Chanam Mal* (12) annulment under S. 39) also show that when an-

(10) A I. R. 1926 Lah. 370.
(11) A. I. R. 1927 Lah. 914.
(12) A. I. R. 1928 Lah. 453.

nulment orders are made under Ss. 39 and 43 of the Act, the Courts have jurisdiction under S. 37 to pass orders vesting the property in a person appointed by the Court for the purpose of protecting the interest of the creditors which is precisely what has been done in this case. The first one of these decisions is referred to *Tirumala Reddi Chinnappa Reddi* v. *Kolakula Thomasu Reddi* (13) (also a case of annulment under S. 43) in which it is generally stated that the annulment of adjudication does not necessarily revest the property in the debtor as the Court can under S. 37 give directions in whom the property should vest pending further orders.

In re, Chidely, in re, Lennard (3) (a) case under the English Bankruptcy Act of 1869), as the head note shows, a trader was adjudicated bankrupt on the petition of a creditor who was, under an execution in possession of chattels belonging to the trader. Under orders of the Court, the bankruptcy was afterwards annulled, and the property of the debtor was assigned by him to the same person who was trustee in the bankruptcy, on trust to secure payment of a composition which the majority of the creditors had agreed to accept. The execution creditor then threatened to proceed with his execution. It was held that as the assignment had been made and the composition had been accepted with the approval of the Court the Court retained jurisdiction over the execution creditor though the bankruptcy had been annulled and that the chattels were vested in the trustee discharged from the execution and that the creditor ought to be restrained from proceeding with the execution. The case shows: (see Williams' Bankruptcy Practice p. 101) that:

"the passing of a composition resolution under S. 28, (corresponding to S. 39, Provl. Ins. Act), even when accompanied by an order annulling the adjudication, did not at all events in cases where provision was made for the vesting of the bankrupt's estate for the security of the creditors alter the rights of secured creditors, or determine the jurisdiction of the Court of bankruptcy to protect the estate from creditors previously bound by the bankruptcy."

This case completely supports the contention of the appellant and was the basis of the decision on this point in *Jethaji Peraji* v *Krishnayya* (2) already referred to. Upon a similar principle it was decided in *West* v. *Baker* (4), that when bankruptcy was annulled as a result of the composition under S. 28 of the Act of 1869 and the bankrupt's estate was vested in a person named by the order of the Court, such person took the property "subject to the right to set off debts which would have been in bankruptcy."

These decisions are authorities for the proposition that:

"in cases where the annulment is, as it is under S. 21, Bankruptcy Act 1914 corresponding to S. 28 of the Act of 1869 and S. 39, Provl. Insol. Act after the Court has approved a scheme or composition, a continuance of the bankruptcy in another form, the rights of and against the bankrupt or the person in whom the bankrupt's estate becomes vested by the order of the Court in respect of that estate will remain as they were under the bankruptcy" (See Williams' Bankruptcy Practice, p. 135.)

As already pointed out under the Indian Act, annulment orders under Ss. 43 and 39 stand on the same footing. If annulment under S. 39 is to be considered as "a continuance of bankruptcy in another form" then it follows that the same may be said about annulment orders under S. 43. Applying the principle laid down in the English decisions, it must be held that Courts in India have jurisdiction under S. 37 to pass orders vesting the insolvent's property in the hands of the receiver for the protection of the creditors.

Amongst the cases quoted by the respondent in support of his argument that the Court under S. 37 has no jurisdiction to pass an order of the kind in question, only two deserve any notice, namely, *Crew* v. *Terry* (7) and the decision of this Court by Devadoss and Sundaram Chetty, JJ. in *Arunagiri* v. *Official Receiver of North Arcot* (9). In the former case the bankruptcy was annulled upon the acceptance of a composition on "the debts proved and admitted in the bankruptcy" and it was resolved that the property of the bankrupt should be handed back to him. It was held that an execution creditor who had neither assented to the composition nor proved under the bankruptcy could levy execution on the property of the debtor which had reverted to him on annulment. In the headnote of this case it is put as a quaere:

"Whether the seizure after the annulment would have been lawful if the composition had

(13) A. I. R. 1928 Mad. 261=51 Mad. 839.

not been confined to 'the debts proved and admitted in the bankruptcy' and had extended to any debts 'provable under the bankruptcy."

At first sight this case may appear to support the respondent ; but when the facts are examined it will be seen that it does not lay down any principle inconsistent with the principle of the decisions already referred to. It may be observed that when the bankruptcy was annulled in this case the property was handed over to the bankrupt without any condition. This feature distinguished this case from the decision in *In re, Chidley re, Lennard* (3). This destinction is thus referred to by Denman, J :

"The case of *In re, Chidley* (3) which was relied upon for the plaintiff, appears, to me to be no authority in favour of his contention; for that was a case in which the resolution upon annulment was not to "hand back" the property to the bankrupt, but to vest it in a new trustee for the benefit of the creditors whose duty it was to see the terms of the composition carried out ; whereas, in the present case, the property was to be at once handed back to the bankrupt immediately on the confirmation of the scheme, and the creditors who assented to the composition agreed that the adjudication should be annulled forthwith on the promissory notes for the composition and a certain sum for costs being paid into the hands of the new trustees under the composition."

Another noticeable feature of the case is this, that the composition and scheme had been entirely confined to debts "proved and admitted in the bankruptcy." Adverting to this feature the learned Judge observes :

"It is not necessary to decide how far the execution creditors here might have been bound if the composition and scheme had not been entirely confined to debts 'proved and admitted in the bankruptcy,"

In this connexion attention may be drawn to the following note which appears in Mr. Williams' book on this case:

It may be doubted whether under the present Act it would be held, even in the absence of an express vesting order framed to secure the payment of the composition, that composition, accompanied with annulment of bankruptcy would remit any creditor to his rights prior to the adjudication as was held to be the case in *Crew* v. *Terry* (7) especially as this section in terms contemplates in some cases a re-adjudication after the acceptance of the composition which S. 28 did not: see p. 101."

The decision in *Arumugiri* v. *Official Receiver, North Arcot* (9) is a case exactly in point and supports the respondent completely. It was held in that case that :

"when an order of adjudication has been annulled, the property of the person who was sought to be adjudicated cannot be distributed by the Official Receiver amongst the creditors. It must remain in his hands for the benefit of the proposed insolvent debtor."

The judgment is a short one and it does not discuss the question with reference to the decisions having a bearing on the point. It has not been referred to either in *Thimmappa* v. *Devasi Hurpal* (8) or *Jethaji Peraji* v. *Krishnayya* (2). With due respect to the learned Judges, I am not able to follow this decision.

In these circumstances both on principle and on authority I think the order of the learned District Judge expunging the direction to the Official Receiver to distribute the assets in his hands amongst the creditors contained in the order of the learned Subordinate Judge should be set aside. The C. R. P. is allowed with costs.

P.R.S./J.M. *Revision allowed.*

A. I. R. 1930 Madras 528

CURGENVEN, J.

Ramanathan Chetty—Petitioner.

v.

Alagappa Chetty and *others*—Respondents.

Civil Revn. Petn. No. 817 of 1927, Decided on 7th November 1929, against order of Temporary Sub-Judge, Devakotta, D/- 30th June 1927.

(a) Civil P. C., S. 150 — Suit pending—Transfer of territorial jurisdiction—Transfer order is technically necessary.

In the case of a pending suit a transfer of territorial jurisdiction will not per se result in a transfer of the suit and technically a transfer order is necessary : *A. I. R.* 1928 *Mad.* 746; *A. I. R.* 1925 *Mad.* 117, *Rel. on.* [P 530 C 1]

(b) Civil P. C., S. 115—Transfer of territorial jurisdiction—Trial of pending suit by Court having jurisdiction without transfer order—Irregularity is merely technical and is not fit subject for revision.

Upon the transfer of territorial jurisdiction if a Court having jurisdiction over the place where the cause of action in a pending suit arose dealt with it without a formal order for transfer of the suit to its file, the irregularity is merely technical and does not form a fit subject for revision. [P 531 C 1]

(c) Civil P. C., O. 20, R. 15—A direction in a final decree leaving the distribution of assets undisposed of is in essence a preliminary decree and the decree is partly final and partly preliminary - Civil P. C., S. 2 (2).

The direction in a final decree dissolving partnership that a partner should take good outstandings as found in the commissioner's report and account for them to the other partners leaves undetermined and undisposed

of the distribution of assets and is in essence a preliminary decree; and the decree is final as regards matters finally decided and preliminary as regards matters still undisposed of: 42 *Mad.* 296; *A. I. R.* 1924 *Cal.* 160; *Dist.*; 35 *All.* 159, *Ref.*; 44 *I. C.* 671; 19 *All.* 155, *App.*

[P 530 C 1, P 531 C 2]

(d) Civil P. C., O. 20, R. 15—Proceedings between preliminary decree and final decree are continuation of suit for carrying out directions in the preliminary decree.

Though the final decree is only by way of working out in detail the principles laid down in the preliminary decree the proceedings which take place between the two decrees are in the nature of a continuation of the suit for the purpose of carrying out the directions contained in the preliminary decree: (1915) *M. W. N.* 725; 8 *Cal.* 420; 30 *Cal.* 609; 19 *Cal.* 132 (*F.B.*); 22 *Cal.* 425, *Approved.*; *A. I. R.* 1928 *Mad.* 914; 13 *Mad.* 236, *Dist.* [P 533 C 1]

(e) Limitation Act, Art. 181—Application in pending case—Art. 181 does not apply.

An application in a pending case is not governed by Art. 181 and is in fact not subject to any rule of limitation: (1915) *M.W.N.* 725; *App.*; 42 *Mad.* 52; *A.I.R.* 1922 *Mad.* 65; (1913) *M. W. N.* 867; *A. I. R.* 1925 *Cal.* 834 (*F.B.*); *A. I. R.* 1924 *Mad.* 695; *A. I. R.* 1925 *Mad.* 981; *A. I. R.* 1921 *Mad.* 124; and 1 *Lah.* 187, *Dist.*

[P 533 C 2]

C. S. Venkatachariar—for Petitioner.

C. Padmanabha Iyengar — for Respondent.

Judgment.—This revision petition is presented against the order of the Principal Subordinate Judge of Devakotta in the following circumstances. The suit out of which it arises was instituted for dissolution of partnership and for accounts in the Court of the Subordinate Judge of Ramnad. It was transferred to the then existing Temporary Subordinate Judge of Ramnad and he passed a preliminary decree on 23rd October 1913 dissolving the partnership from the date of the plaint and appointing a commissioner to examine and report upon the accounts. The commissioner presented his report on 14th January 1915 and the Temporary Subordinate Judge passed a final decree on 22nd March 1915. It is with the legal aspect of a passage in this decree that we are now concerned. The decree contains certain provisions such as normally find place in a final decree for the dissolution of partnership and then occurs the following passage:

"This Court doth further direct that defendant 1 do take the good outstandings due to the firm as found in the commissioner's report and that he do account to the other partners for the same."

This is based upon a passage in the judgment which says:

"As defendant 1 has always been the managing partner and as he has been instituting suits for recovery of all outstandings, etc. the good outstandings due to the firm as found in the commissioner's report will be taken by him and he will account to the partners for the same."

It appears from the commissioner's report that the parties failed to assist in the realization of the assets and the settlement of their accounts and accordingly he had to propose to the Court the appointment of a receiver for this purpose, and the Court decided to take the course above-mentioned. Defendant 1 appealed against this decree to the High Court but died before the appeal was disposed of. Nevertheless, the above quoted passage was reproduced in the appellate decree. So far as we are concerned, it is agreed that we may disregard the appellate decree in this respect and may base ourselves upon the terms of the decree dated 22nd March 1915. No attempt was made by any of the parties to enforce the direction given to defendant 1 until 14th October 1925, when defendant 6, son of one of the partners, applied to the Additional Subordinate Judge of Ramnad at Madura to pass a final decree in pursuance of that direction. About a year later the application was returned by the Additional Subordinate Judge on the ground that he had no jurisdiction and it was re-presented to the Temporary Subordinate Judge of Devakotta.

I will deal first with an objection, which, however, has not been strongly pressed, that the lower Court had no jurisdiction to deal with the suit. I have said that it was originally disposed of by the Temporary Subordinate Judge of Ramnad. That Court was abolished on 1st January 1926, two Subordinate Judges being attached to the Sub-Court of Ramnad at Madura from that date. The application now in question had been filed before the change took place and assuming that the suit to which it related was a pending suit, it should have been transferred to the Ramnad or to the Devakotta Court, since in the case of a pending suit a transfer of territorial jurisdiction will not per se result in a transfer of the suit: *Subramania Iyer* v. *Swaminatha Chettiar* (1) and *Chokkalinga Pillai* v. *Velayuda Mudaliar* (2). I infer that

(1) A. I. R. 1928 Mad. 746.
(2) A. I. R. 1925 Mad. 117.

what took place was that all suits at the time pending before the Temporary Subordinate Judge of Ramnad were distributed between Ramnad and Devakotta but that inasmuch as the present suit had to all appearances been disposed of, no such order was made with regard to it. S. 37, Civil P. C., would have sufficiently provided for any subsequent proceedings if the suit had already been disposed of; but if, as I propose to hold, the suit was still pending, a transfer order was technically necessary. Since, however, it has now been dealt with by the Court which has jurisdiction over the place where the cause of action arose, and to whose file it would certainly have been transferred if any transfer had been ordered, I think that the irregularity is no more than technical and does not form a fit subject for revision.

In the order under consideration the learned Subordinate Judge has given reasons for holding that the direction in the final decree is of an interlocutory character, that by force of it the suit is still pending, and that the application which is in its nature an application to pass a final decree is not subject to the law of limitation. He has therefore decided to take the suit on his file and proceed with it. This order has been attacked on two alternative grounds:

(1) the direction given to defendant 1 is not in the nature of a preliminary decree, but if it is,

(2) the application is barred under Art. 181, Sch. 2, Lim. Act, as having been made more than three years from the date of the decree.

It was in point of fact made about 10½ years after the trial Court's decree and six years after the High Court's decree.

It is contended in the first place that the Code contemplates only one preliminary decree and one final decree, whereas what we must refer to here as the final decree is in fact a composite decree, part final and part preliminary; so that the preliminary portion would require a further final decree to be passed. This position cannot, I think, be substantiated either by the terms of the Code or by any case law. The definition of "decree" in S. 2 (2) concludes with an explanation which says that a decree may be partly preliminary and partly final; and I can find nothing in the Code repugnant to the notion that more than one preliminary or more than one final decree may be passed. There are some observations of Krishnan, J., in *Gulasam Bivi* v. *Ahamadsa Rowther* (3) which deals with the partition suit, to the effect that the Code does not contemplate more than one preliminary decree and one final decree in one suit, and that to have two final decrees and to call the first one a final decree would be a misnomer. I do not think he intended to say that, where circumstances so require, the Court has no jurisdiction to pass a composite decree. A situation rather similar to the present forms the subject of some observations by Mukerjee, J., at p. 260 (of 38 *C. L. J.*), *Peary Mohan* v. *Manohar Mukerji* (4). He says:

"It may be conceded that the legislature contemplated that ordinarily there should be one preliminary decree and one final decree in a suit; the preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. But as observed by Piggott, J., in *Yakub Hussain* v. *Baral Indu* (5), there may be exceptions and the case before us furnishes an instance. Here the original suit was for the removal of the shebait, for cancellation of the judicial sale and for recovery of the trust property. The decree made in the suit has directed the removal of the shebait and the cancellation of the sale subject to the investigation of accounts to be rendered by the shebait in a supplementary proceeding. The order which has now been made is in essence a preliminary decree in the supplementary proceeding and will lead up to the final decree to be made therein."

There is another Calcutta case *Jashoda Dassee* v. *Upendra Nath* (6) where it was found necessary to pass a supplementary final decree dealing with the portion undisposed of in the earlier final decree, the suit being one for partition. I do not think there can be any serious doubt that there is nothing illegal in passing more than one final decree, and in fact Mr. C. S. Venkatachariar does not go so far as to suggest it. What he does say is that such a course is so unusual that neither the Court nor the parties can be held to have contemplated it, and so far as the Court is concerned he points as an indication of intention

(3) [1919] 42 Mad. 296=9 M. L. W. 541=51 I. C. 140=(1919) M. W. N. 284.
(4) A. I. R. 1924 Cal. 160.
(5) [1913] 35 All. 159=18 I. C. 701=11 A. L. J. 120.
(6) [1918] 44 I. C. 671.

to the omission to adjourn to a further date. He supports his argument by reference to Daniel's Chancery Practice, 8th Edn. Vol. (1) p. 686, where the test whether a judgment is interlocutory or final is said to consist in whether it adjourns the consideration of the cause or not. Where there is final judgment, liberty to apply may be given without, however, altering the final nature of the judgment. I do not think, however, that inferences derived from Chancery Practice can be safely applied to procedure in India, and it seems to me that no conclusive inference can be drawn from the mere circumstance that the Court failed to provide any further hearing. We must, I think, look to the terms of the decree rather than speculate upon the Court's intentions, and ask ourselves what is the nature of this part of the so-called final decree. The plaint was framed in terms customary to a suit of this character and asked for the realization and distribution of the assets. Normally then the final decree should be such as is given in Form No. 22 of App. D to the Code of Civil Procedure, providing for the distribution of the fund in Court which has been realised by the receiver or otherwise. It is quite clear that the suit, when it was disposed of by the decree on 22nd March 1915, had not been brought to its natural end, judged by these tests. In the Privy Council case *Muhammad Abdul Majid* v. *Muhammad Abdul Aziz* (7), the trial Court had originally passed a decree for a declaration and for possession of immovable property without deciding the question of mesne profits. About the mesne profits, indeed, the decree made no mention. Even so their Lordships held that the inquiry into mesne profits in the suit should proceed; and the following passage deserves quotation:

"The Subordinate Judge had before him a case consisting of two parts; a question of title and an incidental question of account depending largely on the title. It was for the obvious advantage of the parties; and they proposed, that the first should be decided and the second reserved for decision. In point of fact, the first part has been the subject of successive appeals by the defendant who successfully struggled against the trial of the second part pending these appeals. If the Code forbade the parties and the Court so to arrange the disposal of a law suit, it would be a very startling thing. It is not pretended that the Code contains any such prohibition."

These remarks I think apply mutatis mutandis to the present case. A decree means something which "conclusively determines" (a phrase substituted for "decides" by the Code of 1908) "the rights of the parties." Here it has left undetermined and undisposed of the distribution of assets to be realised by defendant 1, and the duty of the Court has accordingly not been completely discharged. I hold, therefore, that upon this point the learned Subordinate Judge is clearly right. Even were the correctness of his decision less clear, it would scarcely be for this Court in revision to interfere where the Court below has declared its willingness to conduct the matters outstanding between the parties to their final conclusion.

Granting then that the direction to defendant 1 amounts to a preliminary decree, it is further contended that where, as here, there is no adjournment order, further application should have been made within the time prescribed, and Art. 181 is said to prescribe that time. Whether this is so or not depends, I think, on whether it is to be held that between preliminary and final decree the suit is pending because it can hardly be contended that an application in a pending suit, as we ordinarily use that expression, is subject to limitation. Mr. Venkatachariar contends that after a preliminary decree has been passed the suit is not pending in the sense that the rights of the parties have still to be decided. Before going through some of the cases cited for this proposition, I will allude to the special case of mortgage suits. It has no doubt been held that application for a decree absolute and for a personal decree, under O. 34, Rr. 5 and 6 respectively are subject to Art. 181: the decree-holder must apply within three years: see *Gulasam Biti* v. *Ahamadsa Rowther* (3); *M. Venkatiah* v. *B. Venkata Subbiah* (8); *Rama Venkatasubba Iyer* v. *Shanmugham Pillai* (9) and *Pell* v. *Gregory* (10). I do not think, however, that from these special cases a general proposition can be deduced. The rules under the Code make express provision for such applications

(7) [1897] 19 All. 155=24 I.A. 22=7 Sar. 111 (P.C.).

(8) A. I. R. 1922 Mad. 65.
(9) [1913] M.W.N. 867=21 I.C. 530.
(10) A. I. R. 1925 Cal. 834=52 Cal. 828 (F.B.).

and the Court has no duty cast upon it in the absence of them. The view I take in the present case is that the Court should itself have disposed of the suit, and that the Court rather than the party was responsible for further action.

On the question of the pendency of the suit I have been taken through a number of cases under the old Code, mainly originating in Madras and Calcutta. There was under that Code no such device as a preliminary and a final decree for the trial of partnership and partition suits, and different notions arose as to when the single decree should be passed and how much should be left over for execution, difficulties which no doubt gave rise to the introduction of the preliminary and final decrees. In *Seshan* v. *Rajagopalan* (11), the decree passed for partition was in the nature of what we should now call a preliminary decree and the remainder of the operations had to be done in execution. In *Appadu* v. *Venkata Ranga Rao* (12), on the other hand, the view taken was that in a partition suit the decree should ensue upon the actual division. The position was laid down in general terms by Bhashyam Ayyangar, J.,at p. 277 in *Mallikarjunala Setti* v. *Lingamurthi Pantulu* (13) with regard to partition suits. He had. of course, to deal with a single decree, and, when he said that a suit terminates only when the decree is fully effectuated and that it includes proceedings in execution, it may be conceded that the terms he used were used in a wider sense than we have to employ them here. The difficulties which arose in dealing with partition suits under the old Code are illustrated in *Lakshmanan Chetty* v. *Ramanathan Chetty* (14). where the learned Judges found it impossible to decide what precisely was the decree in the suit. These cases, however, are not of much assistance here. More in point is *Srinivasa Mudali* v. *Ramaswamy Mudaly* (15). In that case a compromise decree for partition had been passed and the question arose whether an application for the appointment of a commission to work out the shares recoverable under it was barred by limitation. This depended on whether the application was in execution or in the suit. The learned Judges held that such an order could have been made by the lower Court at any time of its own motion as a step in the disposal of the suit, and that there could be no question of any bar of limitation in connexion with the application for it.

Turning to the Calcutta cases, *Kedarnath Dutt* v. *Harra Chan Dutt* (16), related to a partition, and in 1870 a decree was passed directing a commission to issue to effect the partition. For reasons which I need not go into, no effectual steps were taken for over ten years, when the plaintiff applied for proceedings to continue. He was met by a plea of limitation, but Wilson, J., held that the application being one in a pending suit, the right to apply was a right which accrues from day to day, and, therefore, it was not barred by lapse of time. It will be noted that this related to a stage in the cause after the only decree then provided for by the Code had been passed. This case was followed by Stephen, J., in *Surrendra Kishub Roy* v. *Khetter Krishto Mitter* (17).

In the Full Bench case *Puran Chan* v. *Radha Kishen* (18), it was held that where the decree provided that mesne profits should be ascertained in the execution department no rule of limitation attached to an application to ascertain them. The view taken was that for that purpose the suit was still pending, and that the Court was bound, even without any application, to fix a date for the inquiry. "There is nothing in the Code," the learned Judges say: "compelling a person having the conduct of a pending suit to make formal application from time to time, asking the Court to proceed to judgment."

This case was followed in *Dwarka Nath Misser* v. *Barinda Nath Misser* (19), in regard to an application to appoint an arbitrator in a partition suit, and printed with the report is a judgment of Prinsep and Ghose, JJ., to the same effect. It follows a fortiori

(11) [1890] 13 Mad. 236.
(12) [1908] 18 M.L.J. 23.
(13) [1902] 25 Mad 244=12 M.L.J. 279 (F.B.).
(14) [1905] 28 Mad. 127=14 M.L.J. 436.
(15) [1915] M. W. N. 725=30 I. C. 380=2 M. L. W. 693.
(16) [1882] 8 Cal. 420.
(17) [1903] 30 Cal. 609=7 C.W.N. 517.
(18) [1892] 19 Cal. 132 (F.B.).
(19) [1895] 22 Cal. 425.

that, on the principle underlying these decisions, an application for a final decree is an application in the suit and is not subject to any limitation.

As regards the position under the present Code the petitioner relied mainly on the Full Bench case *Perumal Pillai* v. *Perumal Chetty* (20). The question referred for decision was whether O. 22, Rr. 3 and 4, Civil P. C., applied to cases of death after the passing of the preliminary decree. The answer given was that the provisions did not apply and that the suit did not abate so as to vacate the preliminary decree. This question does not strictly concern us, but Mr. Venkatachariar has sought to derive from some observations of the learned Chief Justice who delivered the opinion the principle that a suit for all purposes is concluded by the preliminary decree. I have been unable to discover any such unqualified proposition in the judgment. The principle relied upon was that the right of action had been determined before the death of the defendant by the passing of the preliminary decree and the learned Chief Justice went on to say that this was so because:

"the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree."

It is nowhere said that the proceedings which take place between the two decrees are not in the nature of a suit; nor of course is it suggested that all the matters in issue between the parties are finally disposed of by the preliminary decree. Indeed it may often happen that most of the contentious work has to be done after a preliminary decree has been passed, and has to be settled by the final decree. It may be observed that the learned referring Judges in that case assumed that the suit was still pending. In the Privy Council case *Lachmi Narain Marwari* v. *Balmakund Marwary* (21), cited in this judgment, a case which related to a dismissal for default of a partition suit after the preliminary decree, the simple principle laid down is that:

"after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside."

I do not find, therefore, that this case is authority for the proposition for which it is cited.

It is clear to me that the suit continues for some purposes at least until the final decree; it would indeed be an anomaly if any decree could be reached by proceedings other than a suit. That being so, I have been shown no authority for the view that an application in a pending suit desiring the Court to proceed to judgment is governed by any rule of limitation. So far as the examples shown to me go, applications which are so governed will be found not to be of this character. In *Kalyani Pillai* v. *Thiruvenkadaswami Ayyangar* (22), the application was to bring on record the legal representatives of a respondent to a Privy Council appeal. *Mangamma Nayakuralu* v. *Ramadasappa* (23), related to execution. *Swaminatha Pillay* v. *Rajagopala Mudaliar* (24), was an unusual case where a trustee who had brought a suit died and application was made to transpose a co-trustee defendant as plaintiff. It is difficult to say whether in the interval between death and transposition the suit could be held to be pending. The case in *Hindustan Bank* v. *Mehraj Din* (25), related to the Companies Act. Indeed, the only case in point, *Srinivasa Mudali* v. *Ramaswami Mudali* (26), to which I have already referred, appears to me very good authority against the application of the Limitation Act.

I think accordingly that the learned Subordinate Judge is right in his view that no question of limitation arises, as well as in the construction which he has placed upon the disputed passage in the decree. It is unnecessary for me to add, therefore, that, even had I felt less convinced of these propositions, I should much have doubted the desirableness of interfering in revision. The civil revision petition is dismissed with costs.

P.R.S./J.M. *Petition dismissed.*

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(20) A. I. R. 1928 Mad. 914=51 Mad. 701 (F.B.).
(21) A. I. R. 1924 P.C. 198=4 Pat. 61=51 I.A. 321 (P.C.).
(22) A. I. R. 1924 Mad. 635=47 Mad. 618.
(23) A. I. R. 1925 Mad. 981.
(24) A. I. R. 1921 Mad. 124.
(25) [1920] 1 Lah. 187=55 I. C. 820.
(26) [1915] M.W.N. 725=30 I.C. 380=2 M. L. W. 693.

A. I. R. 1930 Madras 534

KUMARASWAMI SASTRI, J.

V. V. Subramiah Chetty and *others*—Plaintiffs.

v.

Nataraja Pillai and *others*—Defendants.

Civil Suit No. 53 of 1924, Decided on 21th August 1928.

*** (a) Hindu Law—Succession—In deciding succession among gotraja sapindas, contention that seven degrees must be exhausted in one line before going to next is insupportable.**

In the case of competition between gotraja sapindas there is no case which says that you must exhaust seven degrees in one line before you can go to the next. Such a construction would be contrary to the principles of collateral succession laid down by commentators and text writers. The construction that you must exhaust seven degrees is against the whole scheme of collateral succession and would postpone the heirs specifically mentioned in the Mitakshara as entitled to preference: (*Case Law Referred.*). [P 537 C 2]

*** (b) Hindu Law—Succession—Gotraja-sapindas.**

Father's paternal uncle's son's son succeeds in preference to paternal uncle's sons's son's son. [P 538 C 1]

V. Raghunatha Sastri—for plaintiffs.

P. L. Venkatarama Ayyar, *S. Partha-sarathi Iyengar* and *V. Ramaswami Ayyar*—for Defendants.

Judgment.—This is a suit by the plaintiffs claiming to be trustees of the charities founded by one Calve Sadasiva Chetti by his will dated 25th July 1889, and codicil dated 20th May 1891, for a declaration that plaintiffs 1 to 3 are absolutely entitled to the properties mentioned in the plaint and that the defendants have no manner of right thereto, and other reliefs.

The case for the plaintiffs is that item 1 of the plaint schedule property belonged to Vasavambammal, widow of Calve Sadasiva Chetti, that she died issueless and intestate, that plaintiff 4 succeeded to the properties as the next reversioner, that he by a deed transferred the properties to the trustees constituted by the will of Sadasiva Chetti and that the plaintiffs are thus entitled to the properties. Various defences have been raised by the defendants. They deny that Sadasiva Chetti left a will and codicil. They say that even if he left a will and codicil they are invalid and inoperative. They also deny that the plaintiffs are the duly constituted trustees. Defendant 3 claims the properties as the next reversioner to Vasavambammal and Sadasiva Chetti. His case is that Calve Sadasiva Chetti was adopted to Chinnappa Chetti and that consequently plaintiff 4 is not a reversioner to Sadasiva Chetti or Vasavambammal. Defendants 1 and 2 claim under a transfer from defendant 3 to them of the properties claimed in the plaint. They also claim to be the illegitimate sons of Calve Sadasiva Chetti and entitled to succeed to the properties apart from the deed of gift. Defendant 6 claims to be the adopted son of Vasavambammal and entitled to the properties. It is pleaded that the adoption was upheld by French Courts and that it is, therefore, binding on all the parties as Sadasiva Chetti and Vasavambammal were French subjects resident in Pondicherry. Defendant 8 claims to be a lessee from defendant 2 and entitled to the return of Rs. 2,000 paid as advance. Defendant 7 is said to be in possession of item 2 of the plaint schedule namely a choultry known as Komatti Chathram. As the suit against defendant 5's firm has been dismissed it is not necessary to consider their defence Defendant 4 who is a brother of Vasavambammal is made a formal party to the suit as it is alleged he has no interest in the properties.

The following issues were settled:

1. Did Calve Sadasiva Chetti leave a will and codicil as meniioned in para. 4 of the plaint and are they invalid and inoperative?
2. Are defendants 1, 2, 3 and 6 estopped from denying the validity of the said will?
3. Did Calve Vasavambammal leave an oral will at Pondicherry and, if so, is it valid?
4. Did Calve Vasavambammal by the said will make a gift of the said property, and, if so is it valid?
5. Was Calve Sadasiva Chetti adopted by Chinnappa Chetti and if so is it valid?
6. Is Calve Sankara Chetti defendant 3 the nearest reversionary heir of Calve Vasavambammal or Calve Subbaraya Chetti, plaintiff 4?
7. Is the deed of gift executed by defendant 3 in favour of defendants 1 and 2 valid and binding?
8. Was Calve Sadasiva Chetti a Sudra and are defendants 1 and 2 his illegitimate sons entitled to the said plaint-mentioned immovable properties?
9. Is the claim of defendants 1 and 2 to plaint properties as heirs of Sadasiva Chetti barred by limitation?
10. Was defendant 6 adopted by Calve Vasavambammal? If so, is the adoption valid?
11. Was the said adoption homologated in Pondicherry according to law and if so does it

render the adoption valid and binding upon the parties ?

12. Was the said adoption upheld by the French Courts and if so is the decision conclusive and binding with reference to immovable property in British India ?

13. Is defendant 6 the sale heir of the deceased Calve Sadasiva Chetti and Calve Vasavambammal as claimed by him ?

14. Is the decree in C. S. 226 of 1920 not binding on defendant 6 for the reason set out in paras 10 to 14 of his written statement ?

15. Is defendant 6 entitled to go behind the decree in C. S. 226 of 1924 without setting it aside by appropriate yroceedings ?

16. Did plaintiff 4 give the undertaking referred to in para. 1, of defendant 6's additional written statement and if so is he thereby estopped from claiming the plaint properties by inheritance from Calve Vasavambammal ?

17. Is the lease of the house and ground 1 Jaffar Serang Street Madras bv defendant 2 to defendant 8 true and valid and if so is defendant entitled to occupy the same for any and if so what:period, for what rent and on what terms ?

18. If the lease is held not valid, is defendant entitled to repayment of Rs. 2,000 or any part hereby from the plaintiffs or any of the defendants ?

19. To what mesne profits are the plaintiffs entitled and if so against which of the defendants ?

20. To what relief if any are the parties entitled ?

It is admitted by all the parties that Sadasiva Chetti was a French subject living in Pondecherry and that he had extensivs properties in Pondecherry and also properties in Madras and Government promissory notes and other securities ?

The following genealogical table sets out the relationship between the parties :

Calve Lingi Chetti

Singanna Chetti

Subroya Chetti

Sambasiva Chetti

Krishnaswami Chetti

Subroya Chetti
(Plaintiff 4)

Munusami Chetti

Mutialu Chetti

Sankara Chetti
(defendant 3)

Balakrishnammal
married Sealey
Krishnaswami Chetti

Sealey Sriramulu Chetti

Sealey Subroya Chetti
(Defendant 6)

Chinnapapu Chetti

Sadasiva Chetti
(Testator)
Married
Vasavambal sister of
Ckokalingam Chetti
(Defendant 4)

Krishnaveni Ammal
(married)

Before the plaintiffs can prove their title to the properties they must show that Subbaraya Chetti plaintiff 4 is the next reversioner and entitled to succeed to the properties of Sadasiva Chetti and Vasavambammal. Having regard to the relationship set out in the genealogical table, which is not disputed, Subbaraya Chetti would be the next reversioner if Sadasiva Chetti was not adopted to Chinnapapu Chetti as alleged by the defendants. It is further argued by the plaintiffs that even if the adoption is proved, Subbaraya Chetti would still be the next reversioner.

Before dealing with the evidence and the questions of law involved in the case, I think it is necessary to set out the previous litigation as regards Sadasiva Chettis estate. (The learned Judge then dealt with the evidence relating to adoption and proceed as follows). I am of opinion that the adoption has been clearly proved by Ex, B series and is corroborated by the other Exs. (1 and 2) and receives support from the clause in the will where he gives an allowance to his mother of money and paddy.

The next question is, whether plaintiff 4 would still be the next reversioner. I have already set out in the genealogical table the relationship between the parties and the competition is between Subbaraya Chetti, plaintiff 4, on the one side, and Sankara Chetti, defendant 3, on the other.

There can be little doubt that both of them are sapindas to Sadasiva. The contention of the plaintiffs is, you must exhaust the direct descendants of his father to the seventh degree before you go to collaterals., and that Subbaraya Chetti, would therefore be the nearer

sapinda entitled to succeed. The contention for defendant 1 is that, under Hindu Law, in determining which of two sapindas is the nearer heir, you have to go three degrees in each branch, and after the third degree, you must go three degrees to the next collateral branch, and so on, and that applying this test, defendant 3 would be nearer sapinda.

I can find little authority for the contention of Mr. Raghunatha Sastri for the plaintiffs that you must exhaust the sapindas to the seventh degree in the nearest branch before you can go to any other branch. The text of Manu which forms the basis of sapinda succession to collaterals is found in verses 186 and 187. Verse 186 runs as follows:

"To three ancestors water must be offered to three the funeral cake is given the fourth descendant is the giver of these oblations the fifth has no connexion with them."

Verse 187 says:

"Always to that relative within three degrees who is nearest to the deceased sapinda the estate shall belong afterwards a sakulya shall be the heir then the spiritual teacher, or the pupil."

The words in Manu are Anantaraha sapindath : see Manu, Secred Books of the East : The Mitakshara in dealing with sapratibandha succession in Chap. 2, S. 5, does not specifically state to what degree each line should be exhausted before going to the next line. The words putrah and sunavah have, however, been held to mean the three descendants by their Lordships of the Privy Council in *Buddah Singh* v. *Laltu Singh* (1). It is admitted by the plaintiffs' vakil, that, unless by the words putrah or sons, you must exhaust seven lineal descondants before you go to the next ascending line, plaintiff 4 will not be a nearer heir than defendant 3. It is clear that if Sadasiva Chetti was adopted to Chinnapapu Chetti and if by "son" you only include three degrees of descendants, plaintiff 4 will be excluded by defendant 3.

The consensus of opinion seems to be that you must break off when you come to the third degree, in determining the question who is the nearer sapinda, and go to the next collateral line.

The line of succession is dealt with by Mayne in paras. 570 (a), 571, 572, and it will be seen from the table of agnatic sapindas that is only three degrees that are taken in each branch. It will be seen from the table that the son, grandson and the great-grandson succeed in order ; in their absence the estate goes to the widow, daughter and daughter's son, then to the mother, then to the father, then to the brother, nephew, -grand-nephew : in their absence, it goes to the grandmother, then to the grandfather : and then to the three descendants and so on.

Professor Jolly in his Tagore Lectures on Hindu Law gives a table at p. 212 which is substantially the same as that given by Mayne. He points out that the first part of the table is in accordance with the systems of Apararka and Nanda Panditha.

Jogendra Chunder Ghose in his Principles of Hindu Law adopts a similar rule (pp. 118 and 119).

The same view is taken by Sarvadhikari in Lecture 13, where he refers to the order of succession under the Mithakshara Law, and in the table of succession which he gives in that lecture. In Lecture 10, he gives the views of the commentators.

West and Buhler, however, incline to a different view, but, so far as I can see, the preponderance of authority, both as regards text-writers and commentators, is the other way.

Turning to the decided cases, the question was considered by their Lordships of the Privy Council in *Buddah Singh* v. *Laltu Singh* (1) and it was held that the great-grandson of the grandfather of the deceased, who was also the grandson of his paternal uncle, was preferential heir as against the grandson of the deceased's great-grand father. Their Lordships, after an exhaustive review of the authorities and the texts, observe at p. 620 :

"Dr. Raj Kumar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect, he says that the Mitakshara propounds a definite scheme of succession ; lineal male descendants of the deceased owner down to and including the third degree, who contsitute the first class of propinquous relations (the nearest sapindas) inherit in succession in the first instance. In their default, the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence, the inheritance ascends each ascending line begins with a female, and each has to be exhausted in accordance with the rule of propinquous sapinda

(1) A. I. R. 1915 P. C. 70 =37 All. 604=42 I. A. 203 (P.C.).

relationship before the next in order can take ; so that the parents and their three successive descendants take first ; then the paternal grandmother and the paternal grandfather and their three successive descendants come next, and so on."

Their Lordships then refer to the fact that the view of Dr. Jolly is in substantial agreement with the view of Dr. Raj Kumar Sarvadhikari.

The view taken in Madras, which was based upon a narrower construction propounded by the Smriti Chandrika and the Subodhini, was that instead of three descendants you must take only two, and their Lordships refer to *Suraya* v. *Lakshminarasamma* (2) and *Chinnasami Pillai* v. *Kunju Pillai* (3), and disapproved of the narrower construction, and observe :

"However, the two Madras decisions have received the respectful consideration of their Lordships. They have already given reasons for holding that in the Mitakshara as expounded in the Benares school, the word putra and its synonym employed by Vijnaneswara in connexion with brothers and uncles must be understood in a generic sense, as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the third degree, before making the ascent to the line next in order of succession."

Their Lordships also state that, even under the Mitakshara, in cases of competition between collaterals, preference is given to one who has the right to confer spiritual benefit, and observe :

"It seems to their Lordships that there is another ground on which the plaintiff must fail. It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the manes of the common ancestor. Now, it is, absolutely clear that under the Mitakshara, whilst the right of inheritance arises from sapinda relationship, or community of blood, in judging of the nearness of blood relationship or propinquity among the gotraja, the test to be applied to discover the preferential heir is the capacity to offer oblations. Mitra Misra, the author of the Viramitrodaya an authoritative commentary on the Mitakshara, lays down this doctrine in express terms. He says when there are many claimants to the heritage among gotrajas and the like then the fact of conferring benefits on the proprietor of the wealth by means of offering of oblations and the like only excludes these that do not confer such benefits. Dr. Raj Kumar Sarvadhikari renders the last part of this passage thus : The benefit conferred on the late owner by the offering of the cake and the water determines the title to inheritance".

In the case of *Bhya Ram Singh* v. *Agar Singh* (4), the Board affirmed this rule in the following words :

"When a question of preference arises as preference is founded on superior efficay of oblations that principle must be applied to the solution of the difficulty".

In *Suraya* v. *Lakshminarasamma* (2) the learned Judges held that, according to the law of succession current in the Madras Presidency, the term "sons" used in the Mitakshara, Chap. 2, S. 4 (7), and S. 5 (1), does not include grandsons.

In *Chinnasami Pillai* v. *Kunju Pillai* (3) the learned Judges were of opinion that the word "sons" in the Mitakshara, Chap. 2, S 1, verse. 2. S. 4, verses 7 and 8, and in S. 5 verse 1, should not be given an extended meaning so as to include grandsons, and they approved of *Suraya* v. *Lakshminarasamma* (2) and did not follow the decision in *Kalian Rai* v. *Ramchandra* (5).

As their Lordships of the Privy Council in *Budha Singh* v. *Laltu Singh* (1) referred to above, followed the view in *Kalian Rai* v. *Ramchander* (5), and disapproved of the two Madras decisions, it is unnecessary to deal with those decisions at any length.

So far as I can see, in the case of competition between gotraja sapindas, the difference of opinion has always been whether to take it to three degrees or two degrees, and there is no case which says that you must exhaust seven degrees in one line before you can go to the next. In fact, such a construction would be contrary to the principles of collateral succession laid down by commentators and text writers. As pointed out in the Madras cases, the construction that you must exhaust seven degrees is against the whole scheme of collateral succession and would postpone the heirs specifically mentioned in the Mitakshara as entitled to preference.

Mr. Raghunatha Sastri for the plaintiffs relied on *Rutcheputty Dutt* v. *Rajunder Narain Rae* (6) and *Bhya Ram Singh* v. *Agar Singh* (4) and *Kesar Singh* v. *Secretary of State* (7). But these cases are not cases of competition between sapindas. In *Bhya Ram Singh* v. *Bhyah Agar Siagh* (4), their Lord-

(2) [1881] 5 Mad. 291.
(3) [1911] 35 Mad. 152=21 M. L. J. 856 = 11 I. C. 885=10 M. L. T. 226.
(4) [1870] 13 M. I. A. 373=14 W. R. P. C. 1 5 B. L. R. 293=2 Suther 330=2 Sar. 566.
(5) [1901] 24 All. 128=(1901) A.W.N.189.
(6) [1839] 2 M. I. A. 132 = 2 Suther 1 = 1 Sar. 161.
(7) A. I. R. 1926 Mad. 881=49 Mad. 652.

ships of the Privy Council observe at p. 302:

"This is not a case of priority between two persons claiming as heirs or between two classes of heirs; it is one of asserted exclusion from inheritance, raised by persons not competitors in the prescribed degrees of heirs. The question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference is founded on a superior efficacy of obiations, that principle must be applied to the solution of the difficulty."

I think it is clear that defendant 3 is the preferential heir to the plaintiff 4. In this view of the case, the plaintiffs' suit fails, as they have to establish that plaintiff 4 is entitled to succeed to the property of Vasavambammal or Sadasiva Chetti as the next sapinda.

It is unnecessary to consider the other issues raised in the case. I decide nothing as between the defendants. This suit fails and is dismissed with costs, two sets one for defendants 1 and 2, and the other for defendant 6. The other defendants will bear their own costs. Plaintiffs will take their taxed costs out of the trust estate.

P.R.S./V.S. *Suit dismissed.*

A. I. R. 1930 Madras 538

RAMESAM AND CORNISH, JJ.

T. H. Ismail Hassan—Appellant.

v.

T. S. Haji Moosa & Co. and *others*—Respondents.

Appeals Nos. 105 and 106 of 1928, Decided on 17th October 1929, from judgment of Waller, J., D/- 27th April 1928, in Civil Suit No. 160 of 1927.

Civil P. C., S. 47 — Charge decree—Non-party cannot resist execution — His remedy is by separate suit—Civil P. C., O. 34, R. 1.

The charge-decree-holder is entitled to the benefits of his charge decree in execution of the decree and any other person who refuses to be bound by the decree on whatsoever ground it may be has got to file a regular suit for the proper relief: 14 *Cal.* 631 and 19 *All.* 480, *Ref.*

[P 539 C 1]

T. C. A. Bhasyam Ayyangar—for Appellant.

C. Srinivasachari, A. V. Seshaiya, P. Sankaranarayan, A. Suryanarayana and *K. M. Venkatavaradachari* — for Respondents.

Ramesam, J.—The facts out of which these appeals arose may be stated as follows:

A suit was filed (C. S. No. 160 of 1927) to recover Rs. 1,722-10-0 with interest by the plaintiff Ismail Hassan against two defendants on the following allegations. The amount claimed was due to the plaintiff primarily by defendant 2. But defendant 2 being also indebted to defendant 1, he sent 19 bales of piece goods to defendant 1 instructing him to pay off the amount due to the plaintiff and out of the balance of the amount to pay himself. But defendant 1 has not paid the money or sent any bales equivalent in value to the amount claimed by the plaintiff. This suit was decreed by Beasley, J., as he then was on 28th January 1928. In the meantime a commissioner was appointed to take charge of the goods and afterwards he was directed to sell the goods. A certain amount was realised and is now in Court.

Meanwhile certain other creditors of defendant 2, about five of them, obtained decrees in various Courts and obtained orders of attachment against the goods on dates beginning from 27th May 1927 onwards. They now claim to be paid the amounts of their decree from out of the amount in Court representing the sale proceeds of the bales. The plaintiff and defendant 1 in the suit want to be paid their amounts out of the sale proceeds because they hold first and second charges over the goods under the decree of Beasley, J. These other creditors of defendant 2 allege that the claims of the plaintiff and defendant 1 and their charges are bogus claims, a matter which of course has not been gone into, and cannot be gone into without a regular suit in which both sets of parties are impleaded. The only question that now arises is what is the order that should be passed and who should be referred to a regular suit in which the substantial question between the parties should be tried, namely, how far the claims of plaintiff and defendant 1 are bogus claims. Our brother Waller, J. passed an order directing that the surplus amount that may remain after deducting the sums due to the plaintiff and defendant 1 should be paid to the various decree holders from it. He also observed that the plaintiff and defendant 1 should prefer claim petitions before the attaching Court. The present appeals before us are filed against this order of Waller, J. and the second part of the order is particularly attacked before us. Now the plaint in C. S. No. 160 of 1927

mentions the main facts relating to the charge of defendant 1 over 19 bales and para. 5 may be taken to be an allegation that the plaintiff himself has got a charge over some bales, the value of which is equivalent to his claim. The prayer is not worded as one claiming a charge decree. But the decree awarded by Beasley, J. expressly declares that defendant 1 has got a first charge on the amount realised by the sale of the goods under the two security letters dated 1st July 1926 and 21st October 1926. It also declares that the plaintiff will have a second charge on the sale proceeds on another ground which it is unnecessary to set forth in detail. We must take it that Beasley, J. construed the plaint in C. S. No. 160 of 1927 to be a plaint alleging a charge in favour of plaintiff subject to a charge of defendant 1 and acting on that basis he has awarded a charge-decree. Now it is an established principle that no person who is not a party to a suit on a mortgage praying for a sale whatever the nature of the right he might claim, can intervene in the execution of that decree. He may be a person claiming a paramount title to the property mortgaged and he may allege that the mortgage or charge does not bind him, or such a person may be a creditor of the mortgagor who alleges that the mortgage is a bogus mortgage as in this case. But, whatever the nature of the ground on which he wishes to resist the mortgage decree, he cannot intervene in the execution of that decree. In support of this principle it is enough to refer to *Deefholts* v. *Peters* (1) and *Sanwal Das* v. *Bismillah Begam* (2)

The principle of those decisions is this that the charge-decree holder is entitled to the benefits of his charge-decree in execution of the decree, and any other person who refuses to be bound by the decree on whatsoever ground it may be, has got to file a regular suit for the proper relief. In the present case the respondents attaching creditors would all be entitled to file suits or they may jointly file a suit alleging that the claims of plaintiff and defendant 1 in C. S. No. 160 of 1927 are bogus claims and if they succeed they will be entitled to recover the full amounts of the decree out of the amounts now to be drawn by the plaintiff and defendant 1 in execution of C. S. No 160 of 1927; but, until such a suit is filed by them and it is found in their favour, the charge, decree must have its course. We therefore think that the order of our brother Waller, J. refusing to pay down the amounts to the plaintiff and defendant 1 cannot be sustained. Full effect must be given to the decree of Beasley, J. or, in other words, the amounts claimed by the plaintiff and defendant 1 must be paid out of the amounts lying in Court. So far as the balance, of course, is concerned, there can be no question that it can be paid to the respondents. But in view of the allegations of the respondents we think that we ought to make the payment of the amount conditional on the plaintiff and defendant 1 giving security. They will give security for the amounts they draw to the satisfaction of the Registrar according to the usual practice. The respondents will file their suit within three months after this date, and, if such suit is not filed, the order directing the plaintiff and defendant 1 to give security will be vacated and they will retain the amounts drawn unconditionally. But if such a suit is filed. the security will enure to the benefit of the respondents' creditors, until that suit terminates in their favour. We modify the order of the learned Judge accordingly. In each of the appeals the contesting creditors-respondents, who obtained money-decrees will pay the costs of the appellants proportionate to the interests they claim. We make no order as to costs in the original Court.

P.R.S./V.B. *Order modified.*

(1) [1887] 14 Cal. 631.
(2) [1897] 19 All. 480=(1897) A. W. N. 115.

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* A. I. R. 1930 Madras 539

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

(*Kolangarethath*) *Pachan*— Defendant —Appellant.

v.

Kunhandi—Plaintiff—Respondent.

Appeal No. 149 of 1928, Decided on 6th December 1929, from order of Sub-Judge, South Malabar, in Suit No. 283 of 1927.

*** Civil P. C., S. 11, Expl. 4— Might and ought — Previous suits one for redemption and another for trespass — Right to specific performance available defence in these suits**

but not taken—Subsequent suit by that person for specific performance is not barred.

The failure of a party to plead in defence of a suit against him for redemption and another for damages for trespass that he was entitled to specific performance against the plaintiff in respect of these properties does not bar a suit for specific performance at his instance for, though he might have taken such plea, it was not obligatory upon him to do so; *A. I. R.* 1924 *Mad.* 271 (*F. B.*), *Expl.* [P 540 C 1]

P. S. Narayanaswami—for Appellant.

K. P. Ramakrishna Iyer—for Respondent.

Venkatasubba Rao, J.—The lower Court has held that the suit is not barred as res judicata by reason of certain two previous decisions and the defendant questions the correctness of this view.

The plaintiff before us is Kunhandi, who sues Pachan, the defendant, for specific performance of a contract of sale in respect of two properties. The facts may be briefly stated. Pachan agreed to sell Kunhandi the suit items. At that time, the latter was already in possession of item 1 as mortgagee. He subsequently obtained possession of item 2 also and his case was that he paid the purchase money and was thereupon put in possession. Pachan filed the two previous suits against Kunhandi; one of them was to redeem the mortgage in respect of item 1 and the other related to item 2 and was brought on the footing of trespass. Kunhandi pleaded in those two suits the outstanding agreement to sell in his favour, but the Court passed decrees, remarking, in each suit, that Kunhandi's right would not be affected by the decision.

On these facts, Pachan, the defendant, maintains that the present suit is barred under the rule of res judicata, on the ground that Kunhandi should have resisted the former suits by pleading and proving the agreement now relied on by him. His contention is, that in the previous suits, Kunhandi could have relied upon this agreement as a complete defence and it is not now open to him to raise the question afresh by a separate suit. It seems to us that this contention is untenable. As already mentioned, one of the two previous suits was filed to redeem the mortgage in respect of item 1. Was Kundandi then bound to plead, that he was entitled to specific performance of the contract of sale in respect of that item? Similarly, in the suit based on trespass, was he bound to raise a like defence? The question we have to decide is not, whether he might have raised the plea, but whether it was obligatory upon him to raise it. The defendant relies upon *Vizagapatam Sugar Development Co.* v. *Muthurama Reddi* (1). We are not prepared to construe the decision as meaning that it is incumbent upon a party to put forward the defence that he is entitled to specific performance. It does no more than give liberty to raise a plea of that kind, and we are not prepared to read the decision as compelling him to bring that forward. S. 11, Expl. 4, Civil P. C., refers to a matter which might and ought to have been made a ground of defence. Under the Full Bench decision, the right to specific performance, is a matter that might have been made a ground of defence. That is all; but it is very different from saying that it is not only might, but ought to have been pleaded. The appellant's contention in effect ignores the force of the word 'ought' in the section. The objection of res judicata therefore fails.

In this view, it is unnecessary to decide the further point taken by the respondent, that, in any event, the rule of res judicata does not apply on the facts of this case, as his rights were expressly reserved under the two former judgments. The result is, the appeal fails and is dismissed with costs.

P.R.S./J.M. *Appeal dismissed.*

(1) A.I.R. 1924 Mad. 271=46 Mad. 919 (F.B.).

A. I. R. 1930 Madras 540

RAMESAM AND CORNISH, JJ.

O. M. Subramanian—Plaintiff—Appellant.

v.

C. Appadurai Mudali and *others*—Defendants—Respondents.

O. S. Appeal No. 32 of 1929, Decided on 17th October 1929, against order of Kumaraswami Sastri, J., D/- 23th February 1929.

(a) Madras High Court Fees Rules, O. 6, R. 1, Cls. (b) and (c)—"Disposed of"—Meaning.

"Disposed of" means adjudication after trial: *A. I. R.* 1926 *Mad.* 1214, *Foll.* [P 541 C 1]

(b) Madras High Court, Fees Rules, O. 6, R. 1, Cl. (b)—Scope.

Where there is a confession of judgment Cl. (b) applies and this clause is not confined

to cases which have not reached the final disposal. [P 541 C 1]

S. Krishnamurthi Aiyar—for Appellant.

T. D. Srinivasa Chari—for Respondents.

Judgment.—The rules are no doubt inartistically framed, but they have been interpreted : vide *Official Trustee of Madras* v. *Kamalammal* (1) where "disposed of" is construed to mean adjudication after trial. If the words mean disposal in any manner whatever, the words following are unnecessary. We have got here, a confession of judgment though at a very late stage and Cl. (b) applies and Cl. (b) on its face is not confined to cases which have not reached the Final Disposel Board.

If the result is somewhat unsatisfactory it is a matter for recasting of the rules.

The learned Judge is right and the appeal is dismissed with costs.

V.B./P.R.S. *Appeal dismissed.*

(1) A. I. R. 1926 Mad 1214.

A. I. R. 1930 Madras 541

ANANTAKRISHNA AYYAR, J.

(*Natukendi*) *Pakkaran* and *others*—Defendants—Appellants,

v.

(*Varayalankandi Kanayambath*) *Pathumma Umma* and *others*—Plaintiffs—Respondents.

Second Appeal No. 952 of 1926 and Civil Revn. Petn. No. 449 of 1928, Decided on 16th December 1929, from decree of Sub-Judge, Tellicherry, in Appeal Suits Nos. 183 and 188 of 1925.

(a) Civil P. C., S. 21—Objection to valuation of claim and jurisdiction cannot be raised for the first time in second appeal—Practice—New plea.

A question relating to valuation of a claim and jurisdiction must be specifically raised in proper time, and where it is not so raised it cannot be allowed to be raised for the first time in second appeal : *A. I. R.* 1924 *Mad.* 6 (*F. B.*), *Ref.* [P 542 C 2]

(b) Malabar Law—Tarwad—Tavazhi properties—Children of male member of tarwad are not entitled to—No bona fide disputes—Partition of tavazhi in favour of such children—Principle of family settlements is not applicable.

The children born of male members of a Marumakkathayam tarwad are not members of that tarwad and in the absence of bona fide disputes requiring settlement the principles regarding family settlements are not applicable to a virtual partition of tavazhi properties alloting to them certain shares in that property : 39 *Mad.* 317, *Foll.*; *Stapleton* v. *Stapleton* : (*White* and *Tudor's Leading Cases*), 1 *Equity* 234 *Ref.* [P 544 C 1]

(c) Partition—Minor—Bona fide arrangement can be entered into provided minor's rights are safeguarded.

The existence of a minor is no legal obstacle in the way of the other members entering into a bona fide partition arrangement, so long as the rights of the minor are properly safeguarded. [P 544 C 1]

(d) Civil P. C., O. 7, R. 7—Prayer for possession of some properties only and declaration against others—Objection that prayer should have been respecting all property is not tenable in second appeal.

Where the plaintiff asked for possession in respect only of some properties and for declaration in respect of some other properties, it cannot be allowed to be argued for the first time in second appeal that the plaintiff should have prayed for possession in respect of all the properties. [P 544 C 1, 2]

K. P. M. Menon—for Appellants.

K. P. Ramakrishna Iyer and *K. Krishna Menon*—for Respondents.

Judgment.—In this case defendants 2, 3, 6, 7, 8 and 9 are the appellants before me. One Pakran had gifted certain properties to his wife and children. A creditor of one of the sons named Kunhi Poker attached the share of Kunhi Poker, when the question arose as to what exactly was the nature of the interest created in the children of Pakran in the properties gifted by Pakran to his wife and children. The question came up for decision before a Full Bench of this Court : *Chakkra Kannan* v. *Kunhi Pokker* (1), and it was decided that the properties gifted by Pakran were tavazhi propertiee of his wife and children and were governed by the incidents of Marumakathayam Law, and that none of the sons of Pakran had any such rights in the properties as could be seized or sold in execution of a decree obtained against him by one of his creditors.

The present suit was instituted by one of the daughters of Path Umma, a sister of the said Kunhi Poker, for a declaration that the partition deed Ex. A entered into on 27th August 1919 between defendant 4, defendant 1 (now deceased) and the children of his elder brother, named Ahmad Kutti, defendants 2 to 9, was not valid and binding on the plaintiff. The plaintiff's case was that the properties being governed by the Marumakathayam Law, the children of Ahmad Kutti had no right to the same

(1) [1915] 39 Mad. 317=29 M. L. J. 481=30 I. C. 755=(1915) M. W. N. 740 (F.B.).

and consequently the arrangment evidenced by Ex. A under which they were given some properties would ipso facto be void and not binding upon the plaintiff who is a member of a Marumakathayam tavazhi. The plea of the contesting defendants was that it was in fact a family settlement, that prior to Ex. A, Ahmad Kutti had in conjunction with his younger brother Kunhi Poker and defendant 4 entered into a karar, which is a virtual partition of the tavazhi properties, under which Ahmad Kutti got his share, Kunhi Poker his share, and defendants 4 and 5, the share due in respect of their mother the deceased Patha Umma, that when the karar (Ex. 1) was presented for registration there were difficulties created by virtue of the provisions of the Malabar Moplahs Act, which had in the meantime come into force and that to clear up the disputes which thus arose among the persons interested, this family settlement Ex. A was entered into. The defendants accordingly relied upon Ex. A as a family settlement and contended that even if the plaintiff were able to prove now that defendants 2 to 9 would not under strict law be entitled to any rights, that is not a ground for upsetting a family settlement bona fide entered into by all the members of the family. Both the lower Courts overruled the contention raised by defendants 2 to 9, decreed the plaintiff's suit, and granted the plaintiff a declaration that Ex. A was not valid and binding on the plaintiff or her puthravakasam tavazhi.

In this second appeal, Mr. K. P. M. Menon, the learned counsel for the appellants, contended that the value of the property covered by the suit was beyond the jurisdiction of the District Munsiff's Court, and that neither the District Munsiff nor the Subordinate Judge had jurisdiction to entertain the suit or appeal, and that the plaint ought to have been returned for presentation to the proper Court. His attention was, however, drawn to the circumstance that though there was a vague allegation in the written statement para. 3, that the suit was not sustainable in this Court, no issue was raised in the trial Court on this question, and though the point seems to have been raised before the lower appellate Court, that Court, as I read its judgment ruled that the question could not be raised at that time as no issue had been taken in proper time. There is also a statement in para. 7 of the lower appellate Court's judgment to the following effect :

"I am of opinion that the court-fee paid and the jurisdiction value shown in the plaint are correct."

The learned counsel argued that, being a question of jurisdiction, he is entitled to raise it even for the first time in second appeal and that the lower appellate Court was not right in not having properly considered this objection. The learned counsel wanted to distinguish the Full Bench decision of this Court in the case reported in *Kelu Achan* v. *Cheriya Parvathi Nachiar* (2), stating that in this case his right of appeal was really affected, and that he could have in case of proper valuation, come straight to the High Court in first appeal when he would be in a position to address the High Court on facts; and he also stated that even the right of appeal to the Privy Council would be prejudiced if the decision of the Full Bench in *Kelu Achan* v. *Cheriya Parvathi Nachiar* (2), is applied to such a case. After considering the question, I am inclined to think that the learned counsel is not entitled to raise this question of jurisdiction for the first time in second appeal. If I agree with his contention, I will have to remand the case to the first Court for recording findings after raising a specific issue on the question and after recording fresh evidence on the point. The general allegation in the written statement to the effect that the suit is not maintainable in this Court is too vague to raise this question, and in any event, could not, unless followed by the necessary steps by way of framing a specific issue, and letting evidence thereon, be made the basis of a contention in second appeal that the question of jurisdiction based upon facts should be allowed to be taken here for practically the first time. It may be that, if I go into the question, I may not be able to satisfy myself that the observation of the lower appellate Court in para. 7 of its judgment (quoted by me that "it was not shown that the value was not correct," should be accepted by

(2) A. I. R. 1924 Mad. 6=46 Mad. 631 (F.B.)

me as the record stands. I propose to rest my judgment on the ground that the question relating to valuation ought to have been specifically raised in proper time, and it not having been so raised, it could not be allowed to be raised for the first time in second appeal. I therefore overrule the contention on that point.

Mr. Unnikanda Menon, who followed his learned senior, in regard to the other portions of the case, contended that the lower appellate Court has not properly understood, much less kept in view, the law relating to family settlements. He argued that the policy of the law was in favour of upholding family settlements and, if the members acted bonr fide when entering into the arrangement for the purpose of settling any disputes that might have arisen in the family, then the validity of the claims put forward by each member should not be too much scrutinised. He also argued that the word "family" occurring in the expression "family settlement" should be construed liberally, and though particular members may not be members of the family in the strict legal sense, if they were relations, then according to the English decision the principle of 'family settlements should be made applicable to a settlement made by persons including such members. He drew my attention to the leading case, *Stapleton* v. *Stapleton* (3).

On behalf of the respondents it was argued that the evidence in the present case is that there was no dispute at all, much less a bona fide dispute, and that Ex. 1 which is really alleged to be the basis of the whole argument, has been found by both the Courts to be a concoction. On the facts, it was submitted, no case arose for interference in second appeal.

To appreciate the facts, it is necessary to state that it was with reference to the very same tavazhi property that the High Court had to lay down the law in the Full Bench case. *Chakkara Kannan* v. *Kunhi Pokker* (1), that the property is governed by the incidents of Marumakathayam Law. It is argued that there was no scope for any doubt at all after that decision whether it was governed by Marumakathayam Law or Mahomedan Law, and whether Ahmad Kutti could be said to have a right to claim his separate share in the property. Ex. 1 was presented for registration after Ahmad Kutti's death. It purports in fact to be a partition deed entered into between Ahmad Kutti, his brother Kunhi Poker, and sister Pathumma's children. The contention of the plaintiff was that Ahmad Kutti did not sign this document, and seeing that after Ahmad Kutti's death his children could not possibly derive any benefit from the property of Ahmad Kutti's branch, with a view to create rights in themselves they concocted Ex. 1, to make it appear that Ahmad Kutti had got himself divided from the other members of the branch. Both the lower Courts have given prima facie good reasons for coming to the conclusion that Ex. 1 was a concoction. I am bound by that finding. If Ex. 1 be a concoction, one fails to see, having regard to the Full Bench decision already referred to, how there could be a claim by Ahmad Kutti's children which might be said to afford occasion for bringing into existence a family arrangement in the shape of a karar like Ex. A. There is also the further fact that under Ex. E some moveable properties of this branch were attached in execution of a decree obtained against a member, and it was held that the properties were not liable to be attached.

In these circumstances excepting the mere statement that there was a family settlement, I am not in a position to say that facts have been established which would, in law, enable me to say that "family settlement" was come to, in the present case. The trial Court, whose finding has been confirmed by the lower appellate Court, has also referred to certain other facts which also go to prove against the bona fides of the arrangement evidenced by Ex. A. Some properties were left out. It was mentioned that it was for the purpose of paying debts binding upon the tavazhi. If that be so, one would expect that the debts would all be mentioned in the settlement and also the value of the property set apart, so that one may be able to see that only as much property as was necessary to pay off the debts has been set apart for the purpose of seeing that the plaintiff was a minor at the time. No doubt the existence of a

(3) White & Tutor's Leading Cases 1 Eq. 234.

minor is no legal obstacle in the way of the other members entering into a bona fide partition arrangement, so long as the rights of the minor were properly safeguarded. In this case, as I have mentioned, the findings are that there was no reasonable ground for entertaining any doubt about the nature of the property, and that the way in which the property was dealt with indicated that the arrangement was not bona fide. The learned advocate for the appellants, argued that even in such a case the only remedy of the minor would be to claim the extra property to make good his due share, or seek any other relief that might he necessary to supplement the original allotment made to him, and not to set aside the family arrangement as a whole. But the difficulty in the present case is that both the Courts have found that there was no pretext for the assumption that the properties were governed by any law other than the Marumakathayam Law. If that be so, there is justification for the finding of both the lower Courts that there was neither a bona fide claim nor a bona fide dispute, nor a bona fide settlement. The children born of male members of a Marumakathayam tarwad are not members of that tarwad. Unless therefore there were facts from which Courts could infer that there were some bona fide disputes which required settlement from the facts found in this case I am not in a position to say that the lower Courts were wrong in finding that the circumttances in this case did not justify the application of the principles regarding family settlements. This would be sufficient to dispose of the second appeal.

The learned advocate next argued that the plaintiff asked for possession in respect only of some properties and for declaration in respect of some other properties, and that the plaintiff ought to have prayed for possession in respect of all the properties. I do not find any discussion in the lower appellate Court's judgment about this point. At the most the result of pursuing this objection would be to allow the plaint to be amended so that the plaintiff may ask for possession in respect of all the properties after paying the necessary court-fee. As I do not find the question discussed in the lower appellate Court's judgment and as the issues framed are not specific on this point, I do not think I would be justified in allowing this point to be raised here at this stage.

Seeing that the findings of fact recorded in the case conclude the matter against the appellants, I do not think it is necessary to pursue any further the interesting questions relating to family settlements which were discussed before me by the learned advocates on both sides. For the above reasons, the second appeal is dismissed with costs. Leave refused. The civil revision petition No. 449 of 1928 also is dismissed with costs.

P.R.S./J.M. *Appeal dismissed.*

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* A. I. R. 1930 Madras 544

RAMESAM AND CORNISH, JJ.

R. Viswanatha Chetty—Appellant.

v.

Official Assignee of Madras and *another*—Respondents.

Original Suit Appeal No. 78 of 1929, Decided on 29th October 1929, from judgment of Waller, J., D/- 9th September 1929 in Insolvency Petition No. 38 of 1929.

(a) Presidency Towns Insolvency Act, S. 11 (b)—Motive for taking particular residence has no bearing on question of "ordinarily resided."

A debtor's motive in taking up his residence in a particular place does not affect the question whether he is to be deemed to have "ordinarily resided" there. [P 545 C 2]

*** (b) Presidency Towns Insolvency Act, S. 11 (b)—Debtor's having dwelling house in ordinary jurisdiction is enough—Whether he resides there actually is immaterial.**

It is sufficient for the requirements of S. 11 (b) that the debtor has had a dwelling house, within the High Court's original jurisdiction limits, available for his occupation as a dwelling house, should he choose to dwell there, although he has ordinarily resided elsewhere and has not actually dwelt in the house within the year previous to the presentation of the insolvency petition: *In re, Nordonfelt* (1895) 1 *Q. B.* 151, *Foll.* [P 545 C 2]

(c) Presidency Towns Insolvency Act, S. 24—Adjudication should be on proper petition—If it is wrongfully obtained Court can rescind order of adjudication.

The allegation by the petitioner debtor of inability to pay his debts is not a mere matter of form, but goes to the foundation of the debtor's right to claim the benefit of the Insolvency Act. The Court, therefore, ought not to make an adjudication except upon a proper petition, and that when it appears that the adjudication has been wrongfully made, the

Court ought to rescind it : *In re, Bond*, 21 *Q. B. D.* 17, *Foll.*; and *A. I. R.* 1928 *Mad.* 394, *Ref.* [P 546 C 2]

M. P. Sundararaja Iyer — for Appellant.

V. Varadaraja Mudaliar — for Respondents.

Judgment.—The question raised in this appeal is whether one K. Subbaraya Chetty was properly adjudicated an insolvent. The appellant is a creditor of the debtor and it appears that on 26th January 1929 he obtained a decree for Rs. 10,000 against him. Two days later, that is, on 28th January, the debtor filed his own petition to be adjudged an insolvent, and he was adjudicated insolvent on the same date. In para. 12 of his petition the debtor made the following statement :

"The liabilities of the petitioner amount to about Rs. 55,000 but many of the debts have to be carefully enquired into and investigated and assets which the petitioner is likely to get as his half share in the propetties left by his father will be about Rs. 40,000 and the same is not sufficient to discharge the liabilities."

On 18th February the appellant moved the Court to annul the adjudication, alleging in his affidavit in support of motion that the adjudication was without the jurisdiction of the Court inasmuch as the debtor was "a permanent resident" of Tiruvattiyur. On 21st February the debtor filed his schedule in which he declared that on the date of the order of adjudication his liabilities were Rs. 49,100 and his assets were estimated to produce Rs. 76,550. On 8th March the debtor filed a counter affidavit in which in denial of the allegation in the appellant's affidavit he asserted that he had been "a permanent resident of Madras living at No. 47, Erulappan Street, Madras" and that it was owing to warrants obtained by his creditors that he was temporarily staying at Tiruvattiyur. In reply to this affidavit the appellant on 15th March filed a further affidavit in which in para. 2 he submitted that according to the debtor's admission in his schedule his assets exceed his liabilities and that he should not have been adjudicated an insolvent. The learned Judge dismissed the appellant's motion upon the ground that admittedly the insolvent had two houses in Madras and had lived there within a year before the presentation of the petition, and he thought it unnecessary to hear evidence that the debtor had been in occupation of the houses. He declined to consider the other objection because the appellant had not raised it in his affidavit. Two points have been argued before us in appeal: firstly, that the evidence establishes that for more than a year before the presentation of the petition the debtor "has ordinarily resided" at Tiruvattiyur outside the limits of the High Court's insolvency jurisdiction; and, secondly that the debtor's adjudication having been obtained upon an untrue allegation as to his inability to pay his debts ought to be annulled.

It appears from the documentary evidence tendered by the appellant that from July 1926 to April 1928 letters and documents were being addressed to the debtor at his house No. 11, South Mada Street, Tiruvattiyur. The debtor in his affidavit has explained that this was only a temporary residence for the purpose of keeping away from the warrants of his creditors. That may very well be the explanation but the debtor's motive in taking up his residence in a particular place cannot affect the question whether he is to be deemed to have "ordinarily resided" there; and in our view the evidence justifies the conclusion that for more than a year before January 1929, Tiruvattiyur is the place where the debtor "has ordinarily resided."

The words of S. 11 (b), Presidency Towns Insolvency Act, are :

"The debtor, within a year before the date of the presentation of the insolvency petition, has ordinarily resided or had a dwelling house . . . . . within the limits of the ordinary original civil jurisdiction of the Court."

But the Act -vide S. 13 (5)- contemplates the possibility of the debtor having ordinarily resided in one place and having had a dwelling house in another. We think that it is sufficient for the requirements of S. 11 (b) that the debtor has had a dwelling house, within the High Court's jurisdiction limits, available for his occupation as a dwelling house, should he choose to dwell there, although he has ordinarily resided elsewhere and has not actually dwelt in the house within the year previous to the presentation of the insolvency petition. This view appears to us to be justified by *In re Nordenfelt* (1) where it was held by the Court of appeal that the

(1) [1895] 1 Q. B. 151.

debtor having in fact abandoned his dwelling house and gone abroad could not be deemed to have had a dwelling house within the jurisdiction. But the decision there turned on the fact of abandonment. "The debtor had, no doubt" said Rigby, L. J.:

"had a dwelling house at Bakenham, and he might very easily after he went away to Paris have adopted the house again as his dwelling house. But when it appears, as it does, that he offered all his furniture in the house for sale, and had that which was not sold packed up in such a way that it could not, without some trouble and expenditure, be placed in a position to be used, I am satisfied that he had abandoned the house as his dwelling house before the commencement of the critical year. I am satisfied also that he did nothing during the year to adopt it again as his dwelling house."

It appears to us upon the evidence that the debtor had a house in Erulappan Street, Madras, available as his dwelling house within the year preceding the insolvency petition. This is admitted by the appellant in his plaint dated 17th January 1929 and there is certainly no evidence that he had abandoned it as a dwelling house when he went and took up his residence in Tiruvattiyur. We, therefore, hold that the Court had jurisdiction to adjudicate him an insolvent.

The question then is whether the debtor ought to have been adjudicated an insolvent. A debtor commits an act of insolvency under S. 9 (iii) (f) of the Act "if he petitions to be adjudged an insolvent" and he may be adjudicated an insolvent on that petition (S. 10). But a debtor is not entitled to present an insolvency petition unless (inter alia) his debts amount to five hundred rupees (S. 14) (a). S. 15 (1) provides:

"A debtor's petition shall allege that the debtor is unable to pay his debts, and, if the debtor proves that he is entitled to present the petition, the Court may make an order of adjudication unless in its opinion the petition ought to have been presented before some other Court having insolvency jurisdiction."

The reason for the requirement of the debtor's allegation that he is unable to pay his debts is that a debtor petitioner's only justification for obtaining the benefit of the Insolvency Act is his inability to pay his debts. It is plain from the debtor's schedule in the case before us that the statement in para. 12 of his petition was a most misleading and inaccurate allegation. If his schedule, which has the sanction of the debtor's solemn affirmation, is to be taken, as what it is stated to be, "a full, true and complete statement" of the debtor's affairs on the date of the order of adjudication, it is obvious that he was not "unable to pay his debts" at the time of adjudication, for the estimated assets are very considerably larger than the amount of liabilities. Now it has been held by a Bench of this High Court in *Alamelumanga Thayarammal* v. *Balusami Chetti* (2) that the required allegation by the petitioner debtor of inability to pay his debts is not a mere matter of form, but goes to the foundation of the debtor's right to claim the benefit of the Insolvency Act. In that case it was found that the debtor's statement of inability to pay her debts was deliberately false. But we do not think it makes any difference whether the allegation is deliberately untrue or whether the debtor's misstatement is due to carelessness or to an honest mistake. The learned Judges in the case reported in *Alamelumanga Thayarammal* v. *Balusami* (2) appear to have proceeded on the ground that the Insolvency Act is only applicable in cases of a debtor's inability to pay his debts. We do not altogether agree with this line of reasoning, because it is only necessary to look at the acts of insolvency described in S. 9 of the Act and at S. 13 (4) (b) to see that a debtor may be adjudicated upon a creditor's petition, notwithstanding that the debtor is a solvent person when he commits the act of insolvency. We prefer to base our decision upon the principle stated by Cave, J., in *In re Bond* (3) that the Court ought not to make an adjudication except upon a proper petition, and that when it appears that the adjudication has been wrongfully made, the Court ought to rescind it. The adjudication here was made upon a petition which was not a proper petition. It was an abuse of the process of the Court; and we accordingly set aside the adjudication. The appeal is allowed with costs throughout. Costs to be taxed.

P.R.S./V.S. *Appeal allowed.*

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(2) A. I. R. 1928 Mad. 394.
(3) [1888] 21 Q. B. D. 17.

A. I. R. 1930 Madras 547

CURGENVEN, J.

(*Dasari*) *Lakshmiayya*—Plaintiff—Appellant.

v.

(*Koppolu*) *Murahari* and *another*—Defendants—Respondents.

Second Appeal No. 950 of 1926, Decided on 19th November 1929, against decree of Dist. Judge, Guntur, in Appeal Suit No. 258 of 1924.

(a) Legal Practitioner — Erroneous admission on point of law by legal adviser does not bind his client but it is doubtfull whether principle applies to case where to reopen topic would demand remanding of case (*Quaere*).

An erroneous admission upon a point of law made by legal adviser does not bind his client. Whether this doctrine extends to a case where to reopen the topic which was closed might entail the remanding of the case to the lower Court for a further finding on facts is not very clear : 18 *Mad.* 73 ; 23 *M. L. J.* 327 ; 27 *Cal.* 156 and 27 *C.L.J.* 447; *Ref.*[P 547 C 2 P 548 C 1]

(b) Evidence Act S. 92, proviso 6 — Oral agreement showing nature of document is not admissible but Court can look into circumstances if document is of doubtful tenor.

Proof of an oral agreement to show the nature of a document is excluded by S. 92. Such proof cannot be admitted under proviso 6. All that Court has to do is that if the document is of doubtful tenor, it should in construing it look into surrounding circumstances. A contemporaneous oral agreement contradicting the terms of a document cannot be admitted under the proviso ; *A. I. R.* 1924 *P.C.* 226 *A. I. R.* 1925 *P.C.* 75 *A. I. R.* 1929 *Mad.* 807 *Ref.* 22 *All.* 149 and 28 *Cal.* 256, *Dist.* 25 *Mad.* 7. *Foll.* [P 548 C 2]

(c) Contract Act, S. 23—Document executed for immoral consideration — Circumstance not pleaded — Still Court can dismiss claim.

A document having been executed for an immoral consideration, even though the circumstance may not be pleaded by either party it is open to, if not incumbent upon, the Court to dismiss a claim which is so tainted. 30*C.L.J.* 24, *Rel. on.* [P 549 C 1]

Ch. Raghava Rao—for Appellant.

B. Satyanarayana—for Respondents.

Judgment.—The plaintiff sued to set aside a sale deed which he executed to defendant 1, a dancing girl, upon the allegation that it was intended not to confer an absolute title upon her but merely to afford security for her maintenance as long as she lived with him. The sale deed recites a consideration of Rs. 1,500 and it was defendant 1's case that this money actually passed. Defendant 2 is a purchaser of the suit property from defendant 1. Defendant 1 further denied that the plaintiff had been keeping her. The District Munsiff found that relations of this character had subsisted between them, that defendant 1's allegation with reference to the consideration of Rs. 1,500 was untrue and that the plaintiff was precluded by the terms of S. 92, Evidence Act, from establishing his plea that the transaction was other than the sale deed makes it out. He then found upon the evidence that there was a valid transfer and that the consideration for it was past cohabitation of defendant 1 with the plaintiff. He accordingly dismissed the suit. The plaintiff appealed to the District Court, Guntur, and the learned vakil who appeared for him conceded it to be true that the plaintiff had been keeping defendant 1, who did not dispute that her version with regard to the consideration was untrue, and further agreed that the view of the District Munsiff that S. 92, Evidence Act prevented the plaintiff from establishing his case was correct. Both the lower Courts, I may add, have found that the sale deed could not have been executed merely nominally in order to screen the properties from creditors (a plea not actually raised in the plaint) but that it was intended to be acted upon. The only argument that remained for the learned District Judge to consider, therefore, was whether on the finding that the consideration consisted in previous cohabitation the plaintiff was entitled to a decree because this was an immoral purpose.

The grounds raised here in second appeal are firstly that the pleader who appeared for the plaintiff was wrong in giving up the argument with regard to S. 92 and secondly that the finding as regards previous cohabitation upon which the lower Courts acted runs counter to the pleadings.

Upon the first of these points a number of cases have been cited to me to establish the principle that an erroneous admission upon a point of law made by a legal adviser does not bind his client, and stated in the abstract, thereis no doubt ample authority, as, for instance, *Krishnasami Ayyangar* v. *Rajagopala Ayyangar* (1), *Rama Iyengar* v. *Kasanivendi Iyengar* (2), *Beni Pershad*

(1) [1895] 18 Mad. 73.
(2) [1912] 23 M. L. J. 327=16 I. C. 746.

Koeri v. *Dudhnath Roy* (3), and *Secy. of State* v. *Silaprasad Jana* (4). Whether this doctrine extends to such circumstances as the present, where to re-open the topic which was closed might entail the remanding of the case to the lower Court for a further finding on facts I am not very clear. The inconvenience of allowing such an indulgence is manifest. I decided, however, to hear what the appellant had to say upon the application of S. 92, Evidence Act, and in view of what I propose to hold the other question may remain open. The sale deed Ex. 1 professes to sell to defendant 1 wet land for Rs. 1,500 the amount having been received and delivery having been given. It declares her free to keep the same in her possession thenceforward and the plaintiff promises that neither he nor his heirs shall raise any dispute in respect of it. It is clearly an absolute conveyance. It is equally clear that the document of the nature referred to in the plaint would be of a totally different character. It can scarcely be doubted, therefore, that proof of any oral agreement to show that the sale deed is in fact a document of that character would be excluded by the terms of S. 92. It is sought to bring the case under proviso 6, which says that

"any fact may be proved which shows in what manner the language of a document is related to existing facts".

I have been shown no authority by which a transaction in any degree resembling that now before me has been held proveable under proviso 6. There is a recent case, *Venkataratnam* v. *Venkatasami* A. I. R. 1929 *Mad.* 807, decided by Anantakrishna Ayyar, J., in which land was sold for Rs. 2,000. So far as I understand that case it was quite unnecessary to impugn the true nature of the sale and the matter turned upon whether a certain unregistered kararnama Ex. 1, to be read with the sale deed, was admissible in evidence. The learned Judge held that it was. There is a series of cases illustrated by the two Privy Council cases *Narasingerji* v. *Parthasarathi Rayanim Garu* (5), and *Baijnath Singh* v. *Hajee Vally Mahomed* (6), relating to mortgage by conditional sale. I think that what all those cases are authority for is the position that the surrounding circumstances must be looked into in the construction of a document of doubtful tenor. There is no question in them of a comtemporaneous oral agreement contradicting the terms of the document. As their Lordships stated in the latter of the two cases cited above, in the view taken of the case neither S. 92 nor the ruling under the section, *Balkishen Das* v. *Legge* (7), has any application. *Khankar Abdur Rahman* v. *Ali Hafez* (8) has not I think, been followed in Madras where for all that I have been shown *Achutaramaraju* v. *Subbaraju* (9), is still good law. The point made in the latter case is that proof of such conduct could be relevant only on the ground that the conduct leads to the inference that there was a contemporaneous oral agreement or statement between the parties that the absolute sale deed was to operate otherwise than appeared upon its face, and accordingly that such evidence must be excluded if the terms of S. 92 are not to be circumvented. I am clear accordingly that the District Munsiff was right in excluding proof of the alleged agreement set up by the plaintiff and it would have saved a good deal of time here if the learned advocate had followed the course taken in the lower Court and given up the point too.

The second point relates to the finding that past cohabitation formed the consideration for the sale deed. It is true that this was the case of neither of the parties and in ordinary circumstances it would no doubt be irregular for the Court to record and act upon such a finding. The circumstances, however, are peculiar, inasmuch as the finding involves the plaintiff having executed the document for an immoral consideration. The learned District Judge has adverted to the point in his judgment apparently in response to an objection taken there such as is taken again here and what he says virtually is that the Court, finding a certain set of circumstances to exist and to show

(3) [1900] 27 Cal. 156 = 26 I. A. 216 = 7 Sar. 580 (P.C.).
(4) [1918] 27 C. L. J. 447=45 I. C. 983.
(5) A. I. R. 1924 P.C. 226=47 Mad. 729 = 51 I. A. 305 (P.C.).
(6) A. I. R. 1925 P.C. 75=3 Rang. 106 (P.C.).
(7) [1900] 22 All. 149 = 27 I. A. 58 = 7 Sar. 601 (P.C.).
(8)]1901] 28 Cal. 256=5 C. W. N. 351.
(9) [1902] 25 Mad. 7=11 M. L. J. 370.

that there was an immoral aspect to the bargain, is not bound to give the plaintiff a decree. I think that although neither of the parties pleads these circumstances it is open to, if not incumbent upon, the Court to dismiss a claim which appears to be so tainted. This is laid down in *Atikulla* v. *Habibulla* (10) at p. 774 (of 53 *I. C.*) in the following terms :

"It is well settled that if the illegality of a transaction is brought to the notice of the Court. the Court will not assist the person who invokes its aid. even though the defendant has not pleaded the illegality and does not wish to raise that objection."

and authority for this view is quoted. I cannot find accordingly, if the evidence shows that there was a consideration of this character, that the Courts have committed any irregularity in proceeding upon that footing. The learned District Judge has gone on to discuss whether the plaintiff was in pari delicto with defendant 1 and has answered that question in the affirmative. It is unnecessary for me to go over again the authorities which he has cited as I am in agreement with him upon the conclusion of law reached

On these grounds I consider that the dismissal of the plaintiff's suit must be upheld. The second appeal is dismissed with costs.

P.R.S /V.B. *Appeal dismissed.*

(10) [1919] 30 C. L. J. 241 = 53 I. C. 773 = 24 C. W. N. 306.

A. I. R. 1930 Madras 549

KUMARASWAMI SASTRI AND WALSH, JJ.

Kumaraswamy Asary and *others*—Appellants.

v.

(*Poojari*) *Lakshmana Goundan* and *others*—Respondents.

Appeal No. 439 of 1927, Decided on 7th November 1929, from decree of Sub-Judge, Salem, in Original Suit No. 4 of 1916.

(a) Hindu Law—Religious Endowments—Temple—In absence of grant usage determines its nature.

In the absence of a written grant creating a trust or where the terms of a written grant are ambiguous or where there is no direct evidence of the terms of the grant, usage can be looked into to determine the nature of the grant : 40 *M. L. J.* 289 and 30 *A. I. R.* 1921 *Mad.* 467, *Dist.* (*English cases Referred.*) [P 552 C 1]

(b) Hindu Law — Religious Endowment—Creation of trust—Term reserving surplus offerings for founder and his family—Trust is not illegal if law of perpetuities is not offended.

There is nothing illegal in the founder of a temple in creating a trust and reserving for himself and his family the surplus offerings left over after paying for the maintenance of the temple provided that it does not offend against the law of perpetuities : 40 *M. L. J.* 289 ; *A. I. R.* 1923 *Cal.* 60 and *A. I. R.* 1926 *Mad.* 538, *Ref.* [P 552 C 2]

K. V. Krishnaswami Iyer, *K. S. Sankara Iyer* and *B. V. Vishwanatha Iyer*—for Appellants.

T. Rangachariar, *A. Srirangachariar* and *S. Ramanujam*—for Respondent.

Judgment. — This is an appeal against the judgment and decree of the Subordinate Judge of Salem in O. S. No. 4 of 1916, dated 30th November 1925. The suit relates to the temple of Sri Kandasami in the village of Kalipatti in the Salem District. The temple was founded by one Lakshmana Goundan, the grandfather of defendant 1. He died about the year 1856 or 1857. Defendant 2 who was the son of defendant 1 was added as a party. He has since died and his sons have been added as his legal representatives. The plaintiffs are Hindu worshippers of the temple. They instituted the suit for a scheme of management. Defendant claimed that the temple was a private temple. The Subordinate Judge, Mr. Narayana Ayyar, found it to be a private temple. On appeal to the High Court, Abdur Rahim and Oldfield, JJ., differed, the former finding that the temple was a public temple and the latter holding it to be a private one. A decree was therefore made dismissing the appeal and from that decree the plaintiffs appealed under the Letters Patent, and three learned Judges who heard the appeal, Sadasiva Ayyar, Seshagiri Ayyar and Burn, JJ., delivered separate but concurring judgments finding that the temple was a public one. Against this an appeal was preferred to the Privy Council who decided that the temple was a public one. The suit was therefore remanded for framing a scheme. It is against the scheme so framed that the present appeal is preferred and the main question at

issue is whether the lands which now stand in the name of defendant 1 should be treated as temple property or whether they should be held to belong to defendant 1. The learned Subordinate Judge has held that they belong to defendant 1.

That the properties in dispute stand in the name of defendant 1 is not denied. The argument of the learned advocate for the appellants is briefly this: The temple having been found to be a public one, it must be presumed that all offerings made to the God were the property of the God and that as it is admitted that the suit properties must have come practically entirely out of the offerings to the God, they must be held to be the property of the God of which defendant 1 was only a trustee. It is further argued that the learned Subordinate Judge wrongly threw the onus of proof under these circumstances on to the plaintiffs. For the other side, it is contended that the temple having been admittedly a fairly recent one and there being no written deed of the dedication, usage must determine the nature of the trust and that in fact the gifts were offered on the understanding that, after defraying the expenses of the temple, the remainder should go to the founder and his heirs. It is also contended that the onus of proof that these lands which stand in the name of defendant 1 are temple properties was rightly laid on the plaintiffs. The whole evidence being before us, the question of onus is not very important.

The history of this temple has been narrated in several judgments in the case and it may be summed up in the words of their Lordships of the Privy Council :

"Lakshmana Goundan" the grandfather of defendant 1" lived in a small house which belonged to him in the village of Kalipatti. He was a devout Hindu and originally a poor man. He maintained in his house an idol of the goddess of Amman, which was the private idol of his family. He was also a devout worshipper at the public temple at Palni at which there was an idol of the God Subramaniaswami, and he made yearly pilgrimage to Palni with ofierings to that God. It is said, and probably with truth, that he dreamt that he should install at his house at Kalipatti an idol of the God Subramaniaswami and that the God would come to his house and enable him to foretell events. He did install that idol at his house, adopted the ritual which was followed at Palni, and allowed Brahmins and other Hindus of various castes to worship the idol as if it was a public idol. He acted as the pujari of the idol and received the pujari offerings made to the idol by worshippers and fees which he charged in respect of processions and other religious services. He obtained a great reputation as a holy man and as being enabled by the God to foretell events."

Their Lordships then proceed to describe how the number of worshippers increased and extensions to the temple were made by Lakshmana Goundan. They proceed :

"On certain days in each week the Hindu public was admitted by him free of charge to worship in the greater part of the temple, to one part only on payment of fees, and to the inner shrine apparently not at all. With the income which he derived from offerings and fees at the temple he efficiently maintained the temple as if it were a public temple and discharged all the expenses connected with the temple and the worship of the idol there. That may be assumed from the roputation which the temple acquired against the Hindus. No accounts have been produced, probably he kept none, but it may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable property which he possessed before he died."

The only fact that may be added to this is that apparently the date of his bringing the God from Palni was about 1821 and their Lordships find that the temple itself was founded between 1841 and 1856.

In dealing with this appeal, it has to be remembered that the sole point decided by the Privy Council was that the temple was a public and not a private one. The remarks beyond this point made by the learned Judges of this Court and which have been sought to be used as arguments, however valuable they may be, are obiter. Now we think it is clear in a case of this sort where the temple is of comparatively recent foundation and its origin well known and where there is no deed of gift or dedication the nature of the grant must be determined by the usage. It has to be remembered that the idol was brought by Lakshmana Goundan, from Palni to his house a considerable time, some twenty years or more, before the temple was built. The growth of the temple and of its importance was gradual. The allegation of the plaintiffs that there was a temple in the place before has been found by all Courts to be untrue. Seshagiri Iyer, J., says at p. 306 :

"In the absence of any writing and in the absence of any evidence of persons who were alive in 1819, it is not possible to say when the dedication was made. It is the usage in the temple and it is the practice that has been observed that should guide us in determining this point. From this point of view, I have no hesitation in holding that the temple was dedicated at least during the lifetime of Lakshmana Goundan."

Burn, J., says ;

"As might be expected in the circumstances, the progress of the building was gradual. The main features had, however, been completed by the time of Lakshmana Goundan's death in 1857."

It was sought to be argued (1) that the usage could not be held to evidence the nature of the trust and (2) that a trust by which the surplus money after paying for the maintenance of the temple would go to the pujari would not be a legal trust.

As regards the first point no satisfactory authority was quoted. The following cases were relied on : *Puraviyu Goundan* v. *Poonachi Goundan* (1). That was a case where there was no image of the goddess in the temple and she was represented by akasa or emptiness. It was nevertheless held that the offerings to the pujari in that case were made to the goddess and that the lands endowed to the temple in that case were the property of the goddess and not that of the pujari. But in that case the lands had been given to the temple by a poligar family. There was an inscription describing the dedication on the ceiling and the lands stood in the inam register in the name of the goddess. The next case is *Srinivasacharyulu* v. *Patyanga Rao* (2). There the grant was expressly to the God and the family of the defendants were appointed as archakas. They claimed that the lands belonged to them subject only to the burden of service in the temple. It was held that the grant being clearly to the God, the usage according to the defendants could not be invoked in interpreting the grant. That has no application to a case where the grantor himself founded the temple and there is no written deed of grant. In such cases the only means of determining the nature of grant is by the usage. In *Attorney General* v. *Sidney Sussex College* (3), at p. 732, Lord Hatherley, L. C. says :

"I think the appellants are entitled to apply that principle of the Court which says, that if there be any ambiguity, the course of construction and action upon the bequest may be called in aid, as inferring that the persons who are concerned in the trust have not been committing a breach of trust from the commencement downwards to the present time. The reason why the Court relies upon that rule with reference to charties, where there is anything doubtful in the construction of the will, is, that there have been persons alive who were competent to controvert any such conclusion, and it is not to be assumed that, where many persons were interested in controverting such a conclusion, a course of action has been adopted which has been a plain and clear breach of trust."

In *Attorney General* v. *Bristol* (4), at p. 649, Lord Chancellor Eldon, remarks:

"The construction in these cases I take it, must be considered to go upon intention, and the different rules furnished by the cases I have mentioned, are to be considered as indicia of the intention. Was it then the intention of the donor that Bristol should be a trustee . . . As far as I have read these ancient cases, they state it to depend upon the intention of the donor, and that one way of finding out that intention, is to enquire, whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed amongst the objects of the charity."

In *Attorney General* v. *Corporation of Rochester* (5) at p. 1089, Lord Turner, J. says :

"Undoubtedly, if an instrument be doubtful in its terms contemporaneous usage may be referred to and if there had been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument the Court will lean to that construction of the instrument provided it be doubtful which will best correspond with the mode in which the funds have been so long a period applied."

In *Attorney-General* v. *Skinner's Company* (6) at p. 470, Vice Chancellor Sir L. Shadwell quoted Lord Holt to the following effect:

"I do agree there is no statute of limitation shall bar a charity, but in a thing that is obscure and dark, and there had been an enjoyment for a long time, I think an enjoyment for a long time, without interruption is a great evidence of a right; for quiet enjoyment for a long time does presume a rightful enjoyment."

Turning to the Indian cases, in *Abhiram Goswami* v. *Shyama Charan Nandi* (7) it was held that:

(1) [1921] 40 M. L. J. 289.
(2) A. I. R. 1921 Mad. 467.
(3) [1869] 4 Ch. 722=38 L. J. Ch. 656.
(4) 37 E. R. 640.
(5) 43 E. R. 1079.
(6) 58 E. R. 468.
(7) [1909] 36 Cal. 1003=4 I. C. 449=36 I. A. 118 (P.C.).

"though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that that land formed an endowment for the purpose, yet it was a fact that might well be taken into consideration, when, as in this case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language."

The rule therefore is quite clear that in the absence of a written grant or where the terms of the written grant are ambiguous or where there is no direct evidence of the terms usage can be looked to determine the nature of the grant.

As regards the second contention that such a grant as is contended for by the defendants in the present case is not a legal one, no authority has been quoted. Reliance is placed on certain remarks of Seshagiri Iyer, J. to the following effect;

"It would undoubtedly be regarded as a fraud practised upon the public that the income derived with reference to the sanctity and holiness of a shrine should be regarded as the perquisites of the persons in charge."

and

"that it would strike at the very root of religion in India to hold that the person who is permitted by the worshippers to receive the offerings is the owner, and not simply the trustee of the income."

These must be considered as obiter dicta and in *Puraviya Goundan* v. *Poonachi Goundan* (1) at p. 299, Oldfield, J. criticises them by saying that on this basis:

"it is difficult to see how the existence of any private temple at all can claim legal recognition."

There are many temples where the archakas after performing puja and maintaining the temple are entitled to the surplus. On the abstract question of law, we may quote Tudor on Charities, Ch. 5, 4th Edn. p. 115:

"The surplus income, and the benefit of any subsequent increase, which the charities do not take. may be specifically disposed of either by the divisees being directed to retain it for their own benefit or by its being directed to be applied in other directions"

In *Rambrahma* v. *Kedar* (8), it was laid down that a charitable corporation in so far as it is charitable, is the creature of the founder, and that the proof of intention of the founder, of a religious institution becomes almost conclusive, where the usage is immemorial, though the intention may be presumed from a number of instances extending over a limited period, provided only that the existence of an invariable practice is made out by clear and unambiguous evidence; and that the Court will be slow to draw an inference which will defeat a right that has been exercised without question during a long period; and unless such inference is irresistible the Court will presume everything that is reasonably possible to presume, in favour of such a right. In *Chinnatha Rowther* v. *Karunji Andi* (9), it was held that a member of a family of pujaries entitled to the surplus income of the suit properties belonging to a temple after meeting the puja and other expenses of the temple is entitled to maintain a suit to set aside certain alienations made by certain members of the family as not binding on the temple and to recover the properties on behalf of the trust.

In the present case it is not denied that the temple had been maintained and greatly improved by the founder and defendant 1. These improvements were made at a cost of between Rs, 50,000 and Rs. 1,00,000. We are quite clear that there would have been nothing illegal in the founder of the temple having created a trust to the effect that the temple should be maintained out of the offerings to the idol and that the balance should go to himself and his family, provided this did not offend against the law of perpetuities or such other provisions with which we are not concerned. Their Lordships of the Privy Council say as quoted above:

"It may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable property which he possessed before he died.'

They do not appear to think that this would be any violation of the trust merely because the temple is found to be a public one. In fact the scheme now provides in section 24:

"The pujari shall not ordinarlly be paid any salary for his work and duties from temple funds but if after the temple liabilities are discharged in full at the end of any year after audit it be found that there is a balance of Income over expenditure the pujari will be paid 50 per cent. of that balance amount as his honorarium for that year."

This according to the contention of the learned advocate for the appellants would be an illegal breach of the trust as he contends that all the money be-

(8) A. I. R. 1923 Cal. 60.

(9) A. I. R. 1926 Mad. 538,

longs to the deity. It is difficult to see on his argument how the pujari could even maintain himself out of such gifts.

The origin of the temple has been recounted and we have to try and determine what was the intention of the original founder. Lakshmana Goundan was probably a very pious man but the evidence is perfectly clear that he did not regard all the offerings made or money taken as the property of the deity. It has to be remembered that besides his position as a pujari he was also considered as a seer. Their Lordships of the Privy Council say as quoted above:

"it may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable property which he possessed before he died."

This is not only an assumption but it is proved to the hilt by evidence. (Their Lordships then discussed the evidence on this point and proceeded). Although admittedly the bulk of the money used to purchase the properties in dispute must have come out of the temple offerings, still it appears from the evidence of D.W. 10 that abhishekam money went to defendant 1. He says:

"10 annas should be given for abhishekam. Without that it will not be done."

The witness was quoted to us as saying that neither neivedyam nor abhishekam money was paid to the pujari, but as regards abhishekam this does not appear to be correct. However, the matter is not really material as this is not a case of mixing trust money with private money. For this reason we think that the cases quoted to us with regard to mahants or matathipathis or of trustees who mix private money with trust money have no bearing on the present question and it is not necessary to refer to them. We see no reason to suppose that the trust was not one by which the founder maintained the idol and later on the temple and detained the surplus offerings. He not only founded the temple but admittedly he and his successors have greatly enriched and enlarged it. There is no question of breach of trust on the score. We see no reason to hold that the lands in dispute were bought from trust money or in breach of any trust.

That being so, it is not necessary to go into the second ground urged on behalf of the respondents that even if there was a breach of trust, it would amount to back accounting to enforce restoration of these lands and that this should not be done where the breach of trust had been due to a bona fide mistake. In this connexion the *Attorney-General* v. *The Master, Wardens etc. of the Wax Chandlers Company* (10), at pp. 14 and 23 and *Kelu Achan* v. *Sivarama Pattar* (11), are quoted but we consider it unnecessary to discuss the point.

Turning to the scheme itself, the appellants did not ask for the removal of defendant 1. Whatever may be his character otherwise, he had done a great deal for the temple and the remarks passed about him in various judgments show that the institution will probably suffer if he is not retained. It is, however, argued that owing to his conduct since he has been appointed as receiver, two co-trustees should be added. We think on the whole that this would not conduce to the smooth administration of the temple and that paras. 14 and 21 of the scheme will operate as a sufficient check upon the conduct of defendant 1. Para 25 which provides for the modification of the scheme must be deleted as it has been held that such an order is ultra vires. In other respects, we see no reason to modify the scheme.

The memorandum of cross-objections as regards jewels is not pressed.

In the result the appeal is dismissed and the judgment and decree of the lower Court with the modification noted above are confirmed. The Privy Council allowed the costs of the suit from the temple funds. We think in the circumstances the costs of this appeal on both sides also should be met from the temple funds.

P.R.S./J.M. *Decree modified.*

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(10) [1873] 6 H. L. 1=42 L. J. Ch. 425=21 W. R. 361=28 L. T. 681.
(11) A. I. R. 1928 Mad. 870.

A. I. R. 1930 Madras 554

RAMESAM AND JACKSON, JJ.

Kalandar Batcha Saib and *another*—Applicants—Appellants.

v.

Jailani Sahib and *others*—Defendants—Respondents.

Appeal No. 443 of 1926, and Civil Revn. Petn. Nos. 637, 682, and 683 of 1927, Decided on 3rd September 1929, against order of Sub-Judge, Mayavaram, D/. 5th October 1926.

(a) Trustee — Appointment of trustee—Considerations for Court.

The question who should be appointed to some extent depends upon the nature of the trust, whether it was regarded as a hereditary trust or whether the trusteeship of each holder ends with him and it is a case of a fresh appointment by Court or some other competent authority. [P 554 C 2]

(b) Mahomedan Law—Wakf—Mutawalli—Office hereditary—Though there is no such absolute right, next heir should not be passed over without some strong reason—If next heir minor, deputy may be appointed.

Where the office of a trustee is hereditary and the person to be appointed is always the next heir, although there is no such absolute right to be so appointed a trustee under the Mahomedan Law, the Court should not pass over the next heir unless there is some strong reason for doing so; and if the next heir happens to be a minor, the minor may be recognized as trustee and a suitable deputy may be appointed : 19 *Cal.* 203; *A. I. R.* 1921 *Mad.* 248; *A. I. R.* 1923 *P. C.* 11, *Rel. on.*

[P 554 C 2, P 555 C 1]

K. V. Krishnaswami Iyer and *K. S. Sankara Iyer*—for Appellant.

A. Viswanatha Iyer, *A. Ramaswami Iyer*, *T. S. Ramaswami Iyer* and *V. Sundaram Iyer*—for Respondents.

Judgment.—This appeal arises out of a suit under S. 92, Civil P.C., for the removal of a trustee and for the appointment of a fresh trustee. The matter came up before us in A. S. 419 of 1924 which was an appeal against what may be regarded as a preliminary decree in the suit. That appeal was filed against the order of the Subordinate Judge removing the trustees, defendants 1 and 2 and recently we disposed of that appeal by confirming the order of the Subordinate Judge. The present appeal arises out of a later stage of the same proceedings. The question arose after the removal of the original trustees as to who should be appointed. There were various applicants. The appellants before us are nephews, sister's sons of defendant 2. C. R. P. 637 is on behalf of the minor son of defendant 3. The boy is aged 9 but it is contended before us that he may be appointed trustee and some respectable person may be appointed deputy to look after the management until he attains majority and becomes himself competent to look after the affairs of the darga. The respondent in this appeal is the lineal descendant in the senior line of Shah Phool, the second son of Shah Yedulla who was considered by his father unfit for managing these charities. By Ex. 16 Shah Yedulla entrusted the management of all the three trusts in Killai and Nawabpet which are not involved in this suit and Vellathorai which is the subject matter of this suit to his eldest son Gulam Mohideen. Two members of a junior branch of Shah Phool's line also file a C. R. P. 682.

The question who should be appointed to some extent depends upon the nature of the trust, whether it was regarded as a hereditary trust or whether the trusteeship of each holder ends with him and it is a case of a fresh appointment by Court or some other competent authority. The history of the devolution of the trust shows that in some form or other it was regarded as hereditary. The original charities were founded by Rahimathulla. He was succeeded by his son Shah Yedulla. Shah Yenulla by deed, Ex. 16 appointed his eldest son Mohideen for all the three charities and Mohideen by Ex. 6, appointed his eldest son Fariduddin Attar for the darga of Killai, the second son Mahomed Ghouse for Nawabpet and by Ex. 7 his third son Gulam Jailani for the Vellathorai charties which are now in question in this suit. After Gulam's death it descended to his second son Khadame Hussain by Ex. 8. He having died issueless, he gave the endowment to his brother Shah Yedulla by Ex. 9 and defendant 2 is the son of Shah Yedulla last mentioned. It is true that in the case of the last four or five successions each person appoints the successor under a document, but, even if it were so, it is clear that the person appointed is always the next heir and, as I said, in some form or other the parties seem to have considered it hereditary. At the same time it must be remembered that there is no

absolute right to be appointed trustee under the Mahomedan Law even if it is a case of hereditary trust. This is what we said in the connected judgment relating to the other two dargas, namely, A. S. 186 of 1923. But still if the original idea is that it should descend hereditarily, that fact may at least be remembered in making an appointment. Where the next heir happens to be a minor, the minor may be recognized as a trustee and a suitable deputy may be appointed. This is the view taken by Mr. Amir Ali in his Mahomedan Law of Gifts and Wakfs" p. 445 and Tyabji's "Mahomedan Law," p. 609. These authorities were approved in *Piran* v. *Abdool Karim* (1) : see also *Secy. of State* v. *Ahmed Badsha* (2) and *Akhtari Begum* v. *Dilljan* (3). The net result of the matter is to some extent is in the Court's discretion but where the trust is hereditary we need not unnecessarily pass over the next heir unless there are strong reasons for doing so. We leave it to the Subordinate Judge to determine upon some respectable Mahomedan from out of the Mahomedans in the locality to look after the endowment as deputy during the minority of the minor. We allow, therefore, the Revision Petition No. 637. The appeal and memorandum of objections are dismissed. The petitioner in C. R. P. 637 will recover his costs from the trust estate. C. R. P. 682 and 683 are dismissed.

P.R.S./V.B. *Order accordingly.*

(1) [1892] 19 Cal. 203.
(2) A. I. R. 1921 Mad. 248=44 Mad. 778 (F.B.).
(3) A. I. R. 1923 P. C. 11.

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* A. I. R. 1930 Madras 555

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

(*Nucherla*) *Chengiah* and *another* — Plaintiffs—Appellants.

v.

(*Parasram*) *Subbaraya Aiyar* and *others*—Defendants—Respondents.

Second Appeal No. 409 of 1925, Decided on 24th July 1929, from decree of Dist. Judge, Cuddappah, in Appeal Suit No. 140 of 1923.

*** (a) Hindu Law—Succession—Succession among bandhus of same class how regulated.**

In determining priority among bandhus of same class nearness of blood should be considered to be the governing factor unless the contestants are equal in degree in their relationship to the common ancestor in which case efficacy of oblations may be a test for preference : *A. I. R.* 1922 *P.C.* 33, *Foll.*[P 559 C 1]

*** (b) Hindu Law—Succession—Matri Sandhus—Mother's father's sister's grand son is preferred to mother's father's brother's great grand-son.**

As between mother's father's sister's son's son of the last male owner and his mother's father's brother's grandson's son, both being matri bandhus, the former succeeds in preference to the latter : *A. I. R.* 1925 *Mad.* 807; *A. I. R.* 1928 *Cal.* 289, *Rel. on* : *A. I. R.* 1925 *Bom.* 451 (*F.B.*), *Doubted.*[P 557 C 2; P 559 C 1]

B. Somayya—for Appellants.

V. Govindarajachari—for Respondents.

Venkatasubba Rao, J.—This appeal raises a question of some importance relating to bandhu succession—a difficult branch of Hindu Law; but we do not think that on that account we need reserve our judgment. The following pedigree sets forth the relationship of the parties.

(For pedigree see p. 556)

Sankariah was the last maleholder. He died leaving his widow Kamakshi. She is said to have made certain alienations in favour of the defendants. In this suit, the plaintiffs impeach those alienations and seek to recover the properties so alienated. The defendants contest the plaintiffs' right and assert that Basayya, shown in the pedigree, is the preferential heir whose existence bars the plaintiffs' right.

The question to be decided is, who is entitled to succeed, the propositus, the plaintiffs or Basayya ?

I may state at once that there are certain rules relating to bandhu succession, in regard to which there can be no controversy at present. They may thus shortly stated:

(1) Bandhus are bhinna gotra sapindas and they fall into three groups.

(1) atma bandhus
(2) pitri bandhus and
(3) matri bandhus

2. The enumeration in the text ascribed to Vridhasatatapa, of the bandhus belonging to each of these three categories, is illustrative and not exhaustive.

3. The right of succession among these three classes is governed by the propinquity of the class, in other words, a pitri bandhu does not succeed until the class of atma bandhus is exhausted and a matri bandhu not until the class of amta bandhus and the class of pitri bandhus are both exhausted.

It follows then that although a claimant in the first group happens to be remoter in degree than a claimant in the second, the former succeeds in preference to the latter. The observations of Sadasiva Iyer, J., in *Subramaniam Mudaliar* v. *Ranganatham Chettiar* (1) at top p. 119 (of 44 *Mad.*) illustrate this point. This rule may be compendiously described as the principle of class propinquity as distinguished from individual propinquity: see *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (2).

The question in this appeal arises in a different form. It is conceded by Mr. Somayya (the learned advocate for the plaintiff, the appellant), and the lower Courts have proceeded upon the footing that both the rival claimants in this case belong to the group of matri bandus. It is on that hypothesis that I proceed to deal with the question. What is the rule to be adopted in the case of competition between bandhus belonging to the same class? The defendants urge that Basayya is fourth in descent from the common ancestor and has therefore to be preferred to the plaintiffs who are fifth in descent; in other words, they contend that affinity or propinquity is the governing test. The plaintiffs urge, on the other hand, that, though they are more remote they are entitled to succeed on the ground of superior efficacy of oblations. This is their primary argument. They also rely on a further ground of preference, that in the case of their opponent, a female intervenes between him and the common ancestor, whereas in their case, there is no female so intervening. The point we have to decide is, which of these rival contentions is sound?

The lower Courts have upheld the contention that Basayya is the preferential heir. In my opinion, that view is correct. It seems to follow logically from the observations of the Judicial Committee in *Vedachala Mudaliar* v. *Subramania Chettiar* (3).

In that case, the contest was between the maternal uncle and the paternal aunt's grandson (son's son). Both belong to the group of atma bandhus and the question was, which of the two was preferentially entitled to the inheritance? The Madras High Court, applying the rule that a claimant ex parte paterna should be preferred to one ex parte materna decided in favour of the paternal aunt's grandson. The Judicial Committee reversed this decision, holding that the rule relied on by the learned Judges can in any event have no application, when the contest is between members of the same degree. In my opinion, this is undoubtedly the effect of that decision. On the further point whether the rule is universally applicable or not, the observations of their Lordships are no doubt of somewhat doubtful import. It is this that has led to some difficulty in some subsequent cases. There are two sets of passages in the judgment which have been treated as being somewhat inconsistent, first, the passage at p. 359 (of 48 *I. A.*) which begins with the words "from this it has been inferred" and next, the passage at bottom of p. 363 (of 48 *I.A.*) which reads thus:

"A very small consideration would show that that passage has nothing to do with the members of the same class inter se. It only explains why pitru bandhus are to be preferred to matru bandhus, the mother's position being special to herself under an express rule."

The Judicial Committee rejecting the rule in question in its application to the facts of the case, preferred the maternal uncle to the rival contestant. On what grounds? The answer is furnished by the last para of the judgment. Two grounds are specified: first that the maternal nncle is nearer in degree, secondly, that he is entitled to preference even on the ground of efficacy of

Sitarama Bhotla

Krishnam Bhotlu	Kondu Bhotlu	Kasi Bhotlu	Sasbam Bhotlu	Daughter
	Pedda Subbiah	Daughtet Achamma		Sailam Bhotlu
	Busayya	Sankariah=Kamakshamma (Last male owner)		Basiah (Now alive)
	Plaintiffs & defendant 5			

(1) A. I. R. 1921 Mad. 59?=44 Mad. 114.
(2) A. I. R. 1921 P. C. 53=43 I. A. 86 (P.C.).
(3) A. I. R. 1922 P. C. 33=44 Mad. 753=48 I. A.349 (P. C.).

offerings. But it is significant that they place the ground of propinquity in the forefront and gave the further ground a secondary place by saying:

"He also offers oblations to his father etc." A perusal of the judgment makes it clear that the ground that is emphasized throughout is that of affinity or nearness of blood. It is sufficient to quote only two passages:

"Their Lordships, again, in the view they take of the rights of the parties in the present case, do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that in each class propinquity shonld be the governing factor: (p. 359 of 48 *I. A.*)"

Again:

"Among modern writers, both Golap Chandar Shastri and Rajkoomar Sarvadhikari affirm that nearness of blood is the governing principle in the succession of bandhus."

The fact is, that in that case, either of the two tests (that of propinquity or that of spiritual benefit) whichever was adopted, led to the same result, namely, the preferring of the maternal uncle. But which of the two was the decisive or the governing factor? Their Lordships themselves say that nearness of blood is.

If the two claimants are of the same degree, then and then alone, other considerations may arise, one of such being the question of efficacy of oblations. On this point, Golap Chandra Sastri and Rajkumar Sarvadhikari. quoted by their Lordships, take different views. Both assert that nearness in degree is the paramount or overriding test, but when the claimants are equal in degree the rules they formulate vary. This is brought out most clearly in the passage extracted in the judgments of their Lordships at p. 364 (of 48 *I. A.*) Applying this principle, there can be no question that Basayya being nearer in degree, is the preferential heir and excludes the plaintiffs.

In this connexion, two cases may be usefully cited. In *Rami Reddi* v. *Gangi Reddi* (4), decided by Ramesam and myself. the contest was between a maternal uncle's son and maternal aunt's son. This is what I said in my judgment:

"The mother's sister's son as well as the mother's brother's son are both atma bandhus and are both expressly mentioned in the Mitakshara. They are both related on the mother's side and they are both equally removed from the propositus, (p. 748 of 48 *Mad.*)"

(4) A. I. R. 1925 Mad. 807=49 Mad. 722.

In those circumstances, I applied the test of superior religious efficacy and preferred the maternal uncle's son. In other words, the test of spiritual benefit was applied only when it was found that both the claimants were equal in degree. Ramesam, J., is even more explicit on the point. He observes at p. 733 (of 48 *Mad.*)

"Accordingly I infer from *Vedachala Mudaliar* v. *Subramania Chettiar* (3) that the rules to be applied to the atma bandhus for determining priority are:

(1) propinquity should be the governing factor. (2) if both are equal in degree, the spiritual benefit conferred may be used as a test for preference.

The first of these rules do not help us in the present case, as both the claimants are of the same degree."

Again, in *Hatindra Nath* v. *Nagendra Nath*, *A. I. R.* 1928 *Cal.* 289, the contest was between rival claimants related in the same degree. The test of spiritual benefit was then applied in determining the preferential right. The only case which supports Mr. Somayya is *Sakharam Narayan* v. *Balakrishna Sadasiv* (5) I have read the judgments in that case with close attention but with the greatest respect I am unable to follow how they are reconcilable with the decision of the Judicial Committee in *Vedachala Mudaliar* v. *Subramania Chettiar* (3).

It only remains to add that in my judgment throughout I have assumed without deciding, that the plaintiffs have a preferential right on the ground of superior efficacy of offerings. In the view I have taken, it is unncessary to enquire whether, even if that test be applied, they have or have not such a right. In the result, the second appeal fails and is dismissed with costs.

Madhavan Nair, J. — I agree. As the question is of some importance I shall also but briefly record my opinion. The plaintiffs are the appellants. The facts of the case have been set out in my learned brother's judgment and need not therefore be recapitulated. The following table shows the relationship of the parties.

(*For pedigree see p.* 556)

What we have to determine in this case is as between mother's father's sister's son's son of the last male owner and his mother's father's brother's grandson's sons, who is to be preferred as the heritable bandhu? There is no decision

(5) A.I.R. 1925 Bom. 451=49 Bom. 739 (F.B.).

directly bearing on this point. The lower Courts have found in favour of Basayya respondent who is the mother's father's sister's grandson on the ground that he is nearer in relationship to the common ancestor than the appellants who are mother's father's brother's grandson's sons.

Admittedly, the parties fall within the group known as 'Matri bandhus' under the Mitakshara Law. Basayya is removed from the common ancestor by four degrees while 'the plaintiffs are removed by five degrees. It is argued by Mr. Somayya that since the appellants are entitled to offer pinda libations to the ancestors, the benefit of which will be participated by the propositus, and the respondent is not in that position, preference should be given to the appellants though the respondent is admittedly nearer in relationship to the common ancestor. Mr. Govindaraghavachari does not admit that the appellants are entitled to offer such libations but, for the purposes of this case, we assume that they have the right to do so. The question then is, whether preference should be given to the appellants on the ground of the "religious efficacy of their oblations" as against the respondent who bases his claim on "the nearness of blood" (propinquity.)

In my opinion the principle of the decision in *Vedachala Mudaliar* v. *Subramania Chettiar* (3) supports the respondent's contention. In that case the contesting claimants were atma bandhus and the contest was between the paternal aunt's grandson (son's son) and the maternal uncle. Though the High Court held that the former should be preferred on the ground that he was a claimant ex parte paterna while the latter was one ex parte materna, the Judicial Committee held that the maternal uncle should be preferred to the other claimants. The maternal uncle in that case was related to the common ancestor in greater nearness than the paternal aunt's grandson and further, he was entitled to offer libations as well. So, it is true that, strictly speaking, their Lordships were not called upon to consider the relative merits of these two sets (viz. test of "nearness of blood" as against "the superior efficacy of oblations)"; in coming to the conclusion as to who was the preferable heir. In their judgment their Lordships refer to various passages in Viramitrodaya, Smriti Chandrika, as well as the four propositions laid down in the well known case of *Muthuswami* v. *Muthukumaraswami* (6) for determining the rules relating to the preference of bandhus. Mr. Somayya relying on these argues that propinquity is to be tested with reference to the doctrine of spiritual efficacy in offering libations. There is a certain amount of force in this argument, for it is clear that the attention of the learned Judges was drawn to this aspect of the case. But a careful perusal of the judgment reveals the fact that their Lordships deciding the case as they did, were influenced primarily by the consideration that the maternal uncle was related in greater nearness to the common ancestor than the other claimants. After referring to the passage in the Mitakshara which lay down the rule relating to bandhu succession they expressly state their opinion in the following passage.

> Their Lordships again in the view they take of the rights of the parties in the present case do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that in each case class propinquity should be the governing factor see p. 762.

It appears to me that this passage strikes the dominant note of the judgment, then they refer to the well known ancient rule relating to the sapinda descent:

> "to the nearest sapinda the inheritance next belongs." Later on their Lordships draw attention to the passage in the books of Golap Chandar Sastri and Rajkumar Sarvddhikari. pp 766 and 767, both of which support the position that, unless the competing contestants are of the same degree, the doctrine of spiritual efficacy has very little to do in determining the preference of one contestant over the other. In the last paragraph of the judgment occurs the following passage:
>
> "The appellant is undoubtedly nearer in degree to the deceased than Subramania, He also offers oblations to his father and grandfather to whom the deceased was also bound to offer pinda."

Obviously, their Lordships put "nearness of blood" as a ground of a decision in the forefront, while they assign only a secondary place to efficacy of oblations. Here it may also be mentioned that the

(6) [1893] 16 Mad. 23=2 M. L. J. 296.

three fold classification of the bandhus with regard to their right to succession is also based upon the doctrine of the propinquity of relationship as recently repeated by the Privy Council in *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (2).

From the above considerations we may infer that the Privy Council decided in *Vedachala Mudaliar* v. *Subramania Chettiar* (3) that in determining priority among atma bandhus nearness of blood should be considered to be the governing factor unless the contestants are equal in degree in their relationship to the common ancestor in which case efficacy of oblations may be a test for preference. That this is the true inference to be drawn from the Privy Council decision is made clear by the decision in *Rami Reddi* v. *Gangi Reddi* (4) to which my learned brother was a party. In that case Ramesam, J. at p. 733 (*of* 48 *Mad.*) says thus:

"Accordingly I infer from *Vedachala Mudliar* v. *Subramania Mudaliar* (6) that the rules to be applied to the atma bandhus for determining priority are: (1) propinquity should be the governing factor, (2) if both are equal in degree the spritual benefit conferred may be used as a test for preference."

I respectfully agree with this view, Applying, therefore, the principle that propinquity should be the governing factor. I am of opinion that the lower Court's judgment should be upheld.

The decision in *A. I. R.* 1929 *Cal.* 289 may be cited as an instance where the test of spiritual benefit was applied in determining priority between rival claimants who were related in the same degree. Mr. Mayne's opinion also is in support of the contention of the respondent. In his Hindu Law, Edn. 9, p. 149 the following five rules are laid down:

1 A nearer ancestor and his descendants exclude an ancestor more remote and his descendants.

2 As between descendants of the same ancestor, or ancestors of an equal degree the nearer in degree exclude the more remote.

3 As between ancestors of the same degree, he who is related through the father is preferred to him who is related through the mother.

4 As between bandhus of the same class the spiritual benefit they confer on the propositus is as stated in Viramitrodaya a ground of preference.

5 All other considerations being equal he between whom and the common ancestor no female intervenes will be preferred to one between whom and the common ancestor one female intervenes and the latter will be prepared to him between whom and the deceased two intervene.

Having regard to the facts, clearly R. 2 applies to the present case as Basavayya is removed from the common ancestor by four degrees while the plaintiffs and defendant 5 are removed by five degrees. Mr. Somayya argued that the appellants are entitled to preference because between them and the propositus only one female intervenes, whereas so far as Basavayya is concerned two females intervene. Now, this would be so, according to R. 5: see also *Thiramalachariar* v. *Andal Ammal* (7) if all other considerations are equal. But the considerations are not equal in this case as Basavayya is nearer in degree than the plaintiffs and defendant 5.

The decision in *Sakharam Narayan* v. *Bal Krishna Sadashiv* (5) fully supports the appellant. After reading the judgment carefully I have come to the conclusion that that decision is not reconcilable with the decisions of the Privy Council in *Vedachala Mudaliar* v. *Subramania Chettiar* (3). If it follows from the Privy Council decision, as I think it does, that in deciding the question of succession between bandhus in a case where one of the contestants is related to the common ancestor in a nearer degree than the other, the distinction between ex parte materna and ex parte paterna has no application, then the decision in *Sakharam Narayan* v. *Bal Krishna Sadyshiv* (5), should be different.

In the result, I would dismiss this second appeal with costs.

P.R.S./V.S. *Appeal dismissed.*

(7) [1907] 30 Mad. 406=17 M. L. J. 285.

A. I. R. 1930 Madras 559

REILLY AND CORNISH, JJ.

A. C. Abdul Azeez Sahib—Petitioner—Appellant,

v.

Bader Mull Sowcar—Respondent.

Original Side Appeal No. 37 of 1929, Decided on 19th November 1929, from order of Beasley, J., D/- 15th March 1929, in Application No. 1168 of 1929, in Civil Suit No. 181 of 1925.

Madras High Court Original Side Rules, O. 29, R. 6—Decree-holder cannot bid for less than market value.

Under R. 6, O. 29, the decree-holder's permission to bid cannot be to bid for less than

the market value of the lots, unless the Court makes an order allowing him to bid for less.

[P 560 C 1]

R. Srinivasa Ayyangar—for Appellant

M. A. Tirunarayanachariar and *S. P. Krishanamachari*—for Respondent.

Judgment.—Under R. 6, O. 29, Rules of the High Court Original Side, the decree-holder's permission to bid could not be to bid for less than the market-valve of the lots unless the Court made an order allowing him to bid for less. It does not appear that any such order was made by the High Court in this case. The appeal is allowed with costs and the sale is set aside.

P.R.S./V.S. *Appeal allowed.*

A. I. R. 1930 Madras 560

WALLACE, J.

Sivanu Thevar and *others*—Plaintiffs 2 to 8—Appellants.

v.

Omaiyourubhagam Pillai and *others*—Defendants 1 to 6, 8, 9, 11 and 13 to 15—Respondents.

Second Appeal No. 408 of 1926, Decided on 18th October 1929, from decree of Addl. Sub-Judge, Tinnevelly, in Appeal Suit No. 39 of 1925.

Madras Board of Revenue Standing Orders, O. 19 (1)—Before resettlement of 1909, tree pattahdar having permanent right to their usufruct as long as kist was paid but right to timber vesting in Government — Cancellation of tree pattah under O. 19 (1) has effect of surrender of Government's right and pattahdar gets absolute rights to trees.

Where before resettlement of 1909 a tree pattadar possessed a permanent right to the usufruct of the tree as long as the tree pattah kists were paid, without any right to cut them down and the right to timber was retained by the Government, the cancellation of the tree pattah in pursuance of the policy of Government under Standing Order 19 (1) does not amount to defeasance of the right of tree pattadar. Such cancellation has the effect of surrender by the Government of their title to the timber and the pattadar gets an absolute title to the tree: 36 *Mad.* 148, *Rel. on.* [P 560 C 2, P 561 C 2]

T. M. Ramaswami Iyer—for Appellants.

K. Rajah Ayyar and *V. Ramaswami Iyer*—for Respondents.

Judgment. — The plaintiffs in this case sued originally for a declaration of title to survey No. 353 with the palmyra trees standing thereon and 39 palmyra trees standing on survey No. 352 and for a perpetual injunction restraining the defendants from interfering with their enjoyment. The original Court decreed the suit but the lower appellate Court dismissed it. The plaintiffs appeal regarding their title to the trees only and have given up the claim to the land, survey No. 353.

The facts are as follows: Up to the resettlement of 1909, in this District of Tinnevelly there were several pattas for the suit land and for the suit trees thereon. Such separate pattas were a common feature in that District before the resettlement. The defendants in this case held the land pattas and the plaintiffs the tree pattas. At the resettlement the general Government policy of getting rid of the tree pattas was carried out, and in pursuance of that policy the plaintiffs' tree pattas were cancelled. Since then it is found that the defendants have been in possession of the trees, but since 12 years have not elapsed on the date of the suit from the cancellation of the tree-pattas, the plaintiffs' title to sue is not extinguished unless by the cancellation of the tree-pattas their title was taken away. The general question for decision therefore, is, what right did the plaintiffs possess in the trees by the virtue of the tree pattas and what was the effect on that right of the cancellation of the tree-patta.

The sort of right which tree-pattadars possessed in the trees is somewhat indefinite. But it appears to have been a permanent right to the usufruct so long as they paid the tree-patta kist. They were not full owners of the trees in the sense that they could cut them down. The Government retained the right to the timber. But they were permanent occupancy-holders—if the phrase may be used—of the right of the usufruct; that is, they were not liable to be ejected from that use except upon failure to pay the kist. Now when the Government decided to abolish the double holding of land and tree pattas, it laid down rules for the purpose which are embodied in the Board's Standing Orders, R. 18. The rule applicable to the present case is Standing Order 18 (1) dealing with trees on occupied ladns. It is to this effect:

" . . . No claim should ordinarily be made on behalf of the Government to any rights over trees growing on lands held on ryatwari patta . . . . Separate pattas should not be issued for the trees and where such pattas now exist, the tree-patta should be cancelled and

the tree-pattadar left to make his own arrangements with the land pattadar, if the two are different persons."

At the same time the assessment on the tree-patta was added to the assesment on the land-patta, and the Government in future looked to the land pattadar for the combined assessment. The respondents argue from that fact that the cancellation of tree-pattas put an end to the right of the tree-pattadar. This is directly contrary to the ruling of this Court in *Sengoda Goundan* v. *Varadappan* (1). If respondents' view is accepted, there is no point directing the tree-pattadar to make his own arrangements with the land-pattadar, since there was nothing left with him to arrange about. The meaning of the rule clearly is that the land-pattadar must either arrange to buy out the tree-pattadar or to collect the tree-patta kist from him. It is suggested by the respondents that the rule was that the party to be bought out was not the tree-pattadar but the Government, and the resettlement pattas Exs. A and A (1) are referred to. But there is certainly nothing in these to show that the respondents paid Government kist for the trees and there is no evidence to that effect. If the respondents had done so, there ought to be available evidence. Besides, that such an idea is erroneous seems quite clear from the District Gazetteer, which was compiled by a Tinnevelly Settlement Officer and may, therefore, be regarded as authoritative on this point. In Vol, 1 at p. 309 it says:

"In respect of all palmyras standing on patta lands Government waive their right to the timber."

and further down on the same page:

"In order to induce the ryots to effect by mutual arrangement a transfer of rights and to terminate the system of mixed holding "special officers were at the resettlement appointed to act as mediators."

and again " as a rule, the land-pattadar bought the palmyras from the tree-pattadars.,' The lower appellate Court has fundamentally misunderstood the position. It has applied Standing Order 18 (2) which is not the Standing Order applicable to the case, for it relates to trees on occupied lands. The rule no doubt states that the ownership of the trees continues to vest in the Government, but since that rule has no application to the present case, the lower appellate Court made an error in applying it. It has inferred that the cancellation of the tree-patta amounts to the defeasance of the right of the tree-pattadar which, as I have said, is ditectly opposed to the ruling in *Sengoda Goudan* v. *Varadappan* (1), and is clearly opposed to the principles of the re-settlement as set out in the Gazetteer. The right to the usufruct did not vest in the Government and, therefore, the Government could not have transferred it from the tree-pattadar to the land-pattadar. The lower appellate Court has also misquoted Exs. A and A (1) when it says that they show that the Re-settlement Officer directed the plaintiffs to sue for the trees. On the contrary the Resettlement Officer directed the plaintiffs to sue for the land for which they were then also making a claim. The lower appellate Court's decree cannot, therefore, be supported. The plaintiffs' title to the trees, the Government having surrendered their right to the timber, is now absolute and they have not lost it by adverse possession.

I must, therefore, modify the decree of the lower appellate Court as regards the claim to the trees on lands Nos. 353 and 352 and declare the plaintiff's title to the plaint trees, and grant an injunction that the defendants are restrained from interfering with the plaintiffs' possession of these. The appellants will get their costs here and each party will pay his own costs in the lower Courts.

P.R.S./V.B. *Decree modified.*

(1) [1913] 36 Mad. 148=22 M. L. J. 201=13 I. C. 37=(1911) 2 M. W. N. 532.

A. I. R. 1930 Madras 561

CURGENVEN, J.

(*Mantipragada*) *Sivaramayya*—Appellant.

v.

(*Kapa*) *Venkata Subbamma* and *others*—Respondents.

Second Appeal No. 1353 of 1926, Decided on 4th December 1929, against decree of Dist. Judges West, Godavari, in Appeal Suit No. 76 of 1926.

Partition Act, S 4—"Undivided family" means undivided "qua" property even though divided in status.

The words "undivided family" occurring in S. 4 are not restricted to mean a family joint in status but include a family divided in status but undivided "qua" the property in question and the provisions of S. 4 are therefore fully

applicable to it : 30 *All.* 324 ; 12 *C. L. J.* 525, *Foll.* ; 29 *All.* 308 ; 13 *All.* 282, *Ref.*

[P 562 C 2]

A. Satyanarayana and *P. Satyanarayana Rao*—for Appellant.

P. Somasundaram—for Respondent.

Judgment.—The plaintiff bought a third share in the dwelling house and he sued for partition of it. The members of the family occupying the house were defendant 1 and the plaintiff's vendor, defendant 3, who were brothers, and defendant 2, son of a deceased brother. Defendant 1 died during suit and his widow defendant 6 was added as legal representative and in that capacity she applied for the benefit of S. 4, Partition Act of 1893. The question is whether it applies to the circumstances of the case. The family although occupying the house in common was divided in status. S. 4 has as one of its conditions that the share of the dwelling house in question must belong to "an undivided family." It is contended on behalf of the plaintiff, now appellant before me, that this phrase cannot apply to a family divided in status but must be restricted to what we ordinarily know as a joint Hindu family. There is no Madras decision upon this point. A Full Bench judgment of the Allahabad High Court, *Sultan Begam* v. *Dabi Prasad* (1), is perhaps the leading authority. There had been a previous case in Allahabad, *Hashmat Ali* v. *Muhammad Umar* (2), relating to a Mahomedan family and in that it was decided, on the analogy of another Full Bench decision of that Court *Amme Raham* v. *Zia Ahmad* (3), where the expression 'joint family property' as used in Art. 127, Lim. Act, was deemed to mean property belonging to a joint family, that S. 4 could only apply to an undivided Hindu family and not to a Mahomedan family living together. The meaning and intention of the provision are fully discussed in *Sultan Begam* v. *Dabi Prasad* (1). The learned Judges state the point for decision as follows :

"It is contended on the one hand that the words 'undivided family' as used in this section mean a joint family and are confined to Hindus or to Mahomedans who have adopted the Hindu rule as to joint family property. On the other hand the contention is that the expression is of general application and means a family, whether Hindu, Mahomedan, Christians etc., possessed of a dwelling house which has not been divided or partitioned among the members of the family."

They then allude to the occurrence of the same phrase 'undivided family' in S. 44, T. P. Act, whence it appears to have been borrowed for the purposes of the Partition Act, and point out that the provision in the former statute is clearly of general application. It has been suggested here that the portion of S. 44, T. P. Act, alluding to an undivided family would, if it merely meant a joint family, be superfluous in view of the proviso to S. 2 of the Act that nothing in it shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist law. The Full Bench observes that the purpose of S. 4 appears to be :

"to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferrer's family have a right to live,"

an intention which would of course cover circumstances such as those of the present case, and they conclude by construing 'undivided family as' :

"undivided qua the dwelling house in question and to be a family which owns the house but has not divided it."

There are several decisions of the Calcutta High Court to the same effect. I need only allude to the earliest one : *Khirode Chunder Ghosal* v. *Saroda Prosad Mitra* (4). The learned Judges cite *Sultan Begam* v. *Dabi Prasad* (1) with approval and explain how the law stood previous to the enactment of the Partition Act and the inconveniences which it was designed to avoid. There being no authority in conflict with these cases and it appearing to me that the phrase 'undivided family' is sufficiently ambiguous to justify me in adopting the construction most in consonance with what appears to be the intention of the Act, I follow them and agreeing therefore with the view taken by the lower Courts, I dismiss the second appeal with costs.

P.R.S./J.M. *Appeal dismissed.*

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(1) [1908] 30 All. 324=5 A.L.J. 352=(1908) A. W.N. 126.

(2) [1907] 29 All. 308=4 A.L.J. 209=(1907) A. W.N. 52 (F.B.).

(3) [1891] 13 All. 282=(1891) A.W.N. 88.

(4) [1910] 12 C. L.J. 525=7 I.C. 496.

A. I. R. 1930 Madras 563

ANANTAKRISHNA AYYAR, J.

Kalatty Mudali and *others* — Defendants—Appellants.

v,

Mangapathi Mudali and *others* — Plaintiffs—Respondents.

Second Appeal No. 900 of 1925, Decided on 7th November 1929, from decree of Sub-Judge, Chittoor, in Appeal Suit No. 163 of 1922.

(a) Adverse possession—Trust—Wrongful recipient of profits of trust property does not acquire title by adverse possession—One beneficiary can, however, acquire right adversely to others.

Whilst the trustee is in possession of the estate, the right of the beneficiary is safe, so that if the trustee mistakes his beneficiary and makes over the profits of the estate to a wrong person, such wrongful recipient of the profits, does not acquire title by adverse possession against the rightful cestui que trust. It being the duty of the trustee to pay over the profits to the beneficiary, payment to a wrong person will not give that person a title, but if one or two beneficiaries is excluded by the other who received the rents to the exclusion of the trustees as well, limitation will commence to run against the excluded beneficiary. *Lister* v. *Pickford*, 34 *Bev.* 576 and *East Stonehouse Urban Council* v. *Willoughby Brothers Limited*, (1902) 2 *K. B.* 318, *Ref.* [P 565 C 1]

Where moneys belonging to the community were being spent for the purposes of the village temple at which the community worshipped, use of the community funds for temple purposes cannot be taken to confer any rights on idols to properties of the communities. [P 565 C 1]

(b) Adverse possession—Possession ought to be unequivocally adverse.

In considering whether possession was adverse or not, Courts should remember that there ought to be nothing equivocal in the possession relied upon as being adverse : 2 *Bom.* 388 and *Thomas* v. *Thomas* 169 *E. R.* 701, *Ref.* [P 565 C 2]

(c) Adverse possession — Trustee cannot make his possession adverse.

A trustee cannot by any act of his order make his rightful possession adverse to the real cestui que trust. [P 565 C 2]

S. Varadachariar and *V. N. Shama Rao*—for Appellants.

T. M. Krishnaswami Iyer — for Respondents.

Judgment. — The plaintiffs and defendants 1 to 6 are members of Sangunthi Mudaliar community of the village of Sathravada, and the suit was for a declaration that the plaint topes are common properties of the said community, that the plaintiffs and the members of their faction are entitled to jointly possess and enjoy with defendants 1 to 6, and the members of their faction, the said topes, and for a permanent injunction restraining the defendants and their party from dealing with the topes, or the income thereof, independently of the plaintiffs and their party, for any purpose not sanctioned by the general meeting of the whole community.

The plea of defendant 1 was that the topes belonged to Sri Varadharaja Swami temple of Sathravada, that the temple owned the topes from time immemorial and that the same were in the management of trustees of the temple all along, that the office of trusteeship of the temple was hereditarily in the family of defendants 1 and 2 ahd that defendant 1 was the then trustee of the temple. The Rajah of Karvetnagar was added as the dharmakartha of the temple and made defendant 7 in the case. His plea was that defendant 1 was not the trustee of the temple, but that he defendant 7 was the trustee. He also pleaded that the old accounts disclosed that the plaint topes were the properties of the Sangunthi community mentioned in the plaint, that the trees in the topes were being charged tree tax by defendant 7 and that pattas were issued in respect thereof. Defendant 7 accordingly admitted the title of the plaint community to the topes.

This litigation began in 1916. This matter came before the High Court on a former occasion, and the High Court on 8th April 1921, passed orders in Civil Revision Petition 342 of 1921, preferred against the order of remand passed by the Subordinate Judge on 6th March 1920, and the High Court directed three issues to be tried by the District Munsif instead of the issues specified in the order of remand passed by the Subordinate Judge (see p. 37 of the pleadings book). The District Munsif tried the issues framed in the case, and came to the conclusion that the title to the topes was in the Sangunthi community of the village of Sathravada and that they were not the properties of the temple of Sri Varadharaja Swami of Sathravada as contended for by defendant 1 and the other defendants 2 to 6.

All the Courts which had to try the present litigation were of opinion that the title to the topes in question was in the plaint community and not in the temple. This finding has now become conclusive, and the discussion of the

further questions raised in the case should proceed on that footing. The plaintiffs' case was that the village affairs are managed by two Periyathanakars, that plaintiff 1 has been the Periyathanakar for the last 40 or 50 years and defendant 1 for the last 12 years ; that recently there was a faction in the village, plaintiff 1 had been the head of one faction and that defendant 1 has been the head of the other faction. The defendants admitted the practice of management by two Periyathanakars, but stated that the practice of management related only to caste affairs and properties belonging to the community, but contended that the suit topes were not the properties of the community but were the properties of the temple whose trusteeship vested in defendant 1's family. The defendants also pleaded that the temple acquired absolute rtghts to the topes by effect of adverse possession for more than 12 years.

The trial Court found that defendant 1 had been in enjoyment of the topes on behalf of the temple for more than 12 years, and that the rights of the plaint community to the topes in question had become barred and extinguished by limitation. It therefore dismissed the suit with costs.

On appeal the learned Subordinate Judge of Chittoor after observing that the question of the original title to the topes in the plaintiffs' community was concluded by the finding arrived at by the several Courts which had to deal with this litigation, observed that the only question for decision was how far the enjoyment set up by defendant 1 on behalf of the temple was true and how far it affected the title of the plaint community to the topes in question. He found in para. 3 that the

"alleged possession of the topes by defendant 1 was not adverse to the plaint community."

He accordingly reversed the decision of the first Court and decreed the suit in plaintiffs' favour.

Defendants 1, 2 and 5 have preferred this second appeal. On their behalf it was contended by their learned advocate that the decision of the learned Subordinate Judge was vitiated by reason of his not having properly apprehended the scope of the issues as settled by the High Court in the Civil Revision Petition already referred to. He also urged that some of the distinctions made by the learned Subordinate Judge should not be accepted. On behalf of the respondents (plaintiffs) it was argued that the title to the topes being found to be in the community and defendant 1 being admittedly one of the Periyathanakars of the community, there could be no adverse possession against the community in the circumstances, and that the accounts filed in the case and also defendant 1's admissions made it clear that the funds of the community including income from the topes were being now and then spent for the temple, as the temple was situated in the village and as the community worshipped the *idol* of the said temple and that the *idol* could not claim any rights to the topes in the circumstances.

After having carefully considered the contentions raised by the learned advocates on both sides, I have come to the conclusion that the decision of the learned Subordinate Judge is right and that the community has not lost its title to the topes by limitation.

In 1901, defendant 1 sued on behalf of the temple for recovery of possession of portions of one of the two topes in question, after removing the huts standing thereon. I agree with the learned advocate for the appellants that the description of the present defendant 1 in the possession receipts in those suits should not be taken to negative defendant 1's contention, if his contention would otherwise be tenable, having regard to the other proceedings in those suits. The learned Subordinate Judge's observation that in the possession receipts 1-a and 2-a, the decree-holder was not described as trustee of the temple, though in the suits concerned he had sued as trustee of the temple, should not be taken to be anything more than a verbal criticism of the said exhibits. I do not think that the circumstance that in the possession receipts the decree-holder was not described as a trustee should be taken as conclusive against the present defendant 1's contention ; but the lower appellate Court has referred to the various other circumstances appearing in the case. It has dealt with the way in which the properties and the moneys of the community were being dealt with by the Periyathanakars. It is pointed out that moneys belonging to the community

were being spent for temple purposes, and it is only natural, seeing that the temple was situated in the village and the community worshipped at the temple. Use of the community funds for temple purposes in such circumstances could not be said to confer any rights on the idol to any properties of the community. Just as individual members—worshippers—make offerings of money or materials to the God, the community thought it proper to offer moneys and materials belonging to the community to the God ; even if the incomes from these topes were utilized for such worship, the same could not (for that reason alone) confer any title in the God to the topes, having regard to the circumstances. As remarked by the learned Subordinate Judge in para 2 of his judgment :

"Admittedly defendant 1 and his deceased brother Muthu Muniappa before him have had control of the village collections and that as the Periyathanakars of the community of Senguntbas."

Defendant admitted that the 'plus' balance (surplus income) of the village collections was always devoted for the temple :

"He also admitted that item 1 of the village collection was spent for the temple because the villagers authorized him to do so."

The law on the point as stated by Mitra in his work on the Law of Limitation is quoted in the judgment of the lower appellate Court, and neither of the learned advocates who appeared before me questioned the correctness of that statement. In fact both the learned advocates admitted that the law was correctly stated in Mitra's book. This is what is stated in Mitra's book :

"Whilst the trustee is in possession of the estate, the right of the beneficiary is safe, so that if the trustee mistakes his beneficiary and makes over the profits of the estate to a wrong person, such wrongful recipient of the profits, it has been held in England, does not acquire title by adverse possession against the rightful cestui que trust, It being the duty of the trustee to pay over the profits to the beneficiary, payment to a wrong person will not give that person a title, but if one or two beneficiaries is excluded by the other who received the rents to the exclusion of the trustees as well, limitation will commence to run against the excluded beneficiary."

In discussing the questions argued in the case it is necessary to remember the observations of Sir John Romilly, M. R., in *Lister* v. *Pickford* (1) :

"A trustee who is in possession of land, is so on behalf of his cestuis que trust, and his making a mistake as to the persons who are really his cestuis que trust cannot affect the question . . . . . Suppose that they had imagined bona fide that they themselves were personally entitled to the property, and that they were not trustees of it for anyone, it would, nevertheless, have been certain that they would have been trustees for the cestuis que trust, and no time would run while they were in such possession. The legal estate was vested in them, no other person could have maintained an ejectment against them; they are bound to know the law, they ought to have taken possession, as soon as they saw who were the real beneficiary devisees, and being in possession, they ought to have applied the proper proportion of the rents for the benefit of such residuary devisees. The fact that they did not do so cannot, in any respect, weaken the rights of the devisees. Nor can I see the least distinction in this respect between the trustees having wilfully and fraudulently paid rents belonging to their cestuis que trust to a stranger, and their having done so ignorantly and bona fide. However, they obtained possession and as soon as they did so, their possession must be attributed to their real right to possession and not to any other. Were it otherwise, it would be possible for trustees to give the property of one cestuis que trust to another."

In *East Stonehouse Urban Council* v. *Willoughby Brothers Ltd.* (2), p. 335, Channell, J., observed as follows :

"The persons for whom the trustees really were trustees were not barred by the erroneous payment because a trustee could not by any act of his own make his rightful possession adverse to the real cestuis que trust."

In considering whethsr possession was adverse or not, we should remember that there ought to be nothing equivocal in the possession relied upon as being adverse. As remarked in the Full Bench case reported in *Lallubhai Bapubhai* v. *Mankuwarbhai* (3), at p. 413 :

"The Courts are loth to convert a possession which began lawfully into a wrongful and adverse possession"

and again, as stated by Wood, V. C., in *Thomas* v. *Thomas* (4) at p. 703, "possession is never considered adverse if it can be referred to a lawful title."

These principles should be kept in view in deciding the present case, because the properties of the community were in the possession of two Periathanakars plaintiff 1, and defendant 1 and they were managed by these two people on behalf of the community. Therefore, the mere circumstance that either a part or the whole of the management of the topes was more directly

(1) 34 Bev. 575=55 E. R. 757.

(2) [1202] 2 K. B. 318.
(3) [1877] 2 Bom. 388.
(4) 169 E. R. 701.

under defendant 1 than under plaintiff 1, or that defendant 1 was solely in possession and management of the topes and even spent the whole income of the topes as he thought fit, would not make his possession adverse to the community. Nor, having regard to the circumstances that the temple is situated in the village and the idol is being worshipped by the members of the community, who make various offerings to the idol, could the circumstance of the income from the topes being spent for the temple be taken to change the original possession of defendant 1 on behalf of the community, into adverse possession on behalf of the idol. It was open to the community to spend its income in any way it liked, and having regard to the admission made by defendant 1 that practically all the surplus income of the community was being spent on the temple, the proper view to take of the circumstances appearing in the present case would seem to be that the amounts were spent as offering by the community to the temple, not that the idol acquired any rights either to the topes or any other properties of the community. The description of defendant 1 as trustee of the temple in the litigation of 1901 in respect of small portions of one of the topes, or his taking a rent deed in respect of huts standing thereon (Ex. 3 of 1899) could not, having regard to the general circumstances appearing in the case and to the special circumstances mentioned already, be taken to be conclusive in favour of the view put forward by defendant 1. The same should be considered along with the other circumstances, and I think the learned Subordinate Judge was right in his view.

Defendant 1 no doubt filed two suits in 1901 as trustee of the temple, in respect of small portions of one of the topes in question, to have certain huts put upon the same by certain trespassers removed. He got decrees in those suits and got possession in execution. As observed by the learned Subordinate Judges " possession receipts do not describe him as trustee " but those receipts should be read along with the proceedings in the suit. But it should be remarked that the subsequent accounts filed in the suit make it clear that the income from the topes was included in the general accounts of the community, and the ledger books showing that the income from the topes was enjoyed by defendant 1 on behalf of the temple has been found to be a recent concoction by all the Courts. Exs. C-1 (relating to fasli 1317) A series and D (pattah issued on behalf of the Karvetnagar Samasthanam) are in the name of both defendant 1 and the plaintiff, and they are in respect of the topes in question. Defendant 1's previous deposition K1 contains important admissions against his present contentions as also his depositions in the present suit as D. W. 1. He admits that the plaintiff and himself are the Periathanakars of the community, that in fasli 1316 or 1317, he knew that these topes were described in the accounts as the topes of the community; he adds that it was only four or five years back that he heard that they were puttahed in his name and in plaintiff 1's name. The two Periathanakars have been managing the affairs of the community for a long time. For suits in regard to these topes moneys were spent and they are entered in the account as gramapathu (p. 30 of his deposition). Further, amounts are shown as spent as gramapathu for removing prickly pear in the eastern tope, the entries being in defendant 1's brother's handwriting. He says that he credited marriage collections to the temple as the villagers asked him to do so. At p. 32, he admits that tope pattah suit was conducted at Ranipet against Mangapathi-plaintiff 1 only. He admitted that the village collections were all with him. At p. 33 in re-examination he said :

" balance of village account if any, will be taken to temple account at the end of the year."

Having regard to the admissions made by defendant 1 and the circumstances proved in the case, I think that the learned Subordinate Judge had materials before him on which he could have come to the conclusion that possession of the topes was with the plaint community only, that defendant 1 had not got the possession of the same as trustee (in the legal sense) that whatever possession dafendant 1 had must be taken to have been only on behalf of the village community, that the same could not be said to be adverse to the

village community, whose title to the topes has been found by all the Courts, that the criminal proceedings which upheld defendant 1's possession could not operate to render it adverse to the village community, and that the community had not lost its rights to the topes by adverse possession.

In the circumstances, I do not think it necessary to discuss in detail the status of defendant 1 as a trustee de-facto or de jure of the temple. For disposing of the present second appeal, it is enough to say that the right of the community to the topes has not been lost by adverse possession.

It follows that the decision of the learned Subordinate Judge was correct. The second appeal is dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

A. I. R. 1930 Madras 567

ANANTAKRISHNA AYYAR, J.

Mahammed Ismail Saheb and *another* —Plaintiffs—Appellants.

v.

Rasool Bi and *others*—Respondents—Defendants.

Second Appeal No. 1568 of 1925, Decided on 13th November 1929, against decree of Sub-Judge, Masulipatam, in Appeal Suit No. 59 of 1925.

(a) Contract—Stranger—Right to enforce —Mortgagee not being party to agreement between mortgagor and her vendee as regards payment of mortgage money cannot enforce agreement.

A mortgagee not being a party to the vendee's sale deed nor to the arrangement made between the mortgagor and her brother on the one hand and their vendee on the other with reference to the payment of the mortgage decree amount, is not entitled to rely on the same nor base any rights in her favour by virtue of a transaction to which she is not a party.

[P 567 C 2]

(b) Evidence Act, S. 115—Mahomedan lady executing mortgage attested by her brother to raise money to meet his debts—Mortgagee bringing suit on mortgaged property—Property purchased pending suit—Purchaser suing for cancellation of delivery order—Purchaser held not estopped from setting brother's rights in mortgage property.

C a Mahomedan lady executed a mortgage deed in favour of *B*. *B* put that mortgage into suit, and when the suit was pending, *A* purchased the property from both *C* and her brother *D*. In fact the property belonged really to *C* and that for a debt due by *D*, *C* executed the mortgage deed and *D*, her brother, also attested the said mortgage. *B* succeeded in his suit and having himself purchased the property got delivery through Court. *A* brought the present suit for declaration of title and for cancellation of delivery order.

Held: that, as *B* had not proved that *D* and *A* are estopped from setting up *D*'s rights in the properties, *A* was entitled to *D*'s rights in the properties and that *A* and *B* were entitled to joint possession of the properties. [P 568 C 2]

P. Satyanaryyana Rao—for Appellants.

Ch. Raghava Rao—for Respondents.

Judgment.—This second appeal has been preferred by plaintiffs who, as purchasers from defendant 2 and her brother Muhammad Hussain, claim to be entitled to the suit property, said to have been purchased by defendant 1 in execution of the mortgage decree that she obtained against defendant 2. The facts are these: Defendant 2 executed a mortgage deed Ex. 1 in 1911 in favour of defendant 1. Defendant 1 put that mortgage into suit, and. when the suit was pending, the plaintiffs purchased the property under Ex. A from both defendant 2 and her bother Muhammad Hussain. Plaintiff 2 as P. W. 1 admits that a portion of the consideration for Ex. A was reserved with the plaintiffs for payment to defendant 1 in respect of the decree that she had obtained. The plaintiffs did not, however, make any payment. The result was that defendant 1, in execution of the decree which she obtained, purchased the property and got delivery through Court. The plaintiffs intervened under O. 21, Civil P. C. but their objections were not heeded to, with the result that defendant 1 obtained delivery of the properties in execution. The plaintiffs' present suit is for declaration of their title and for cancellation of the delivery order.

Several defences were raised by defendant 1. The main defences were those covered by issues 2 and 3. Both the lower Courts held that the plaintiffs were bound to discharge the decree debt in O. S. No. 215 of 1914, and on that ground they held that the plaintiffs were not entitled to any relief. Having had that question fully discussed before me, I have come to the conclusion that defendant 1, not being a party to Ex. A, the plaintiff's sale deed, nor to the arrangement made between defendant 2 and her brother on the one hand and plaintiffs the vendees on the other, with reference to the payment of the decree amount, is not entitled to rely on the

same, nor base any rights in her favour by virtue of a transaction to which she was not a party. Reading Ex. A, I am not able to find that the plaintiffs undertook with defendant 1 to discharge the decree amount. No doubt, the amount was reserved with them by defendant 2 and her brother, and they would have their own remedies against the plaintffs if the plaintiffs did not act according to the terms of the agreement entered into by them with defendant 2 and her brother. So far as defend ınt 1 is concerned, I am clearly of the opinion that she is not entitled to take advantage of the arrangement mentioned in Ex. A. The learned counsel for the defendant 1, however, drew my attention to para. 4 of the written statement filed by defendant 1 in which it is alleged that the properties belonged really to defendant 2, and that for a debt due by Muhammad Hussain defendant 2 executed the mortgage deed to defendant 1 and that the brother of defendant 2 also attested the said mortgage. He drew my attention to the fact that issue 2 was specifically raised with reference to the said allegation in the written statement, and that the lower appellate Court had not recorded any finding on issue 2. I think that, before I finally dispose of the appeal, it is necessary to have a definite finding on the point covered by issue 2 on the evidence on record. I accordingly call upon the lower appellate Court to record a finding on issue 2, and the finding should be submitted within one month after the reopening of the lower appellate Court: 7 days will be allowed for objections.

The case was very fully discussed before me, and I think it is proper that I should record my impressions, in case the finding on issue 2 should be ultimately against defendant 1. It was argued that, because defendant 1 purchased the whole of the properties in suit by virtue of the decree in the mortgage suit and got possession of the same the plaintiff's only remedy would be to file a suit for partition and that the plaintiffs would not be entitled to any relief in the suit as framed. No doubt, in case it be found on the question of estoppel that the plaintiffs are estopped from setting up their claim to the suit properties, and from contending that the mortgage to defendant 1 is not binding upon them, then the plaintiffs would not be entitled to any relief at all. If, however, the finding on the issue of estoppel is in favour of the plaintiffs, then, I think the proper relief that should be given to the plaintiffs in this case would be to give plaintiffs joint possession along with defendant 1 and modify the delivery order to defendant 1 accordingly, with liberty to the plaintiffs and defendant 1 to work out their rights in the properties by a suit for partition.

[In compliance with the order contained in the above judgment the Subordinate Judge of Masulipatam *submitted* the following.

Finding. —The following is the issue on which I am called upon by the High Court to submit a finding on the evidence on record.

"Whether he (the brother of defendant 2) and his reversioners, the plaintiffs are not estopped in setting up his claim to the suit property."

* * * * * * * *

On the whole, judging from the material evidence on record, I am of opinion that there is no warrant for holding the view that defendant 2's brother Muhammad Hussain or his representatives in interest. the present plaintiffs, are estopped from setting up his claim to the property in question. I find on the issue accordingly that they are not so estopped.

This second appeal coming on for final hearing after the return of the above said finding the Court delivered the following:]

Judgment.—Having regard to the observations of the lower appellate Court in para 3 of the finding, I have to accept its finding. and I hold that defendant has not proved that defendant 2's brother and the plaintiffs are estopped from setting up defendant 2's brother Muhammad Hussain's rights in the properties.

The result will be that the decree of the lower Courts will be modified by declaring that plaintiffs are entitled to Muhammad Hussain's rights in the properties and the delivery made to the defendant 1 in O. S. 215 of 1914 will be set aside to this extent that plaintiffs and defendant 1 should be held entitled to joint possession of the properties till their respective rights are worked out in

separate appropriate suits. In the circumstances each party will bear his costs in all Courts.

P.R.S./v.S. *Decree modified.*

A. I. R. 1930 Madras 569

PHILLIPS AND PANDALAI, JJ.

Chockalinga Chetty and *others*—Plaintiffs—Appellants.

v.

Kolagiri Munigan and *others*—Defendants—Respondents.

Second Appeals Nos. 1682 to 1707 of 1927, Decided on 8th March 1929, from decrees of Dist. Judge, Chingleput, D/- 26th October 1926, in Appeal Suits Nos. 65 to 85 and 26 to 29 and 35 of 1926 respectively.

Madras Estates Land Act, S. 3 (2) (c)—Mafooskhanpet being jagir, Act is applicable.

The estate known as Mafooskhanpet being a jagir within the meaning of S. 3, the Act applies : 40 *Mad.* 664, *Ref.* [P 570 C 1]

P. S. Ramaswami Iyengar, *T. N. C. Srinivasa Varadachari* and *S. Varadachariar*—for Appellants.

T. Rangachariar and *M. S. Venkatarama Iyer*—for Respondents.

Phillips, J.—In these second apppals, it is contended that the finding of the lower Courts that the suit lands constituted a jagir is incorrect. This would appear to be primarily a finding of fact but it has very frequently been contended in this Court that when a finding of fact is based upon the construction of documents, that necessarily implies a further question of law. I am not saying that in this present case the argument has been put forward in that broad form but it has been so put forward before me very frequently. That it is thoroughly untenable is clear from the judgment of the Privy Council in *Midnapur Zamindari Co. Ltd* v. *Umacharan Mandal* (1), where a finding which was based on documentary evidence alone was held to be a decision upon a question of fact, with which the Court could not interfere in second appeal. Their Lordships remark:

"It is clear therefore, that, unless it can be shown that he (namely the District Judge) has misdirected himself in point of law in dealing with this question of fact upon this evidence there is no ground for appealing from his decision upon the question of fact,"

and again:

"The suggestion is that it can be made to appear clearly from the construction of the documents prior to the ruffinama, that the present tenure can be dated earlier than the 6th March 1884. That appears to their Lordships to be nothing but a contention that a different conclusion of fact might have been drawn from those documents."

In the present case, the District Judge has considered the various documents beginning from the year 1761 and has come to the conclusion that the suit land is a jagir and therefore that it comes within the provisions of S. 3 (2) (c), Estates Land Act which relates to unsettled palaiyams or jagirs. There is no definition of the term "jagir" in the Estates Land Act or, so far as I know, in any other legislative enactment and therefore we are thrown back upon what are looked upon as authorities on the subject such as Willson's Glossary, Baden Powell's Land Tenures" and Maclean's "Manual of Administration" and the definitions given in these authorities have been considered by a Bench of this Court in *Sam* v. *Somalinga Mudaliar* (2) and the definition of "jagir" has been there laid down. The District Judge has considered all these definitions and has considered whether the facts in the present case bring the suit estate within the definition of "jagir."

It is argued that the word "jagir" in S. 3 (2) (c) must be interpreted as referring only to one class of jagirs and not to another class of jagirs. I can see no ground whatever for saying that there are two clasees of jagirs. The Act deals with jagirs and jagirs alone. It is possible that lands may be called jagirs at times which are not really jagirs but we have to see what the word means. The District Judge has accepted the interpretation of the word by this Court and, after a consideration of the documents, has come to the conclusion that the suit estate comes within the definition.

It is argued that the nature of the grant in this case, which dated back to the 18th century, has not been definitely proved. It is true that there is no direct evidence of the term of the grant, for the grantees themselves have been unable to put forward such evidence, and therefore, one must look to the circumstantial evidence for coming to a conclusion as to the nature of the tenure.

(1) A. I. R. 1928 P.C. 187.

(2) [1917] 40 Mad. 664=34 I. C. 803=30 M. L. J. 600.

The point has to be decided and must be decided on what evidence is available. There is the evidence of history and there is the evidence of fact that this estate has been styled a jagir at least from the year 1840 and that, although the Inam Commissioner at one time was inclined to consider it as a "devadayam inam," he finally decided that it was a grant which was outside the province of his department, and this apparently was the decision of this Court in a suit in 1866. It is therefore impossible to say that, in considering the evidence, the Judge misdirected himself in point of law; and consequently his finding is a finding of fact which is binding upon us here in second appeal and that finding must be accepted. On that finding, the appeals must fail.

It, however, appears that by some mistake the lower Court's decree has uot been drafted in accordance with the judgment and the plaintiffs' suit was dismissed instead of an order being passed that the plaint should be returned for presentation to the proper Court, This modification must be made in the decree and subject to that, the appeals are dismissed with costs. The Civil Revision Petitions are also dismissed with costs. The Civil Misc. Appeal Nos. 456 to 462 of 1926 are not pressed and are dismissed with costs.

Pandalai, J. — I also agree that there was material before the learned District Judge from which he could have come to the conclusion that Mafooskhanpet was a jagir within the meaning of S. 3 (2) (c), Estates Land Act. Mafooskhan was the brother of the then Nawab. He bought the kudivaram rights in a portion of the Nayar village in 1761. It is known that two years later this portion of the Nayar village was not handed over to the East India Company along with the remainder of the Chingleput jagir and it is also admitted that at no subsequent time had this property been subjected to taxation. From that time onwards, both the melwaram and kudivaram rights have been joined in one hand. Then about 1840 we see that in the paimash account the property was described as "Mafooskhanpet jagir and the owner as "jagirdar." In 1866 at the time of the Inam Commission the property was described as "Mafooskhanpet jagir," Therefore, in addition to the admitted fact that Mafooskhan. the brother of the then Nawab, was the grantee of the melvaram right and that he had previously bought the kudivaram right, there was also the fact established in evidence that for a period of nearly 90 years before the suit, the property had been regarded in Government accounts and by private parties as a jagir, The idea that it was an inam in the proper sense, that is, an endowment to a charity, seems to have been at one time suggested but it was negatived so early as 1867 when this Court found that it was not an endowment for the mosque. Mafooskhan seems to have perpetuated his name by founding that subsequently came to be known as Mafooskhanpet in the area which he acquired. He seems to have also built a mosque there with the same object. I do not see why a gift by the Nawab to his near relation for the purpose of perpetuating his name or of his winning his goodwill should not come within the definition of the word "jagir" as adopted by this Court in the decision referred to by Mr. Varadachariar. At any rete, all that the District Judge did was from these available materials to draw the inference that the gift to Mafooskhan was of such a character as to fall within the definition of the word "jagir." I am not prepared to say that he was not entitled to do so in the circumstances. This is sufficient to dispose of the second appeals.

I agree to the orders proposed by my learned brother.

P.R.S./P.R. *Appeals dismissed.*

A. I. R. 1930 Madras 570

CURGENVEN, J.

(*Chennubhotla*) *Venkatasubbarayudu* —Defendant 3—Appellant.

v.

(*Duvvuri*) *Nagamma* and *others* —Plaintiffs—Respondents.

Second Appeal No. 1230 of 1926, Decided on 3rd December 1929, from decree of Sub-Judge, Narsapur, in Appeal Suit No. 6 of 1925.

(a) Transfer of Property Act (4 of 1882): S. 75—Subsequent mortgagees not party to suit by prior one—Sales under both mortgages—Purchaser at puisne mortgagee's sale gets good title subject to first mortgage rights of purchaser at prior mortgagee's sale.

A Subsequent mortgagee is not affected by

proceedings to which he was not made a party and his right to sue for sale of the equity of redemption continues and the purchaser at such sale gets a good title against the purchaser at the sale held under the prior mortgage, but is subject to the first mortgage rights acquired by his purchaser under the earlier sale : 21 *M. L. J.* 213 ; 40 *Mad.* 77, *Foll.* ; 32 *Mad.* 485 and 22 *M. L. J.* 129, *not Appr.*

[P 571 C 1 P 572 C 2]

(b) Transfer of Property Act (4 of 1882), S. 52—Effect of—Purchase at execution sale—Suit improperly constituted—Principle of lis pendens still applies.

The principle of lis pendens applies to a purchase where the purchaser whose purchase is in execution of a decree in a suit improperly constituted and comes into existence pendente lite.

[P 572 C 2]

B. Satyanarayana and *K. Bhimasankaran*—for Appellant.

G. Lakshmanna—for Respondents.

Judgment.—The property in suit was twice mortgaged, first by the original owner, Chenna Peribhotlu, and again by Yegyanna the purchaser of the equity of redemption. The first mortgagee sued in O. S. No. 369 of 1897, making parties Peribhotlu and Yegyanna (with his sons), but not the puisne mortgagee, and obtained a decree. The puisne mortgagee sued in O. S. 184 of 1901, impleading Yegyanna and his sons, and obtained a decree on 15th November 1901. After this decree in 1902, defendant 4 through whom the plaintiffs (now respondents) claim, purchased the property in Court sale under the prior mortgagee's decree. The property was again sold under the puisne mortgagee's decree and bought by defendant 3, who is the appellant before me. The question for decision is whether the title of the 4th or of the 3rd defendant is to prevail.

An answer in favour of each claimant may, if I construe them correctly, be derived from cases decided by Courts. Broadly stated the one view is that the auction-purchaser at the later sale, here defendant 3, would buy nothing because the saleable interest of the judgment-debtor had already passed to the earlier auction-purchaser ; the other view is that the puisne mortgagee not having been made a party to the prior mortgagee's suit, his rights would not be in any way affected, and his auction-purchaser would secure a title subject to the first moragage interest vested in the first purchaser. Examples of the former line of argument are *Kutti Chettiar* v. *Subramania Chettiar* (1) and *Vekatagiri* v. *Satagopa Chariar* (2) ; of the latter *Mulla Veetill Seethi* v. *Achuthan Nair* (3) and *Chinnu Pillai* v. *Venkatasamy Chettiar* (4). In the first of these cases the puisne mortgagee sued first and sold first, and the view taken was that both the mortgagees have an equal right to sell the property, and once it is sold at the instance of one mortgagee there is no futher saleable interest left in the judgment-debtor to be sold again. That, no doubt, is indisputable. The only question seems to be whether it necessarily settles the point. The next case in order of time is the Full Bench judgment in *Mulla Veetil Seethi* v. *Achuthan Nair* (3). The question referred was whether a first mortgagee who has bought in execution of his decree can sue to eject a puisne mortgagee with possession. The judgment contains an elaborate review of the case law dealing with the rights of puisne mortgagees. It is urged that many of the observations made are obiter, but I do not think so; the learned Judges begin with the remark that there are conflicting decisions and that the source of the difficulty seems to lie mainly in arriving at a definite conception of the rights of the second mortgagee. What those rights are therefore had to be investigated. It was held that the subsequent mortgagee could not be affected by proceedings to which he was not a party, and if the rights of the puisne incumbrancer who was not made a party to the suit of the prior mortgagee are preserved in every respect, the right to sue for sale of the equity of redemption which existed previous to the suit by the first mortgagee must continue to remain after it. It would seem that if the right to sue for sale remains, the right to sell remains, and with it the ability to give the purchaser a good title. But it would, I dare say, be going too far to use the passage above cited as authority for the proposition that the second mortgagee may sell behind the back of the first auction-purchaser, though indeed

(1) [1909] 32 Mad. 485=4 I. C. 1077=19 M. L. J. 728.
(2) [1912] 22 M. L. J. 129=14 I. C. 449.
(3) [1913] 21 M. L. J. 213=9 I. C. 513=(1911) M. W. N. 165.
(4) [1917] 40 Mad. 77=30 M. L. J. 347=34 I. C. 507=(1916) 1 M. W. N. 245.

the first sale was conducted behind his own back notwithstanding that he was a necessary party to the first mortgagee's suit. This Full Bench opinion was considered by Munro and Sankaran Nair JJ. in *Venkatagiri* v. *Satagopachariar* (2), another case of two competing sales. They remark, what is no doubt true, that a different question was referred to the Full Bench, though it was apparently decided that a puisne mortgagee may sue the purchaser of the equity of redemption without redeeming the prior mortgage. Their own view is that the puisne mortgagee has a right to sell the property even after sale by the first mortgagee, but he can exercise that right only after redeeming the prior mortgage.

The rights of the two mortgagees in the matter of sale came up again for consideration by Coutts, Trotter, J. (as he then was) and K. Srinivasa Ayyangar J. in *Chinnu Pillai* v. *Venkatasami Chettiar* (4). The several cases which I have alluded to are reviewed by the latter learned Judge. Referring in particular to the argument relied on in *Venkatagiri* v. *Satagopa Chariar* (2) and the cases, that the judgment-debtor's interest having been sold there is nothing left for the puisne mortgagee to sell, he observes that :

"this ignores the fact that the first purchasr purchases it subject to the rights of the second mortgagee to sell."

and later on he thus criticizes the opposite view, with cogency, if I may most respectfully say so:

"Therefore it comes to this: That the second mortgagee is entitled to, and must bring a fresh suit against the purchaser in the first sale to sell the property for the satisfaction of the second mortgage debt subject to which the first purchaser took, and that the whole of the proceedings taken by the second mortgagee to realize his security, which proceedings were regularly and properly constituted, in which he obtained the decree he was entitled to get. . . . . become wholly infructuous not owing to any fault of his, but because a purchaser comes into existence pendente lite, whose purchase is in execution of a decree in a suit improperly constituted."

The learned Judges refused to regard the dicta in the Full Bench case *Mulla Veetil Seethi* v. *Achuthan Nair* (3) as obiter, approved them and deemed them to be binding on them, and dissented from *Venkatagiri* v. *Satagopachariar* (2) and other cases to the same effect. At the end of his judgment Srinivasa Ayyanger J. deduces seven general propositions. The last of these applies to the circumstances of the present case ; and I propose to adopt this view of the law in preference to the view that no title can pass by the sale.

One of the conditions laid down in the other cited proposition is that where there has been a sale under the first mortgage the auction-purchaser should be made a party. It has not been contended here that that condition was not satisfied. Defendant 4, who bought the property in the sale under the first mortgagee's decree, is a son of Yegyanna, the transferee of the equity of redemption. The learned District Munsiff found, indeed, that this purchase was on behalf of the joint family, in other words, by the holder of the equity of redemption. The learned Subordinate Judge differed from him on this point. The propriety of the Subordinate Judge's finding is questioned here but on the view I take I do not think it is necessary to pronounce upon it. In the second suit Yegyanna and his sons were impleaded as the mortgagors, so that in that capacity defendant 4 was before the Court which ordered the sale now in dispute. It is perhaps worth repeating that defendant 4 did not buy the property until after the decree in O. S. 184 had been passed against him and his father and brother. The principle of lis pendens, I think, applies to his purchase.

I consider therefore that the appellant is entitled to possession of the suit property as against defendant 4 and the plaintiffs who derive title from him. Defendant 3 holds the property subject to the first mortgage rights acquired by the purchaser under the earlier sale. The plaintiffs sued for possession and prayed that if they could not recover it defendant 3 might be made to pay compensation. Neither of these prayers can be granted. They ask me to compel defendant 3 to redeem them. This would be to allow them to put forward newly an alternative case, and ask for an alternative relief, after fighting their claim on the footing that the execution proceedings were void. It appears that defendant 3 has been continuously in possession of the property since, 1915, and under Art, 132, Lim. Act such a

claim, if now preferred would be barred. In these circumstances I do not think that I ought to comply with the request.

The result accordingly is that the second appeal is allowed and the plaintiff's suit dismissed, with costs of defendant 3 throughout.

P.R.S./J.M. *Appeal allowed.*

A. I. R. 1930 Madras 573

ANANTAKRISHNA AYYAR, J.

(*Palakolanu*) *Manikyam* and *others*—Plaintiffs—Appellants.

v.

(*Palakolanu*) *Chandrasekharudu*—Defendant—Respondent.

Second Appeal No. 1235 of 1926, Decided on 7th January 1930, from decree of Dist. Judge, Kistna, in Appeal Suit 1 of 1925.

(a) Madras Hereditary Village Offices Act (3 of 1895), S. 13—Question as to emoluments of office decided by Collector—Parties cannot agitate same in civil Court—Civil P. C., S. 11.

Under S. 13, Civil P. C., the Collector has jurisdiction to determine whether lands are the emoluments of an office or not, and the parties to the proceeding are debarred by S. 11, Civil P. C, and the general principles of res judicata from re-agitating the same question subseqnently in a civil suit: 30 *Mad.* 320, *Foll.* [P 574 C 2]

(b) Madras Hereditary Village Offices Act (3 of 1895), Ss. 13 and 21 — Revenue Court having jurisdiction—Civil Court cannot consider correctness of decision by revenue Court.

The civil Courts are not entitled to go into and consider the correctness of the decision on the merits in a case which otherwise was properly within the jurisdiction of the revenue Court under S. 13 of the Act. [P 575 C 1]

(c) Jurisdiction—Effect or meaning of Court having jurisdiction to entertain suit explained.

A Court having jurisdiction to entertain a suit has also jurisdiction to decide it, whether the decision on the merits be right or not. If it has decided wrongly, the only remedy for the aggrieved party is to take steps prescribed by law for setting it aside, either by means of an appeal or revision or, where the law provides such a remedy, by means of a fresh suit. [P 575 C 1]

G. Lakshmanna—for Appellants.

P. V. Vallabhacharyulu—for Respondent.

Judgment.—The plaintiffs instituted the suit out of which this second appeal has arisen in the Court of the Subordinate Judge of Narasapur against the defendant for a declaration that the decrees in R. S No. 14 of 1922 on the file of the Sub-Collector, Narasapur and A. S. No. 6690 of 1923 on the file of the Collector of Kistna are:

"null and void for want-of jurisdiction and illegal and for a permanent injunction restraining the defendant from executing the decrees in the said suit and appeal."

The defendant's father was a village carpenter in a Government village governed by the Madras, Act 3 of 1895. The lands which are the subject matter of the present suit and also the subject matter of R. S. No. 14 of 1922 are lands attached to the office of the village carpenter. On the allegation that the defendant was appointed as the village carpenter by the revenue authorities in 1921, he filed R S. No. 14 of 1922 in the Court of the Sub-Collector of Narasapur Division for recovery of the lands claiming that they formed the emoluments attached to the carpenter service inam of Illapakurru village. The defendants in that suit, who were the present plaintiffs, raised various pleas, one of which was that the then plaintiff's father who was the carpenter in 1907 was dispossessed by them of the lands in question, that they had acquired title to the lands by virtue of adverse possession for more than the statutory period and that the mere fact that the then plaintiff was appointed as the village carpenter in 1921 could not give him a right to recover the properties to which the defendants had acquired (according to them) title by adverse possession for more than 12 years. They also pleaded that the revenue Court had no jurisdiction to entertain the suit. Both the Sub-Collector and on appeal the District Collector, overruled the pleas of the then defendant and decreed the plaintiff's suit in his favour and directed that the defendants should surrender possession of the properties to the then plaintiff with mesne profits.

The present suit has been filed by the present plaintiffs (who were defendants in the revenue suit) for a declaration that the decrees passed by the Sub-Collector, and the District Collector in appeal, are null and void and illegal and also for an injunction restraining the successful plaintiff in the revenue suit, who is the defendant in the present suit, from executing those decrees. Both the lower Courts have dismissed the suit. Hence this second appeal has been preferred by the plaintiffs.

The learned advocate who appeared for the plaintiffs in this second appeal argued that as the present plaintiffs had been in possession of these lands from 1907 and as the revenue suit (14 of 1922) was filed in 1922, they had acquired title to the lands by adverse possession and that the mere circumstance that (after the acquisition of such title by them as against the then village carpenter, that carpenter resigned, or died) and a new carpenter was appointed did not give the newly appointed carpenter a fresh right to recover possession of the properties to which the persons in possession had acquired title by virtue of limitation. He also argued that on a proper construction of the plaint in R. S. No. 14 of 1922 that suit must be taken to have been instituted against a trespasser and that such a suit would not lie in the revenue Court. After considering the arguments urged by the learned advocate for the appellants carefully, I have come to the conclusion that in substance and in fact, the prior suit was a suit by the village carpenter to recover emoluments which he alleged were attached to that office. Such a suit is specifically provided for by the Madras Act, 3 of 1895. With reference to the argument of the learned advocate that that was not the real nature of that suit, I think it necessary just to quote a sentence or two from the judgments of the Sub-Collector and the District Collector in appeal.

This is what the Sub-Collector says (Ex. 1) :

"He (the plainttff) has brought the suit only by virtue of his appointment to the office. It is really a suit for emoluments within the meaning of S. 13 of the Act, as the plaintiff has been discharging the duties of the office, since the date of the appointment (1921)."

Similar observations were made by the learned District Collector in appeal. This is what he says. (Ex. 2) :

"There is no doubt at all that the respondent is the sole registered holder, that he instituted his suit within three years from the time when he was registered as office holder and that the lands in dispute formed the emoluments of the office."

I agree with these observations, and in my view the prior suit was in substance a suit under S. 13 of the Act by an office holder appointed in 1921 to recover lands which he alleged were attached to that office. If I am right in my construction of the proceedings in the prior suit, it is clear that the result of that suit is binding upon both the parties. Under S. 13 read with S. 21, the revenue Court has been conferred special exclusive jurisdiction to take cognizance of suits by the officers mentioned in S. 3 of the Act to recover the emoluments attached to such offices. It is not denied that the village carpenter is one of the persons mentioned in S. 3. The only question then being whether the prior suit was a suit to recover emoluments attached to the village carpenter's office, having regard to my view that that was the nature of that suit, it is clear that the adjudication in that suit is binding on both the parties. This proposition could not possibly be contested. In fact, the decision in *Seshayya* v. *B. Subbayya* (1) is a direct authority on this question where Benson and Wallis, JJ., say as follows :

" Under S. 13 of Act 3 of 1895, the Collector has jurisdiction to determine whether lands are the emoluments of an office or not, and the parties to the proceeding are debarred by S. 13. Civil P. C. and the general principles of res judicata from re-agitating the same question subsequently in a civil suit."

It also seems to me that the authority of the Full Bench in *Kesiram Narasimhalu* v. *Narasimhalu Patnaidu* (2), is also in favour of this proposition. The learned advocate, however, argued that the effect of dispossession of the office-holder has not been duly considered, nor the law relating to that point properly applied, by the revenue officers in the prior suit. He also argued that adverse possession against an office-holder is adverse possession against his successor also and that the successor could not by the mere fact that he filed a suit within the limitation period after he was appointed to the office, claim to recover possession in a case where the defendants were in adverse possession for more than 12 years during the time of the previous office-holder. In my view that question does not arise for decision in the present case. If I am right in my view that the prior suit did lie in the revenue Court under S. 13, then I am not concerned with the correctness or otherwise of the decision on the merits in that litigation. No second appeal lies to the High Court

(1) [1907] 30 Mad. 320.
(2) [1907] 30 Mad. 126=16 M. L. J. 514.

against the Collector's decision and the present second appeal is not against the decision of the Collector. In fact, under the Act, the High Court has no jurisdiction to interfere with decisions passed by Sub-Collectors and District Collectors in appeal, the Revenue Board being given jurisdiction in such cases. Having regard to the policy of Act 3 of 1895, I think that the civil Courts are not entitled to go into and consider the correctness of the decision on the merits in a case which otherwise was properly within the jurisdiction of the revenue Court under S. 13 of the Act. In the lower appellate Court the plaintiffs relied on a decision of a single learned Judge of this Court reported in *Kotiah* v. *Reddamma* (3), in support of the position that, if a plaint contained an allegation which was not strictly necessary for the purpose of enabling the suit to be brought under S. 13 of the Act, then the revenue Courts have no jurisdiction. I find, however, that the decision in *Kotiah* v. *Reddamma* (3), was on appeal under the Letters Patent reversed by two learned Judges vide : *Pattayya* v. *Kotiah* (4). As regards the construction of the plaint in the prior suit, I think that that was a suit properly brought under S. 13 of the Act, and within the special cognizance of the revenue Court.

In this view it is unnecessary for me to say anything with reference to the other argument raised by the learned advocate for the appellants. I have got a case where under the Act special jurisdiction has been conferred upon the revenue Court and assuming, but not admitting, that the decision of the revenue Court was on the merits erroneous on the question of limitation, that does not render its decree null and void nor does it enable the present plaintiffs to obtain a declaration to that effect which is what they seek in the present suit. A Court having jurisdiction to entertain a suit has also jurisdiction to decide it whether the decision be on the merits right or not. If it has decided wrongly, the only remedy for the aggrieved party is to take steps prescribed by law for setting it aside, either by means of an appeal or revision or, where the law provides such a remedy, by means of a fresh suit. In the present case Act 3 of 1895 provides special remedy in respect of suits to recover emoluments attached to offices mentioned in S. 3, in the revenue Court and having regard to the authorities referred to by me, civil Courts have no jurisdiction to go into that question.

On behalf of the respondent it was suggested that having regard to the circumstances that under S. 25 of the Act while certain sections of the Limitation Act have been incorporated and made applicable to proceedings under Madras Act 3 of 1895, S. 28, Limitation Act, is not one of the sections so incorporated. From that, if I understood the learned advocate properly, he argued that the effect of adverse possession, assuming it to be so on the part of the present plaintiffs as against the prior carpenter, would not extinguish the title either of the prior carpenter, or of the present incumbent. On this point, the learned advocate drew my attention to the observations in the case in *Vanchinatha Iyer* v. *Rajagopala Iyer* (5), the learned advocate for the appellant in his reply submitted that having regard to the facts of that case the learned Judges had not to decide about the applicability or otherwise of S. 28, Limitation Act, to a case brought in the civil Court. However, I do not feel called upon to express any opinion upon such a point. I think that the lower Courts were right in their view regarding the nature of the prior suit and I accordingly hold that the plaintiffs are not entitled to the declaration sought for and that the decision of the lower Courts is right. The second appeal is accordingly dismissed with costs. Leave refused.

P.R.S./V.B. *Appeal dismissed.*

(3) [1916] 1 M. W. N. 278=33 I. C. 658.
(4) [1917] M. W. N. 7 = 37 I. C. 918 = 5 M. L. W. 151.
(5) A. I. R. 1922 Mad. 361.

A. I. R. 1930 Madras 575

JACKSON, J.

Rengathammal—Petitioner.

v.

Venkatachariar and *others*—Respondents.

Civil Revn. Petn. No. 152 of 1929, Decided on 5th November 1929, against order of Dist, Munsif, Devakottah, D/- 30th July 1928, in Insolvency Appeal No. 116 of 1928.

Civil P. C., S. 2 (11)—**Member of Hindu joint family sued on pro-note dying—Legal representatives.**

When a member of a Hindu joint family, who has been sued on a pro note, dies, and it is contended that his brothers can be impleaded as legal representatives, it must be shown prima facie that the deceased has an estate before the first definition in S. 2 (11), can be applied. [P C 576 1]

S. V. Venugopalachari—for Petitioner.

P. R. Srinivasan—for Respondents.

Judgment.—The point here raised is whether when a member of a Hindu joint family has been sued on a pro-note and dies, his brothers may be impleaded as legal representatives. It is argued that they can be so impleaded, no matter whether the deceased did or did not own an estate. They are the legal representatives on the hypothesis that he had an estate, and questions of reality can be left to execution.

I think such a view would unnecessarily harass the parties so impleaded. It must be shown prima facie that the deceased has an estate before the first definition in S. 2 (11) Civil P.C., applies and in the record of this particular case there is no such showing. The petition is dismissed with costs.

P.R.S./v.S. *Petition dismissed.*

A. I. R. 1930 Madras 576

CURGENVEN, J.

Secy. of State—Petitioner.

v.

C. R. Subramania Ayyar — Respondent.

Civil Revn. Petn No. 214 of 1929, Decided on 9th October 1929, against order of Principal Sub-Judge, Kumbakonam, D/- 8th November 1928.

(a) Land Acquisition Act (1 of 1894), S.25—Scope.

Section 25 is concerned with the maximum and minimum amounts which the Court may award in each of the three cases: (1) where the applicant has made a claim before the Collector, (2) where without sufficient reason he has failed to make a claim, and (3, where with sufficient reason he has so failed. In the last of these cases the minimum is not to fall below the amount of the Collector's award, but no maximum has to be observed. [P 576 C 2, P 577 C 1]

(b) Land Acquisition Act (1 of 1894), Ss. 18 to 28—Proceedings under, were not independent judicial ones—Claimant cannot make out fresh case.

The proceedings before the Court are of the nature of objections to the Collector's award, and not a judicial inquiry independently undertaken into such questions as the claimant may raise, and it would not be open to a claimant to make out a fresh case, whether by way of supplementary claims to compensation or otherwise: 145 *P. W. R.* 1918, *not App.* [P 577 C 1]

Government Pleader—for Petitioner.

Salem Ramaswami Iyer—for Respondent.

Judgment. — This petition is preferred by the Secretary of State against an order passed by the Subordinate Judge of Kumbakonam in a land acquisition case. Certain land of the respondent was acquired and under S. 10 of the Act (1 of 1894) he put in a claim to compensation which was made up of the value of the land, of some cocoanut trees, and of two walls, together with a sum claimed as compensation for depreciation of his property. In due course an award was made and subsequently the respondent asked the Collector under S. 18 to refer the matter for the determination of the Court. Before the Court he supplemented his claim by the addition of two new items, the cost of constructing new walls and the cost of erecting latrines. It was objected on behalf of the Government that the Court had no power to entertain such newly preferred claims. The learned Subordinate Judge, however, found that in certain circumstances S. 25 gave him jurisdiction. He disallowed the claim in respect of the latrines but allowed it in respect of the walls. Against the latter part of the order this petition is filed.

Section 25 of the Act, upon sub-S. (3) of which the lower Court has relied, runs as follows;

"Section 25 (1) When the applicant has made a claim to compensation, pursuant to any notice given under S. 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under S. 2.

(2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

(3) When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the Court shall not be less than, and may exceed the amount awarded by the Collector."

It will be seen that the section is concerned with the maximum and minimum amounts which the Court may award in each of the three cases: (1) where the applicant has made a claim

before the Collector (2) where without sufficient reason he has failed to make a claim and (3) where with sufficient reason he has so failed. In the last of these cases the minimum is not to fall below the amount of the Collector's award, but no maximum has to be observed. That it appears to me, is all that the section says, and I can read into it no authority whatever for the course which the Subordinate Judge has found himself open to take under it. It deals with the amount of compensation, not with the grounds upon which compensation should be awarded, and I see no reason to hold that because the amount awarded by the Colloctor may be exceeded, therefore, grounds other than those on which the award was made may be entertained.

If, therefore, it is open to the Court to entertain fresh grounds, it must be by virtue of other provisions of the Act, or at least those other provisions must not conflict with such a course. Ss. 23 and 24 respectively lay down what matters the Court shall, and what it shall not, take into consideration but I do not think that it is sufficient to find the item of claim admissible under S. 23 to hold that the Court may grant it. Under S. 9 claims to compensation for all interests are to be made to the Collector; and under S. 15 the Collector, equally with the Court, is to be guided by the terms of Ss. 23 and 24. In all ordinary circumstances, therefore, a claimant can and should present his case fully before the Collector, and should be held bound throughout the proceedings by what may be termed his pleadings. Turning then to S 18, it enables a person interested to require the Collector to refer the matter for the determination of the Court:

"Whether his objection be to the measurement of the land, the amount of compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested."

Under sub-S. (2) he has to state the grounds on which objection to the award is taken. The proceedings before the Court are thus of the nature of objections to the Collector's award, and not a judicial inquiry independently undertaken into such questions as the claimant may raise. On this view. it would not be open to a claimant to make out a fresh case, whether by way of supplementary claims to compensation or otherwise. The point is practically bare of authority, the only opposite case cited to me being a decision to this effect by a Judge of the Punjab Chief Court in *Umar Baksh* v. *Secy. of State* (1).

It is objected that it ought to be within the power of the Court where, as here, grounds have been shown for failure to make the claim, or some part of the claim, before the Collector, to entertain it. I agree that S. 25 might well have been so drafted as to provide not only, as it does, that the amount may be enhanced but that fresh grounds may be adduced; but in point of fact it does not so provide. Hardship from absence of such a provision is not likely to arise often or in an accute form, and is of course no justification for the lower Court's action if jurisdiction so to act is lacking. I allow the revision petition, and set aside the order so far as it declares the claim admissible. Respondent will pay petitioner's costs in this Court.

P.R.S./V.B. *Revision allowed*

(1) [1918] 145 P.W.R. 1918=46 I.C. 906.

A. I. R. 1930 Madras 577

MADHAVAN NAIR AND CORNISH, JJ.

Sait Asuram Sada Suk Bhattadu—Appellant.

v.

Sub-Collector of Rajahmundry and *another*—Respondents.

Appeal No. 115 of 1928, Decided on 23rd September 1929 against order of Dist. Judge, East Godavari, D/- 19th October 1927.

(a) Civil P. C., S. 144—Decree varied—Restitution of money paid under original decree—Interest not provided in security bond—Interest can still be awarded.

After a decree has been varied in appeal, the Court of first instance while ordering restitution of money paid under its decree has discretion to award interest even though the security bond does not provide for it : 2 *Pat. L. J.* 149, *Foll.* ; 41 *Mad.* 316 and 35 *Bom.* 255, *Appr.* [P 578 C 2]

(b) Civil P. C., S. 35—Costs—Third party liable when claiming through a party to the suit.

An order for costs binds a person not party to a suit when it is directed against persons through whom he claims. [P 579 C 1]

G. Lakshmanna—for Appellant.

Government Pleader — for Respondents.

Madhavan Nair, J — This appeal arises out of an application under Ss. 144 and 151, Civil P. C., for restitution against respondent 3 in A. S. No. 256 of 1924 before the third Court and also for the recovery of costs that were ordered to be paid by the claimants 1 and 2 in the two connected appeals Nos. 256 of 1924 and 324 of 1924. The facts of the case are stated in detail by the learned District Judge and need not be restated. It appears that a sum of Rs. 22,614-12-0 was ordered to be paid in excess by the District Judge to the claimants in a certain land acquisition proceeding on a reference to him under the Land Acquisition Act. Against the order to pay the excess amount two appeals were preferred to the High Court, one A. S. No. 324 of 1924 by the claimants in that proceeding and another, A. S. No. 256 of 1924, by the Government. In A. S. No. 256 of 1924, the Government filed an application for stay of execution of the order, that respondent 3 may be allowed on furnishing security to take the amount of money that would be deposited by the Government in the lower Court. This order was passed on 24th September 1924 and the money was deposited by the Government on 9th October 1924. The security bond which was executed by respondent 3, the appellant before us, is Ex. A. In that security bond, the appellant undertakes that :

> "If A. S. No. 256 of 1924 on the file of the Madras High Court should be partly or wholly decided in favour of the appellant and respondent 3 deposits in the Court the said sum of Rs. 22 614-12-0 or any part thereof as he may be required to pay back under the decree of the High Court, this bond shall be void and of no effect, otherwise it shall remain in force."

He withdrew the money from the Court after executing this security bond. The High Court dismissed A. S. No. 324 of 1924 filed by the claimants who were respondents 1 and 2 and allowed the appeal by the Government A. S. No. 256 of 1924 to a certain extent, with the result that the amount to be deposited by the Government as compensation for the lands of respondents 1 and 2 was reduced by Rs. 17,148-15-10 and respondents 1 and 2 were made liable to pay the Government by way of costs Rs. 1,601-1-2 and Rs. 756-12-5. There was no decree against or in favour of respondent 3. Now, the Government have filed the present application for recovery of the amount of Rs. 17,148-15-10 plus interest upon that amount as well as the two sums ordered as costs from respondent 3. Respondent 3 does not deny his liability to pay the amount of Rs. 17,148-15-10 ; but his case is that he should not be called upon to pay interest upon that amount nor should he be asked to pay the costs. The learned District Judge has disallowed both these contentions. In the present appeal, the appellant urges both these grounds.

As regards interest, the argument of the learned advocate for the appellant is that under the security bond executed by respondent 3 he undertook to pay the total amount. There is no provision made for the payment of interest and, therefore, he is not bound to pay interest to the Government. The question is, whether there is the limitation of the liability to pay interest introduced in this security bond. The proceeding is admittedly one under S. 144, Civil P. C., and the Court has discretion to order the payment of interest on the amount which the parties are bound to pay back to the Government by way of restitution under that section. We do not think that the security bond in any way limits the liability for the payment of interest which the Court has got power to order as against respondent 3. In the case reported in *Indra Chand Bothra* v. *A. H. Forbes* (1) S. 149, it was held that: "under S. 144, Civil P. C., the Court may in its discretion award such interest as it chooses, and the fact that the principal only is secured by a bond under the order of the Court at the time of the withdrawal of the sum originally decreed, does not affect the liability of the person ordered to make restitution to pay interest in accordance with the section."

This case was followed by this Court in the decision in *Alagappa Chettiar* v. *Muthukumara Chettiar* (2). No doubt, the decision of our Court was not one under S. 144, Civil P. C.; but the learned Judges followed the principle underlying that section. The learned Judge of this Court, Srinivasa Ayyangar, J., decided against the contention that the party should be ordered to pay interest on the ground that the undertaking given by the party did not provide for the payment of interest in that case. The learned Judge in L. P. A. following the decision in 2 *Pat. L. J.*, set aside

(1) [1917] 2 Pat. L. J. 149=39 I. C. 22.
(2) [1918] 41 Mad. 316=42 I. C. 836=(1917) M. W. N. 669.

this decision. The decision in *Collector of Ahmedabad* v. *Laoji* (3) referred to by the learned Government Pleader comes nearer to the point as it relates to the payment of compensation under the land acquisition proceedings though there was no security bond executed in that case. In that case, as in the one before us, the High Court reduced the amount of compensation payable to the claimant and, when the Government applied to recover from the claimant interest upon the excess amount drawn by him from the Court, that claim was allowed. It was held :

"that the interest claimed should be awarded inasmuch as the claimant had the benefit of the money belonging to the Government in excess of that to which the High Court held him to be entitled and the benefit was represented not only by the excess wrongly taken by the claimant from the District Court but also the amount of interest which the excess carried."

We are prepared to apply the principle underlying these decisions to the present case. One special feature of this case may be noticed and that is, that the Government asked for an order staying execution of the decree and deposited the money when the order in favour of respondent 3 was made here. In these circumstances, we think the order as regards interest should be upheld.

The next argument of the appellant is that he should not be asked to pay costs, because he was not a party to the suit and there was no order against him.

It is true that there was no decree against him as regards costs ; but, for the purpose of the present case, we think he stands in the shoes of claimants 1 and 2, and the amount which was ordered to be paid by the High Court was in favour of the claimants. As a matter of fact, the appellant before us has no claim to the money except through the claimants 1 and 2 and, for the purpose of the proceedings under the Land Acquisition Act and in these connected proceedings for restitution, his interest must be considered to be identical with the interest of claimants 1 and 2. And, further, in the security bond he undertook to deposit in Court whatever money he might be required to pay back under the decree of the High Court ; that is to say, he made himself liable to the decree of the High Court and the decree of the High Court made the claimants 1 and 2 in the two appeals before it liable for costs of the Government. In these circumstances, we uphold the order as regards costs as well.

In the result, the civil miscellaneous appeal is dismissed with costs.

Cornish, J.—I agree.

P.R.S./J.M. *Appeal dismissed.*

(3) [1911] 5 Bom. 255=13 Bom. L. R. 259=10 I. C. 818.

A. I. R. 1930 Madras 579

WALLACE AND ANANTAKRISHNA AYYAR, JJ.

Dawloo Ma and *others*—Plaintiffs—Appellants.

v.

Karnam Ghowdappa and *others*—Defendants—Respondents.

Second Appeals Nos. 1155 of 1924 and 757 of 1925, Decided on 6th November 1929, against decree of Dist. Court, Bellary, in A. S. Nos. 105 of 1922 and 6 of 1923.

(a) Civil P. C., O. 22, R. 4—Legal representatives already on record—Note may be made to that effect even on oral application—Some legal representatives brought on record as such and others not—Estate properly represented — Fact of omission of others is not fatal to case.

In cases where the legal representatives are already on record a mere note may be made to that effect in the records and that there need not be a formal application. Courts are not debarred from passing orders in such matters without formal application and the fact that the Court had no written application, but was moved only orally is no ground for holding that it had no jurisdiction to pass an order. Further in such a case, the fact that some of the legal representatives are brought on record as such and others not, provided the estate of the deceased is properly represented and there is no prejudice to the case, is not enough to set aside the order or decree in the case. [P 581 C 1]

(b) Civil P. C., O. 47, R. 1—Subsequent ruling of Court of binding authority taking different view is no cause for review.

Because there is a subsequent decision of superior Court of binding authority on a question of law, the prior judgment passed on a different view of law is not liable as a matter of coure to be reviewed. [P 581 C 1]

K. Periasami Goundan for *T. C. Kurup*—for Appellants.

B. Somayya—for Respondents.

Anantakrishna Ayyar, J.—These two second appeals arise out of two original suits instituted, one (O. S. No. 414 of 1921) by the daughters of a deceased lady called Narasamma, and the other (O. S. No. 327 of 1921) by a son

of the deceased Narasamma. The prayer in the first suit instituted by the daughters is to recover possession of the properties. The prayer in the suit brought by the son is to set aside the decree passed by the High Court in a prior second appeal and to recover his share of the properties.

The facts leading to these cases are these: The deceased Narasamma first married a Hindu and inherited certain properties from him. She subsequently married a Muhammadan and had by him three daughters who are the plaintiffs in O. S. No. 414 of 1921 and two sons, one of whom is the plaintiff in O. S. No. 327 of 1921. The reversioners to the estate of Narasamma's Hindu husband filed a suit, O. S. No. 194 of 1912, for a declaration that certain alienations alleged to have been made by her were not binding upon them. They subsequently applied to have their plaint amended by adding a prayer for possession of the properties. The amendment was allowed, and in the result the reversioners were given a decree for possession of the properties. While the appeal in the prior litigation was pending, Narasamma died. Along with Narasamma three other persons were party defendants in the prior suit. The first was her husband's son by a prior wife, and the other two were her sons by the Mahomedan husband. Defendant 4 in that suit is the plaintiff in the present suit (O. S. No. 327 of 1921). On the death of Narasamma, an application seems to have been made orally to the Court by the plaintiffs to have the defendants 2 and 3 (respondents) brought on record as her legal representatives. Defendant 4 therein, namely, Mahboob Sahib, being then a minor, was represented by Narasamma and on her death respondent 2 was appointed as guardian ad litem for the said defendant 4 (respondent). The present suit by Mahboob Sahib is based on the main allegation that in the prior suit, on the death of Narasamma, necessary steps were not taken to bring the proper legal representatives of Narasamma, on record and that consequently, the decree and all subsequent proceedings should be taken to be null and void. In order to elucidate the circumstances in connexion with the prior proceedings, this Court called for the finding from the lower appellate Court whether the then plaintiff's action in having continued the litigation with defendants 2 and 3 as the legal representatives of the deceased Narasamma was a bona fide act. The finding of the lower appellate Court is this:

"I do not, then, see any mala fides in stating that the legal representatives were respondents 2 and 3. I find, then, on this issue that proceedings in A. S. No. 87 of 1915 were continued bona fide against respondents 2 and 3 as legal representatives of Narasamma, but that they were not so continued as against defendant 4."

The learned advocate for the appellants in this second appeal argued that the finding of the lower appellate Court meant that there was no bona fides in the matter of having brought only some defendants on record as the legal representatives of the deceased Narasamma in the prior proceedings. We do not understand the finding in that way. The facts make it clear that there could not have existed any want of bona fides on the part of the then plaintiffs in their having done so. As already remarked, along with Narasamma, three other persons were made party defendants in the appeal. Respondents 2 and 3 were brought on as the legal representatives of the deceased Narasamma, at the request of plaintiffs (appellants) in that case. No doubt, technically respondent 4 also ought to have been brought on record as a legal representative and a note made in the appeal memo accordingly. It may have been a mistake on the part of the plaintiffs. But the question to be considered now is whether any fraud or mala fides has been proved on the part of the appellants in the prior case in not having brought respondent 4 also as the legal representative. We questioned the learned advocate for the appellants to suggest any reason why the appellants in the prior case should not have brought respondent 4 also as a legal representative and whether there could have been any reason for their not doing so. Having regard to the fact that respondent 2 was brought on record as a legal representative and having regard to the fact that respondent 3 was admittedly one of the legal representatives, we do not see any reason why we should not accept the finding of the lower appellate Court to the effect that the prior

appeal was continued bona fide against respondents 2 and 3 as legal representatives of the deceased Narasamma. The estate of the deceased Narasamma must be taken to have been properly represented in the litigation.

It was contended by the learned counsel for the appellants that the proper procedure would have been to bring all the children of the deceased Narasamma as her legal representatives, and that the absence of formal application to bring on legal representatives should be taken to vitiate all the subsequent proceedings. But this Court has held that, in cases where the legal representatives are already on record, a mere note may be made to that effect in the records and that there need not be a formal application. Courts are not debarred from passing orders in such matters without formal written application, and the fact that the Court had no written application, but was moved only orally is no ground for holding that it had no jurisdiction to pass an order as in the present case. As we agree with the lower appellate Court that the estate of Narasamma should be taken, in the circumstances, to have been properly represented in the prior appeal and as plaintiff is unable to prove any prejudice, we think that the plaintiff is not entitled to have the decree and the subsequent proceedings set aside on the sole ground alleged by him. This finding is enough for disposing of the present appeal.

But it was argued by the learned advocate for the appellants that the guardian ad litem, respondent 2 in the prior case, was guilty of gross negligence in not having applied for review of the judgment passed by the High Court. After the decision of the High Court in the second appeal in question, a Full Bench of this Court held that a Hindu widow marrying a Mahomedan forfeits her widow's estate in her Hindu husband's properties. It cannot be said that, because there was a subsequent Full Bench decision of superior Court of leading authority on a question of law, the prior judgment passed on a different view of law is not liable as a matter of course to be reviewed, much less can we say that the guardian is bound to incur expenses for applying for review in such cases. The lower appellate Court has considered all the circumstances and has come to the conclusion that the guardian was not guilty of gross negligence. In coming to that conclusion it has also considered the fact that respondent 3 who was a major all along and whose interests were exactly similar to those of the present plaintiff took no such steps. The finding that there was no gross negligence should therefore be upheld for the purpose of this second appeal.

These are the main contentions urged by the learned advocate for the appellant in this second appeal, and both the grounds failing, second appeal No. 757 of 1925 must be dismissed with costs.

In Second Appeal No. 1155 of 1924 which arises out of the suit brought by the three daughters, a special question was raised by the learned advocate for the appellants based upon certain observations made by the lower appellate Court that the plaintiffs' mother was estopped and consequently the plaintiffs' (daughters) also were estopped. But it is unnecessary to discuss the daughters' suit upon that ground. As the learned counsel very properly admitted the result of enfranchisement by the Government in the name of Narasamma in 1906 would be to confer upon her absolute right to the properties ; and in the subsequent litigation against her by the reversioners of her late husband to recover possession of the properties she ought to have pleaded that the said properties did not any longer belong to the estate of her husband ; and, if for any reason she did not set up any such defence, it is not open to her daughters, as representing her, now to set up such a plea. The fact was that according to the law as understood at that time, enfranchisement of an inam in the name of a widow was understood to confer upon her only a life estate. It was only some years later that the Privy Council decided that the enfranchisement in the name of a Hindu widow would confer an absolute estate on her. It is unfortunate that Narasamma had not the benefit of the Privy Council decision as to the effect of enfranchisement in the name of a Hindu widow, as she had not the benefit of the subsequent Full Bench decision on the ques-

tion of Hindu Law mentioned by us as to the effect of a Hindu widow's marriage with a Mahomedan husband on the properties inherited by her from her Hindu husband : but the same is no ground for holding that the previous decree passed in the suit against Narasamma should not be binding upon her daughters by the Mahomedan husband i. e., the present plaintiffs. The dismissal of the suit of the daughters is accordingly correct and this second appeal also is dismissed with costs.

P.R.S./V.B. *Order accordingly.*

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* A. I. R. 1930 Madras 582

WALLACE AND ANANTAKRISHNA AYYAR, JJ.

(*Piratla Peda*) *Venkatasubbarayudu* and *others*—Defendants 2 to 4—Appellants.

v.

(*Haji*) *Silar Sahib* and *others*—Plaintiffs 1 and 2 and Defendant 1—Respondents.

Second Appeal No. 1281 of 1926, Decided on 13th December 1929, from decree of Dist. Judge., West Godaveri, in Appeal No. 53 of 1926.

(a) Mahomedan Law — Wakf — Quasi-public—Reservation of benefit to grantor's family or mutvali is not contradictory to Mahomedan Law.

A quasi public wakf which provides for the benefit of the mutvali or of the family of the grantor as well as for the public benefit of the mosque is not contradictory to Mahomedan Law and the question whether any beneficial interest is retained for the mutvali is one of fact : *A. I. R.* 1923 *P. C.* 44; *A. I. R.* 1916 *P.C.* 86; *A.I.R.* 1919 *P.C.* 62, *Foll.*; 23 *All.* 233, *Ref.* [P 583 C 1]

(b) Mahomedan Law — Wakf — Quasi-public—Inalienability is not absolute—Sale by mutvali is valid during his lifetime.

Though wakf property vests in God and that property is inalienable except for the purposes of the wakf the inalienability is not absolute and a sale by a mutvali is valid during his litetime provided he has a beneficial interest in the property : A. *I. R.* 1922 *P. C.* 123; *A. I. R.* 1926 *P. C.* 9 and *A. I. R.* 1923 *P. C.* 44, *Foll.* [P 583 C 1]

(c) Mahomedan Law — Wakf — Quasi public — Distinction between permanent lease and sale is illusory—Sale valid during mutvali's lifetime—Adverse possession begins from his death—Limitation Acts, Arts. 144 and 134.

There is no difference between a permanent lease and a sale of wakf property and where a sale by the mutvali of such property is valid during his lifetime, adverse possession against the mosque commences not from the date of sale but from the date of the death of the mutvali: *A. I. R.* 1922 *P. C.* 123; *A. I. R.* 1925 *Mad.* 822; *A. I. R.* 1927 *Mad.* 1163; *A. I. R.* 1926 *Pat.* 239, *Foll. A. I. R.* 1922 *Pat.* 243; *A. I. R.* 1926 *P.C.* 9; *A. I. R.* 1923 *P.C.* 44 *Ref.* [P 584 C 2]

*** (d) Mahomedan Law—Wakf — Endowment by non-Mahomedan publicly made and recognised by Government—Endowment is not invalid.**

Where endowment is publicly made and recognised by Government, a wakf is not to be declared invalid merely on a presumption that there could be no exception to the rule of Mahomedan Law that no wakf can be endowed by a non-Mahomedan : *A. I. R.* 1924 *P.C.* 109, *Ref.* [P 584 C 2, P 585 C 1]

P. Venkataramana Rao—for Appellants.

P. Somasundaram—for Respondents.

Wallace, J.—The main question in this appeal is one of limitation. The plaintiffs' father was the muttavalli of a mosque for the lighting in which the suit wakf was endowed. He and his eldest son, defendant 1, sold the property to the father of defendants 2 and 3 (and grandfather of defendant 4) on 25th Novemher 1909. The vendee held the property until the date of the suit, 27th March 1922. The plaintiffs sue to declare that the sale is invalid and for recovery of possession of the property for the mosque. Both the lower Courts decreed the suit and defendants 2 to 4 appeal.

The main point argued is that the suit is time barred. It is conceded that, on the latest rulings of the Privy Council, Art. 134 has no application to the case, and Art. 144 is the proper article. The appellants contend that the wakf property is inalienable and that therefore time begins to run from date of the sale, on which date the vendee came into possession, and that therefore the vendee has prescribed for much more than 12 years' adverse possession. The plaintiffs contend that time began to run from the date of the death of the last muttavalli which occured on 6th March 1915. The lower Courts have upheld the latter contention.

Both the Courts are agreed that the property is wakf and for the purpose of this argument it will be taken to be so. It is not trust property strictly speaking. Prima facie then it vests in the deity and is inalienable. The plaintiffs contend that when a beneficial interest is retained in the property, say for the family of the founder, the sale of the

whole property is valid during the lifetime of the vendor, and that limitation only begins to run from his death. That proposition has been approved in a number of reported rulings as applying to the case of the head of a Hindu mutt. The plaintiffs seek to apply it by analogy to the case of the muttavalli of a mosque. The appellants contend that there is no such analogy, and that it is a fundamental proposition of Mahomedan Law that the whole property vests in the deity so as to forbid any retention of beneficial interest in anyone apart from the interests of the institution.

Whether in the present case any beneficial interest was retained for the muttavalli himself is essentially a question of fact, and that question both the lower Courts have answered in the affirmative. In fact the statement in the plaint that the surplus income is to go to the family of the grantee was not controverted in the written statement, and that has been the custom for 150 years. Now wakfs of this quasi-public kind are of common occurrence in this Presidency and elsewhere, and have been recognized as valid by the Privy Council: see *Abdur Rahim* v. *Narayan Das Aurora* (1), where the Privy Council laid down at page 334:

"The original settlement was undoubtedly a valid creation of a wakf, for the provision intended to benefit the family of the settler was not the preponderating feature of the settlement, nor was the provision made for the perpetuation of religious ceremonies and charitable gifts by any means illusory or unsubstattial: see also *Mujibunnissa* v. *Abdul Rahim* (2) therein quoted."

There is therefore nothing contradictory to Mahomedan Law in such quasi-public wakfs; and we must accept the finding of fact, not controverted in the written statement, that this wakf is one which itself provided for the private benefit of the family of the grantee as well as for the public benefit of the mosque, though the dominent purpose no doubt was to endow the mosque. The rulings of the Privy Council in *Ramanadhan Chettier* v. *Levvai Marakayar* (3) and *Aruna chalam Chetty* v. *Venkatachalapathi Guruswamigal* (4), indicate that a question of this kind is one of fact to be decided on the circumstances of each case. The latter ruling no doubt deals with a case of mutt property, but the endowment in the present case is very similar in nature to the endowment of a Hindu mutt where the head of the mutt maintains himself and the institution out of the endowment. Such a similarity has been recognized in several reported rulings, notably by the Privy Council in *Vidya Varudhi* v. *Balusami Ayyar* (5) and *Abdur Rahim* v. *Narayan Das Aurora* (1). In the latter case at p. 336 (of 50 *Cal.*) their Lordships say:

"Under the Mahomedan Law the moment a wakf is created all rights of property pass out of the wakf and vest in God Almighty"

and further down:

"It is in very deed "God's, acre" and this is the basis of the settled rule that such property as is held in wakf is inalienable except for the purpose of the wakf. A similar view forms the basis of the inalienability of a Hindu mutt."

In *Vidya Varuthi* v. *Balusami Aiyar* (5) the argument proceeds on the footing that the same legal principles as to alienation of the property vested in him shall apply to the head of a mutt and to the muttavalli of a mosque. No doubt the general question there argued was whether such persons are trustees, but even in a decision on this point one would expect the distinction sought by the appellants to be drawn if it in fact did exist. The same language applied by their Lordships in speaking of the mutt can be applied mutatis mutandis to the case of a mosque. The head of neither is a trustee nor does the property vest in him in either case. In both cases alike the property vests in the idol or the deity, and the same theoretical quality of inalienability applies to both, but it has never been held absolute in the case of a mutt, and there is no good ground for holding either that it is absolute in the case of a mosque. The validity during his lifetime of a sale of the mutt property by the head of the mutt has been recognised in numerous cases: see in addition to the Privy Council cases quoted above, *Lalchand Marwari* v. *Ramrup*

(1) A. I. R. 1923 P. C. 44=50 Cal. 329=50 I. A. 84 (P. C.).
(2) [1901] 23 All. 233=28 I. A. 15 (P. C.).
(3) A. I. R. 1916 P. C. 86=40 Mad. 116=44 I. A. 21 (P. C.).
(4) A. I. R. 1919 P. C. 62=43 Mad. 253=46 I. A. 204 (P. C.).
(5) A. I. R. 1922 P. C 123=44 Mad. 831=48 I. A. 302 (P. C.).

Gir (6). In all these rulings I can see no ground for distinction between the position of the head of a mutt and that of a muttavaili of a mosque. We pressed the learned advocate for the appellants to quote any cases in which in case of a wakf which retains a benefit for the family of a grantee it has nevertheless been held, in contra-distinction to the similar case of the head of a Hindu mutt, that he has no power to alienate the property during his lifetime. But no such case appears to be forthcoming. The learned advocate fell back on his general argument that, as the whole property vested in the deity, none of it could be alienated even temporarily. But that proposition is as true of a mutt as for a mosque, so that the distinction is really one without a difference. The point in issue is not really a question of law but a question of fact in each case.

The learned advocate for the appellants endeavoured to draw a distinction between a case of outright sale and the case of a permanent lease, contending that in the former no question of a beneficial interest apart from the endowment generally will avail. But that is not the trend of the reported rulings. In *Vidya Varuthi* v. *Balasami Iyer* (5) the Privy Council recognised the general rule that except for unavoidable necessity the head of a mutt cannot create any interest in the mutt property to enure beyond his lifetime. It is true that the alienation under consideration there was a permanent lease, but the general proposition will equally apply to the case of a sale, and this Court has so suled, see *Ranjadasa i* v. *Latchuma Dasan* (7), *Vellachami Naicker* v. *Alagirisami Naicker* (8). A Bench ruling in the Patna High Court is quoted, *Badri Narayan Singh* v. *Kailash Gir* (9) a case of a sale by the head of a matt, where it was held that adverse possession runs from the date of the sale. It is to be noted that when a similar ruling went to the Privy Council from the decision in *Ramrup Singh Lalchahd Marwari* (10) their Lordships did not decide the point. See *Lalchand Marwari* v. *Ramrup Gir* (6). They speak of the point at page 325 (of 5 Pat) as a difficult question, and refer to *Vidya Varuthi* v. *Balusami Iyer* (5) and say that they must not be taken to accept the view with reference to it propounded by the High Court of Patna. The appellants, on their argument that the property is wholly vested in the idol, are really forced to the position that a permanent lease is as much an invalid alienation as a sale, and that therefore limitation for both must run from the date of the alienation. But that proposition has never been upheld in the case of a permanent lease. As the law at present stands therefore I cannot see any reason for drawing any distinction between a permanent lease and a sale. In such a case the seller selles only such interest as he has, namely, the right to alienate during his lifetime, and it is impossible to restrict his right to sell such portion of the endowment as will suffice to provide for his own income. See *Abdur Rahim* v. *Narayan Das* (1) The sale is therefore valid during the lifetime of the seller, and adverse possession aaginst the mosque began only from the date of the death of the seller.

It was finally urged for the appellants that this property could not be wakf at all because no Hindu can endow a wakf for a Mahomedan institution, and several commentators on Mahomedan Law were quoted to that effect. No direct ruling for this general propcsition was quoted to us. The Privy Council in *Muhammad Raza* u. *Yadgar Hussain* (11) declined to decide it. The point was never taken in the trial Court, and thus the attention of the parties during the trial was never directed to it. I think it would not be correct to allow the point to be taken now. I am not prepared to say that it is a pure question of law. It is not uncommon for persons of Zamindars, Mittadars, etc. in whose estates there are Mahomedan as well as Hindu inhabitants, to make endowments of property for Mahomedan institutions and such endowments, so far as I know, have always been accepted by the donee as valid. The present endowment was publicly made by the Zamindar and publicly recognised by Government in

(6) A. I. R. 1926 P. C. 9=5 Pat. 312=53 I. A. 24 (P. C.).
(7) A. I. R. 1925 Mad. 822.
(8) A. I. R. 1927 Mad 1163.
(9) A. I. R. 1926 Pat. 239=5 Pat. 341.
(10) A. I. R. 1922 Pat. 243=1 Pat. 475.
(11) A. I. R. 1924 P. C. 109=51 Cal. 446=51 I. A. 192 (P. C.).

the inam proceedings, and I should hesitate to declare it invalid merely on a presumption that there could be no exception of any kind to the rule of Mahomedan Law that no wakf can be endowed by a non-muhammadan.

The final point urged was that the plaintiffs are not muttavallis and therefore are not entitled to sue. That point also was not taken in the lower Courts and it is essentially a question of fact that should have been the subject matter of an issue. I cannot therefore allow it to be taken there. There is therefore no ground to interfere with the decision of the lower Court and I would dismiss this appeal with costs.

Anantakrishna Ayyar, J.—I agree. The plaintiffs alleged that the property described in the plaint schedule was wakf property granted for lighting lamps and for some other services in the mosque, and that the muttavallis were entitled to the balance of income of the properties left after deducting the expenses of lighting, etc. in the mosque. They alleged that their deceased father, and elder brother defendant 1, alienated the properties in favour of P. Ramayya father of defendants 2 and 3 and grandfather of defendant 4 on 25th November 1909, that the plaintiffs' father died on 6th March 1915 and that the alienation was invalid and not binding on the plaintiffs. They sued to recover possession of the properties. The defendants pleaded that there was no connexion between the suit lands and the mosque, that the sale by the plaintiffs' father and defendant 1 was valid, and further that the suit was barred by limitation since the present plaint was filed in March 1922—more than 12 years from the date of the alienation in favour of their father in November 1909. Both the lower Courts held that property was wakf property. They also held that the muttavallis are entitled to the surplus income after meeting the expenses of the mosque. They held that the sale was not binding as it was not for necessary purposes. On the question of limitation. both the lower Courts held that limitation began only from the date of the death of the last muttavalli in 1915; the plaintiffs' suit was accordingly decreed in their favour and defendants 2 to 4 have preferred this second appeal.

On their behalf the learned advocate raised the following questions.

(1) That the wakf is not valid, since a non-moslem could not validly make a dedication for a moslem place of worship.

(2) That the plaintiffs have no beneficial interest in the property.

(3) That the sale was for necessary and binding purposes, and

(4) That the suit was barred by limitation.

As regards the first point, the learned advocate argued that Ex. A, the inam statement mentions that the lands were granted in Fasli 1187 (1777 A. D.) by Raja Narasimha Appa Rao Bahadur Garu, that a non-moslem could not validly make a dedication for moslem place of worship, and that theretore the grant must be taken to be a personal one to Hussain Sahib Peer Jada ancestor of the plaintiffs—and consequently the sale by the plaintiff's father was perfectly valid to convey the title to the vendee. This question was not specifically raised in the written statement, no specific issue was raised on this point, there is no reference to it in the judgment of the first Court; and in the grounds of appeal filed in the lower Court on 30th June 1924, no specific grounds are taken on this point. At the time of the argument in the lower appellate Court in 1926, this point was raised, evidently because in *Muhammad Raza* v. *Yadgar Hussain* (11) a decision of the Privy Council had been published in the interval, where their Lordships remarked at p. 454 as follows:

> The Board makes no pronouncement whatsoever on a question mooted namely whether a grant by a Hindu to Mahomedan community was incompetent of the foundation of a wakf,"

The learned District Judge after noting that the Privy Council left the question undecided in the case quoted, referred to Amir Ali's Mahomedan Law Vol. 1, p. 200, Edn. 4, where the learned author, after stating that a non-muslim cannot validly make a dedication for a Moslem place of worship. added the qualification that "this can be done by the consent of the heirs after his death." The learned Judge also observed that in the present case, it was no private individual who made the dedication, but the local Rajah or zamindar, presumably in the exercise of sovereign rights. And he concluded the discussion as follows:

"That a grant of this nature is lawful and indeed a characteristic exercise of the royal prerogative in this country even where the sovereign does not share the creed of the grantee is too well known to require demonstration by example"

Before us, the learned advocate for the respondents referred to Bailee's Mahomedan Law, Vol. I, p. 560, and to Tyabji's Mahomedan Law, p. 542, in addition to Amir Ali's book Edn. 4, p. 200. He argued that the reason for the above rule would seem to be that under Mahomedan Law a person could not disinherit his heirs by alienating the whole of his property and that was the reason why the observations were made that the consent of the grantors' heirs would validate the grant.

This raised a question of great importance; in my view there is no sufficient basis laid in this case for the assumption that the grant was made by an ordinary Hindu. The defendants' argument is based on an observation occurring in the inam statement that the grant was made in 1777 by Rajah Narasimha Appa Rao Bahadur Garu by the Privy Council in the case reported in *Vidya Varuthi* v. *Baluswami Ayyar* (5) at p. 854, (*of* 44 *Mad*).

"The inam proceedings did not create any dedication. They were instituted simply with the object of investigating titles to hold lands revenue-free as belonging to valid endowments. . . . . The purposes of the dedication must therefore be gathered from established usage and practice."

and not solely from the statement in the inam register that the dedication was for a specific purpose, namely, the worship of the idol.' The grant in the present case was made many years prior to the inam inquiry of 1860, and from the passage occurring in the inam statement (quoted already), it cannot be held to be established that the grant was made by an ordinary Hindu. If the question had been properly raised in proper time, and if this specific objection had been raised in the written statement, an issue would have been framed on the point. Not having done so, I do not think that it was open to the defendants to raise this point for the first time in appeal. As suggested by the lower appellate Court, it is quite possible that the grant was made by the ruling sovereign of the locality at the time. It is admitted that the Inam Commissioner treated this as inam, which would prima facie indicate that it was, probably, not a grant made by an ordinary private individual since in such cases the Government is not likely to desist from imposing the usual assessment on the land. Further, in a prior litigation evidenced by Exs. C and D, the civil Courts held that the properties, were wakf property though the judgments in that case would not constitute the question res judicata. In the present case, there is evidence on which the lower Courts could have found that the properties were wakf properties. In the circumstances, I am of opinion that the defendants ought not to be allowed to raise this question for the first time in appeal not having raised the same in the trial Court.

The second and third contentions could be summarily disposed of. Both the lower Courts have found that the muttavallis have beneficial interest in the surplus income of the properties. There is evidence to support the same, and it is a question of fact binding on us in second appeal. The question whether the alienation was for necessary and valid purposes was not specifically taken in the trial Court. The only evidence adduced on the side of the defendants in the sale deed in question Ex. 1; the documents alleged to prove that the debt to discharge which the alienation was made under Ex. 1 was outstanding for many years prior to Ex. 1, were not filed in the case, and no evidence was adduced as regards the nature of the debts originally incurred. The second and the third contentions are accordingly overruled.

The last contention raised by the learned advocate for the appellants relates to the question of limitation. He argued that it is a case of trust, and that as more than 12 years have elapsed from the date of the alienation, the suit is barred by limitation. He contended that the case of matathipathies is different, and that the Privy Council cases made it clear that in cases of trust, adverse possession against the trust began on the date of the alienation, and that the succeeding trustee would not be entitled to a new starting point of limitation from the death of the alienating trustee.

The learned advocate for the respondent contended that on the finding of both the lower Courts that the muta-

valli has got beneficial interest in the present case, the case is exactly analogous to the case of matathipathy, and that the Privy Cauncil has held that in the case of matathipathies, a new cause of action accrues to the succeeding matathipathy on the death of the matathipathy who made the alienation. Various cases were quoted before us: *Abhiram Goswami* v. *Shyama Charan Nandi* (12): *Ishwar Shyam Chand Jin* v. *Ramakani Ghouse* (13); *Vidya Varuthi* v. *Baluswami Ayyar* (5); *Abdur Rahim* v. *Narayan Das Aurora* (1) and *Mahomed S. Chamnad* v. *Jaina Bi* (14), on the side of the respondent on one hand, and *Damodar Das* v. *Dakhan Das* (15); *Nilmony Singh* v. *Jagabandhu Roy* (16); *Subbayya Pandaram* v. *Muhammad Mustapha Maracayar* (17); *Lal Chand Marwari* v. *Ramrup Gir* (6); *Ramrup Gir* v. *Lalchand Marwari* (10) and *Vadlamudi Sastrulu* v. *Venkata Seshayya*, *A. I. R.* 1928 *Mad.* 614, on behalf of the appellants.

In *Vidya Varuthi* v. *Baluswami Aiyar* (5) at p 855 (*of* 44 *Mad.*), the Privy Council observed as follows:

"According to the well settled law of India (part from the question of necessity, which does not here arise) a mahant is incompetent to create any interest in respect of the mutt property to enure beyond his life. With regard to mahunt No. 2, he was vested with a power similarly limited."

At p. 840 their Lordships observed:

"The manager of the waqf is the mutavalli, the Governor, Superintendent, or curator."

In *Jewan Doss Sahoo* v. *Kubeer-uddin* (18), the Judicial Committee called him "procurator." It related to konkah, a Mahomedan institution, analagous in many respects to a mutt where Hindu religious instruction is despensed . . . . . He is teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a larger interest in the usufruct than an ordinary muttavalli. But neither the sajjadanashin nor the muttavalli has any right in the property belonging te the wakf; the property is not vested in him, and he is not a "trustee in the technical sense." At p. 843 they observed:

"Neither under the Hindu Law nor in the Mahomedan system is any property "conveyed" to a shebait or a muttavalli, in the case of a dedication."

Again at p. 847 the conclusion is expressed as follows:

"From the above review of the general law relating to Hindu and Mahomedan pious institutions, it would prima facie follow that an alienation by a manager or superios, by whatever name called, cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English Law."

In *Abdur Rahim* v. *Narayan Das* (1), the Privy Council followed their earlier observations relating to wakf in the case reported in *Vidya Varuthi* v. *Baluswami Ayyar* (5). They also observed at p. 335 (*of* 44 *Mad.*), that the effect of the deed was to give the property in substance to charitable uses and that the dominating purpose was to make adequate provision for the pious uses mentioned in the same, and that the provision for the mutavalli was not unenforceable nor did it render the wakf invalid. In *Jagga Row Bahadur* v. *Gouhar Bibi* (19), it was held that in the case of a Mahomedan wakf, the succeeding mutavalli was entitled to recover the alienated property (usufructuarily mortgaged) within the 12 years of the death of the alienor (mortgagor-muttavalli).

The decisions quoted for the appellant relate to cases of trust in the proper sense of the term. The distinction between the two lines of cases is referred to by the Privy Council in *Lalchand Marwari* v. *Ramrup Gir* (6) at p. 325 (*of* 5 *Pat.*). Their Lordships observed that:

"It is unnecessary to deal with the important and difficult question whether the case is governed by the decisions, of which *Damodar Das* v. *Dukkan Das* (15), may be taken as the leading authority or by the line of authority of which *Vidya Varuthi* v. *Balusami Aiyar* (5), may be taken as typical."

The question is discussed in the judgment of the Patna High Court in the case reported in *Ramrup Singh* v. *Lal-Chand Marwari* (10), which went on appeal to the Privy Council in *Lalchand Marwari* v. *Ramrup Gir* (6). There has been evidently difference of opinion in this Court on the question of the start

(12) [1909] 36 Cal. 1003=4 I. C. 449=36 I. A. 148 (P.C.).
(13) [1911] 38 Cal. 526=10 I. C. 683=38 I. A. 76 (P.C.).
(14) A. I. R. 1926 Mad. 861.
(15) [1912] 37 Cal. 885=7 I. C. 240=37 I. A. 147 (P.C.).
(16) [1896] 23 Cal. 536.
(17) A. I. R. 1923 P. C. 175=46 Mad. 751=50 I. A. 295 (P.C.).
(18) [1837-41] 2 M. I. A. 390=6 W.R. 3 (P.C.).
(19) A. I. R. 1923 Mad. 545.

ing point of limitation in cases of alienations by trustees who have no beneficial interest in the property, the decision in *Govinda Rao* v. *Chinna Thurai Pillai* (20); *Ranga Dasan* v. *Lutchuma Dasan* (7); *Vellachami Naicker* v. *Alagaraswami Naicker* (8) and *Mahomed S. Chamnad* v. *Jaina Bi* (14), evidently supporting the view that limitation as against the successor begins only from the death of the alienating trustee whereas *Vadlamudi Sastrulu* v. *Seshayya*, *A. I. R.* 1928 *Mad.* 614, would seem to support the other view. The Court will have to consider in each case the nature and legal incidents of the institution wakf, mutt, or grantee and the proper article of the Limitation Act, applicable to a case could be decided only after the said exact legal nature and incidents of the same are definitely ascertained.

The question before us being, however, with reference to a wakf where the muttavalli has beneficial interest, we think we are bound to proceed on the analogy of a mutt where the mathipathi has beneficial interest. The Privy Council decision in *Vidya Varuthi* v. *Baluswami Aiyar* (5) is a direct authority in support of such a procedure. In the present case, as both the lower Courts have found that the mutavallis have got beneficial interest in the property, the present mutavalli could sue within 12 years from the death of the mutavalli who alienated the properties to the father of defendants 2 and 3, and the present suit brought within 12 years from that mutavalli's death is not barred by limitation.

We may note here that the legislature has intervened to clear up matters on what the Privy Council called the "important and difficult question," arising in such cases, and by Act 1 of 1929, has added three new articles (135-a, b and c), to the Limitation Act.

I am, therefore, of opinion that it is not necessary, in the circumstances, to discuss the question further, or review the effect of the authorities in greater detail, since the matter is otherwise only of academical interest, the law for the future being that laid down by the newly amended articles of the Limitation Act. I am of opinion that the contention of the learned advocate for the appellants on this question of limitation is not tenable.

In the result, I would dismiss the second appeal with costs.

P.R.S./J.M. *Appeal dismissed.*

(20) A. I. R. 1926 Mad. 193.

A. I. R. 1930 Madras 588

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Vappu Rowther—Petitioner.

v.

Sivakataksham Pillai—Respondent.

Civil Revn. Petn. No. 876 of 1928, Decided on 19th July 1929, against order of Dist. Judge, East Tanjore, in A. S. No. 278 of 1926.

(a) Limitation Act, Art. 182—Step-in-aid—Application under Civil P. C., O. 21, R. 72 coupled with request to set off purchase money against decretal amount is step-in-aid.

An application for leave to bid at the auction sale coupled with a request to set off the purchase money against the decretal amount is a step-in-aid of execution within the meaning of Art. 182 (5) since the request to the Court to set off the purchase money against the decretal amount is one for furthering the execution of the decree : 12 *C. W. N.* 621, *Foll.* 30 *Cal.* 761 ; 10 *C. W. N.* 209 ; 16 *M. L. T.* 103 ; *A. I. R.* 1922 *Mad.* 79 ; *A. I. R.* 1926 *Mad.* 1178 and *A. I. R.* 1926 *Mad.* 1197 13 *All.* 211 ; 22 *All.* 339; 21 *Bom.* 331, *Ref.*

[P 589 C 2]

(b) Limitation Act, Art. 182—Application for leave to bid at auction-sale whether is step-in-aid.

Quaere.—Whether an application for mere leave to bid at the auction is a step-in-aid of execution within the meaning of Art. 182 (5).

[P 589 C 2]

V. K. John and *Panchapagesa Sastri*—for Petitioner.

Venkatasubba Rao, J.—The point to decide is, is the execution application in time? That would depend upon, whether the previous application was for taking some step-in-aid of execution. The present application was within three years of the previous one and we are therefore to determine whether the latter was an application to take some step within the meaning of Art. 182, Lim. Act.

The lower Courts have held in favour of the decree-holder. He is not here represented but Dr. V. K. John who appears for the judgment-debtor has drawn our attention to numerous authorities on the point. I may mention that it was in a pending execution petition that the previous application was made. That application was for leave to bid

and to set off the price against the decree amount. The question is, does such an application fall within Art. 182 (5), Lim. Act?

On this point, there is no decided case of the Madras High Court. The test in such cases has been laid down in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) and it has been approved in the subsequent decisions *Krishna Pattar* v. *Seetharam Pattar* (2). *Hamidudin Sahib* v. *Ghouse Sahib* (3). The article says that the application must be to the proper Court to take some step-in-aid of execution. First, is the step in furtherance of execution in other words, does it advance execution Secondly is the Court asked to take that step? In applying this test there has been great difficulty and divergence of opinion. Let us examine if an application for mere leave to bid is a step within the meaning of the article. Our attention has not been drawn to any Madras case on the point. But it has been held by the Allahabad and Bombay High Courts that an application of that kind is such a step: see *Bansi* v. *Sikree Mal* (4) *Dalel Singh* v. *Umrao Singh* (5) and *Vinayakarao Gopal Desmukh* v. *Vinayak Krishna* (6). In the second of these cases, the learned Judges observe thus:

"The fact that a decree-holder is prepared to bid for property and is anxious to purchase . . . . brings the decree within nearer distance of complete execution and satisfaction . . . . . There are indeed three steps. There is the step of the application which the decree-holder makes; there is the step taken by the Court of granting permission, and there is the further step which the decree-holder again takes of availing himself of such permission by bidding at the sale."

This view is also shared by some Judges of the Calcutta High Court. In *Troylokya Nath Bose* v. *Jyoti Prokash Nandi* (7) Bannerjee, J., thus states his reason for that view:

"An application to the Court by the decree-holder to give him leave to bid is to my mind an application to the Court to take some step, that is, to do something which would aid execution, that is make it effective by securing a higher price for the property to be sold."

In *Hira Lal Bose* v. *Dwija Charan Bose* (8), Mukerjee, J., while also being of the opinion that such an application may be a step-in-aid observes that the rule is not an inflexible one and it may depend upon circumstances whether an application for leave to bid is or is not a step within the meaning of the article. While I am disposed to agree with the decision in *Dalel Singh* v. *Umrao Singh* (5) the point does not now really arise in that form. In the present case the application for leave to bid is coupled with that for leave to set off. Such an application it has been held in *Nabadip Chandra Maiti* v. *Bepin Chandra Pal* (9) fulfils the requirements of the article. This is the only decided case on the precise point involved in this petition and I see no reason to dissent from it. Dr. John contends that the Court in such cases is merely invited to make an order and not to take some step. In one sense this is perfectly true. The learned counsel contends that the step which the Court is asked to take must be something like attaching or selling property. I am not prepared to place this restricted view upon the words. In *Desireddy Yellamandar* v. *S. C. Pitchayya* (10). Oldfield and Napier, JJ., have held, that a wide construction must be placed on the words "step-in-aid of execution" in Art. 182. Indeed, to accept Dr. John's contention would be against the ratio decidendi adopted in several cases including those of our own High Court. The civil revision petition fails and is dismissed.

Before closing, I may remark that the decided cases on the subject reveal an extreme conflict of view they fail to disclose even a principle of general or uniform application. The wording is so uncertain that it leads to the spending of efforts in barren and fruitless discussion and a good deal of time of the Court is thus wasted. Such a large body of case law has now grown up on the point that the legislature may well with the aid of the decided cases catalogue the application which in its opinion ought to serve as steps-in-aid of execution. This is a suggestion I venture to make with a view to make the

(1) A. I. R. 1922 Mad. 79=45 Mad. 466.
(2) A. I. R. 1926 Mad. 1178=50 Mad. 49.
(3) A. I. R. 1926 Mad. 1197.
(4) [1890] 13 All. 216=(1890) A. W. N. 230.
(5) [1900] 22 All. 399=(1900) A. W. N. 129.
(6) [1897] 21 Bom. 331.
(7) [1903] 30 Cal. 761=8 C. W. N. 251.
(8) [1906] 10 C. W. N. 207=30 C. L. J. 240.
(9) [1908] 12 C. W. N. 621.
(10) [1914] M. L. W. 573=25 I. C. 58=16 M. L. T. 103.

law more certain for certainly especially in the law relating to execution is essential.

Madhavan Nair, J.—I do not desire in this case to express any opinion on the question whether an application for leave to bid at an auction will be a step-in-aid of execution within the meaning of Art. 182 (5) Lim. Act. It may be possible to argue on the strength of the decisions of this Court and according to the principles mentioned in *Kuppuswami Chettiyar* v. *Rajagopala Aiyar* (1) and in *Krishna Pattar* v. *Seetharama Pattar* (2) *Haidudin Sahib* v. *Ghouse Sahib* (3) that such an application is not an application asking the Court to take a definite step in furtherance of execution. In this case, whatever view we may hold about the nature of such an application it is clear that the execution application contained a request that the decree-holder should be permitted to set off the purchase-money against the decree amount. This in my opinion is a request to the Court to take a step effectively furthering the execution of the decree. The precise point has not been decided in this Court but it has been decided in *Nabadip Chandra Maiti* v. *Bipin Chandra pal* (9) that such an application is a step-in-aid of execution. I am prepared to follow this decision. I would therefore agree with the opinion of the lower Courts that the application in question is a step-in-aid of execution and dismiss this civil revision petition

J.M./P.R.S. *Application dismissed.*

A. I. R. 1930 Madras 590

CURGENVEN, J.

(*Illur*) *Ramayya Chetti*—Defendant 6—Appellant.

v.

Mannaru Chetti and *others* — Plaintiffs—Respondents.

Second Appeal No. 1317 of 1926, Decided on 18th December 1929, from decree of Dist. Judge, Chittoor, in Appeal Suit No. 137 of 1924.

(a) Evidence Act, S. 92—Document silent as to interest of two joint transferees—Evidence of subsequent conduct is not barred as between the transferees inter se.

It is open to one of two joint transferees to prove what interest, if any, is taken by the other where the document does not specify the extent of the shares, and evidence of subsequent conduct to prove this is not barred by S. 92 between the transferees inter se : 10 *All.* 421 ; *A. I. R* 1927 *Mad.* 1102, *Foll.* ; *N. E. Ry.* v. *Hastings*, (1900) *A. C.* 260, *Ref.*

[P 592 C 1]

(b) Civil P. C., S. 100 — Conclusion as to intention arrived at on certain consideration —Second appellate Court cannot reassess him.

It is not open to a Court in second appeal to reassess the considerations which led the lower Courts to a particular conclusion as regards the intention of parties to a contract. [P 592 C 2]

T. V. Ramanatha Iyer—for Appellant.

E. Krishnamurthi—for Respondents.

Judgment.—By a so-called deed of release (Ex. 2) executed by the reversioner in 1882, property, including the suit house, was conveyed to the 5th defendant Narasamma, sister of the last male holder, and to her son defendant 1, then a minor, for a consideration of Rs. 200. From time to time since then defendant 1 has alienated portions of the property. This property consisted of two houses, a piece of wet and a piece of dry land. While he was still a minor his mother acting as his guardian sold one of the houses under Ex. D in 1885. In 1895 he himself sold one half of the suit house under Ex. C, a sale deed which his mother attested. The remaining half of the suit house was mortgaged in 1904 to the plaintiff's brother. To conclude with the alienations, he disposed of the nanja and punja lands under Exs. F, F (1) and G in 1908 and 1907.

The mortgaged portion of the house fell to the plaintiff in the family partition and he obtained a decree bringing the property to sale in 1921 and purchased it himself. When he attempted to obtain possession he was resisted by defendants 6 and 7, who are respectively the son-in-law and daughter's son of Narasamma, defendant 5. They set up an independent title as her vendee. The plaintiff applied as auction-purchaser for the removal of the obstruction but his application was dismissed so that he brought the present suit. The question is whether the title of the plaintiff or of defendants 6 and 7 should prevail.

No attempt has been made before me to substantiate the pleas of estoppel and

of adverse possession by defendant 1 against his mother which were successful in the Courts below. The question for decision accordingly is whether title to the suit property was in the son or the mother. There is a genealogical table affixed to the plaint as Sch. B. The property was originally held by Pedda Narasimhalu Chetti and passed from him to his son Chinna Narasimhalu Chetti and after his death to his mother Gururajamma. After the latter died it came into the hands of the 5th defendant Narasamma. The reversioner at that time was Pedda Narasimhalu Chetti's brother's son Gurunatham Chetti, and he executed the deed of release referred to above. It is in favour of Narasamma and her son Krishnama Chetti, described as a minor aged about nine years living under her protection and it conveys to them all the property which had been the ancestral and self-acquired property of Pedda Narasimhalu Chetti and his son Chinna Narasimhalu Chetti. There is a recital that it had devolved upon Narasamma as stridhanam but that is incompatible with the description given of it and as the learned District Judge surmises need not be taken seriously. And it goes on to say that mediators having settled the matter the executant agrees to receive a sum in cash of Rs. 200 and thereafter never to make any claim either upon Narasamma on her son and adds :

"You and your son, grandson, etc., shall hereditarily enjoy these moveable and immovable properties with absolute rights."

Prima facie this document invests the mother and son with a joint interest in the property. Nevertheless both the lower Courts have held that its effect must have been to convey the property to defendant 1 and not to his mother. In coming to this conclusion they have relied very largely upon the subsequent conduct of the parties in dealing with the property. The question of law which arises for decision is whether such evidence is admissible to ascertain the true nature of a transaction evidenced by a written instrument like Ex. 2 and if so whether its effect is as found by the Courts below. In *Mulchand* v. *Madho Ram* (1) a sale of certain property was executed ostensibly in favour of two brothers, Ganga Prasad and Mul Chand jointly. Subsequently Ganga Prasad brought a suit against Mul Chand in which he prayed for a declaration that he alone was the real purchaser and to eject Mul Chand from a portion of the premises. He alleged that the whole of the purchase money had come out of his pocket and that he had been in sole possession of the property under the sale deed though he had allowed the defendant to occupy a room in the house. The defence set up was based upon S. 92, Evidence Act, which excludes evidence of an oral agreement as between the parties to any instrument of the kind contemplated in that section, for the purpose of contradicting, varying, adding to or subtracting from its terms.

The case went up to the Allahabad High Court in second appeal and the learned Judges came to the conclusion that S. 92 had no application because the phrase 'as between the parties' meant as between the persons who on one side and on the other came together to make the contract. It would not apply to two joint vendees. Thus between the vendor and themselves, neither of the vendees would be heard to plead or would be allowed to offer oral evidence to show that both were not parties to the buying of the house but the section would not apply to questions raised by the parties on one side inter se, and not affecting the other party to the contract, touching their relation to each other in the transaction. They gave as another instance the case of promisor to a joint note, where it is competent to one of them who has had to pay the entire debt, to show in variation of the terms of the note, as against his co-promisor, that the payer is a surety only. After expressing these views the learned Judges found themselves unable to dispose of the second appeal owing to the state of the evidence, and remanded it for findings upon certain points. It may be observed that among these points was a question with regard to Mul Chand's subsequent occupation which showed that they deemed the subsequent conduct of the parties a relevant matter for adjudicating upon their respective rights. This case was referred to by Devadess, J., in *Md. Sultan Mohideen Ahmed Ansari* v. *Amathul Jalal* (2). In that case

(1) [1888] 10 All. 421=(1888) A.W.N. 127.

(2) A.I.R. 1927 Mad. 1102.

a father bought a certain property in the names of his two sons, allotting Sch. A property to one and Sch. B property to the other. Owing to some objection during registration the schedules were struck out of the deed and eventually one son sued the other claiming an exact moiety.

It was argued that the document was silent as to the shares and that S. 92 was a bar to any oral evidence being given to show the father's intentions. The learned Judge agreed with the Allahabad case and rejected this contention. I have not been shown anything to lead me to suppose that that case is not still good law. I think accordingly that it is open to one of two joint transferees to prove what interest, if any, is taken by the other where the document does not specify the extent of the shares. It may be that there is a presumption that the shares would be equal, but it is rebuttable presumption and if as in the Allahabad case one transferee may be shown to be no more than a mere trustee for the other and to possess no beneficiary interest in the property, so too I think may a mother be shown to have taken the property as between two transferees who are sui juris, on the understanding which existed between them, and where as here, one is a parent and the other a minor child, of the intention with which the parent received the property. I do not think that evidence of the manner in which the mother and son subsequently dealt with the property is inadmissible to prove such intention. I have already mentioned that the Bench in the Allahabad case seems to have thought such evidence relevant. Of course where a document is clear and unambiguous and contains no omission to be supplied no amount of proof of subsequent conduct will justify the reading of it otherwise than its plain sense demands: *North Eastern Ry.* v. *Hastings* (3). But it is not sought here to give an unnatural construction to the language of Ex. 2 in order to bring it into accord with the subsequent conduct of the parties. Such conduct is to be used only to ascertain what the document leaves undecided, the rights of the transferees inter se. For this purpose I hold that evidence of it is admissible.

I have already enumerated the several items of property and the manner in which they were disposed of one after the other by defendant 1. The last remaining portion was this one half house, which, as I have said, defendant 1 had mortgaged in 1904. From all these transactions it appears that Narasamma regarded the property as her son's and defendant 1 regarded it as his own. Indeed, if the terms of the original transfer had not been known one would have inferred from the subsequent transactions that it must have been a conveyance to the mother as guardian. An obvious criticism of course is that if such a transfer had been intended Ex. 2 would have been framed accordingly and would not have described the property as Narasamma's stridhanam. Where, however, the finding is that notwithstanding certain recitals in the original document the subsequent conduct of the transferees establishes a certain intention I do not think it is open to me in second appeal to re-assess the considerations which led to that conclusion. It is enough to find that it is not based on inadmissible evidence or otherwise contrary to law. I think that it was open to the learned District Judge upon an appreciation of the evidence to find that Ex. 2 was in effect a conveyance of the property to the son with the mother as guardian, a finding which entitles the plaintiff to the decree given to him.

The second appeal is dismissed with costs.

P.R.S./J.M. *Appeal dismissed.*

(3) [1900] A.C. 260=69 L.J. Ch. 516=82 L.T. 429=16 T.L.R. 325.

A. I. R. 1930 Madras 593

WALLACE, J.

Muhammad Naina Maracair and *others*—Plaintiffs—Appellants.

v.

Ummanaikani Ammal and *others*—Defendants—Respondents.

Second Appeal No. 984 of 1926, Decided on 14th November 1929, from decree of Sub-Judge, Tiruvarur, in Appeal Suit No. 64 of 1924.

(a) Mahomedan Law — Gift — Validity—Parties to gift living in house gifted—Actual delivery to donees is not necessary.

Under Mahomedan Law the gift of a portion of the family house in which the donor and donee have all along been living is valid even though there is no actual divesting by donor or delivery to the donees. 13 *Mad* 46, *Foll.* [P 593 C 1]

(b) Mahomedan Law — Gift — Donee a minor unable to take possession—Donor and guardian holding property on minor's behalf—Intention declared in deed is sufficient.

Where the donee is a minor who can not take possession of the property gifted, the intention to give declared in the deed is sufficient provided the donee and guardian continue to hold the property on behalf of the donee. 13 *Mad.* 46, *Foll.* [P 593 C 2]

(c) Mahomedan Law—Gift—Mushaa.

Under the Shafi Law "Mushaa" or the gift of an undivided share is not invalid. [P 593 C 2]

(d) Civil P. C., O. 22, R. 3—Legal representative of deceased plaintiff is confined to pleadings and case of that plaintiff.

The legal representative of a deceased plaintiff is confined to the pleadings and case of the plaintiff whose representative he is and cannot agitate in that suit his own claims against the other plaintiffs in the case though he may do so in any other proceeding. [P 593 C 2]

K. Bhashyam Iyengar and *T. R. Srinivasan*—for Appellants.

B. Pocker—for Respondents.

Judgment.—The contesting defendants have not appeared in this Court.

Plaintiffs 2 to 4 are the appellants, Plaintiff 1 died while the appeal was pending in the lower appellate Court and Ahmed Hussain, her brother, was brought on as her legal representative along with plaintiff 2 already on the record. He is respondent 6 here. It is argued that the lower appellate Court's reasons for holding Exs. B and C invalid are unsound in law. In the case of both, the lower appellate Court held that the gifts were not completed by any delivery of possession. As the gifts were of portions of the family dwelling house, in which the parties have all along been living, the actual divesting by the donors and delivery to the donees was not necessary. Such possession as was suitable and possible in the circumstances was given. See *Hussain* v. *Shaik Mira* (1). Further in the case of Ex. B the donee was a minor, who could not take possession, and the intention to give declared by the deed of gift was sufficient, provided the donor and guardian continued to hold the property on behalf of the donee: see again *Hussain* v. *Shaik Mira* (1). Nor is Ex. B invalid because of the want of consent of the brother Ahmed Hussain. The share of the actual donors Gulam Kadir and Muhammad Nachial would pass. Further it may be reasonably contended that both Exs. B and C were not mere hibas but hiba-bil-iwaz, as consideration in both cases was dowry for marriages of daughters of the family. As regards Ex. C the lower appellate Court has held that it was invalid because of mushaa. But it appears from the Hidaya 483, quoted by Mulla in his "Principles of Mahomedan Law", notes under S. 134 and by Wilson "Anglo-Mahomedan Law," Section 412, relating to Shafi Law, that among Shafis, to which sect the parties belong, the gift of an undivided share is not invalid.

I can see no valid reason therefore for holding either B or C invalid under Mahomedan Law, and I must hold in reversal of the lower appellate Court's decree that they are both valid. The result is that plaintiffs-appellants are entitled to a decree in the terms of the prayer in the plaint for A schedule property. The decree will run jointly in the names of appellants and Ahmed Hussain in his capacity as legal representative of plaintiff 1.

I make it clear here that Ahmed Hussain's (respondent 6's) rights in the plaint property are not affected by this litigation except so far as he is the legal representative of plaintiff 1 and is bound by this litigation as such. He wished to argue that his being brought on the record as legal representative of plaintiff 1 would enable him to agitate here his own claims against the appellants plaintiffs, even if that involved taking up a position and urging contentions contrary to those of plaintiff 1 in her plaint. This I hold he is not entitled to do, as he is in law, from the

(1) [1890] 13 Mad. 46.

legal position he holds in this case, strictly confined to the pleadings and case of plaintiff 1 whose legal representative he is. Any rights he has above and beyond those to which he succeeds in this litigation as legal representative of plaintiff 1 he must agitate elsewhere.

Decree will be given as indicated above. Appellants will get their costs from respondents 1 to 5 in all Courts.

P.R.S./J.M. *Appeal allowed.*

A. I. R. 1930 Madras 594

ANANTAKRISHNA AYYAR, J.

Krishnasami Iyer — Defendant—Appellant.

v.

Natesa Iyer and *another*—Plaintiff—Respondent.

Second Appeal No. 1 of 1928, Decided on 12th November 1929, against decree of Sub-Judge, Negapatam, in Appeal Suit No. 61 of 1926.

(a) Contract Act S. 60—Advance amount paid by tenant to landlord — Landlord is entitled to appropriate same towards rent due though suit for rent due is barred by limitation—Creditor and debtor.

When an advance amount is paid by the tenant to the landlord under a stipulation that the same is to be applied towards the last year's rent due under the tenancy the landlord is entitled to appropriate the same towards the rent due for the instalments due for the final year, though a suit for rent due in respect of such instalments might be barred by limitation : *Waller* v. *Lacy*, 1 *Man & G* 54, *Dist.* [P 595 C 2]

(b) Contract Act S. 62 — Whether oral agreement to extend time is substitution of old agreement—Quaere.

How far an oral agreement extending time for payment could be said to be a new agreement in substitution of the old agreement and if so whether such new agreement would be supported by legal consideration as required by law ? [P 596 C 2]

K. Bhashyam Iyengar and *R. Viswanatha Iyer*—for Appellant.

T. V. Muthukrishna Iyer and *R. Vaidyanatha Iyer*—for Respondents.

Judgment.—The plaintiff and the defendant are brothers. The plaintiff obtained a lease for ten years from the Tiruppananthal Mutt agreeing to pay rent (partly in paddy and partly in money) every year. The paddy rent was to be paid in particular months, and cash rents in particular months, by instalments. A sum of Rs. 1,000 was paid as advance to the mutt. The plaintiff gave the benefit of half the lease to the defendant who was to pay one half of the rent due. The defendant had also paid Rs. 500 towards the advance as the advance of Rs. 1,000 was made from funds belonging to plaintiff and defendant. The terms of the contract between the parties have to be ascertained from Ex. A executed by the plaintiff to the mutt, and Ex. B executed between the plaintiff and the defendant. On the allegation that the defendant had not paid the rent due for the 9th year of the lease (fasli 1328) the plaintiff filed the prior suit O. S. 246 of 1919, to recover the same from the defendant. That claim was settled between the parties but the plaintiff filed O. S 131 of 1923 against the defendant to recover the amount due in respect of the tenth or the last year of the lease (fasli 1329) after giving credit to the defendant for the sum of Rs. 500 paid as advance as mentioned above. The defendant pleaded payment of 50 kalams of paddy, and also claimed credit to a sum of Rs. 105 for reasons mentioned in the written statement. Those pleas were found against him by both the lower Courts and being questions of fact are concluded by the said finding. The defendant further pleaded that a portion of the plaintiff's claim was barred by limitation. Both the lower Courts overruled that contention. That is the main plea that has to be considered in this second appeal preferred by the defendant. The plaintiff stated that he had paid the mutt and settled accounts with it regarding the lease.

The question arises in this way. 50 kalams of paddy became payable on 30th November 1919, and a portion of the cash rent namely Rs. 105 became payable on 1st December 1919.

The suit was filed on 4th April 1923, i. e., more than three years from those dates. The plaintiff's case was twofold : (1) That there was an agreement between the plaintiff and the defendant that the said paddy and money were to be paid along with the other instalments of paddy and money due in March and June 1920, and as the suit was filed within 3 years from the latter dates (taking into account, holidays) the suit was in time and ;

(2) That the plaintiff had the right to credit the advance amount of Rs. 500 towards the rent due, and having credited the said advance amount towards the rent due in November and December aforesaid, and having only claimed the balance rent in this suit, there was no question of limitation. The defendant denied that there was any agreement regarding payment of the said rents as alleged by the plaintiff. He also denied the plaintiff's right to set off the same against the advance.

Both the lower Courts found as a fact that the agreement set up by the plaintiff was proved. They also held that the plaintiff was entitled to appropriate from the advance of Rs. 500 the rent due in November and December 1919. They accordingly overruled the above contentions of the defendant. In second appeal the learned advocate who appeared for the appellant raised the same contentions before me.

I propose to take the second contention first. In para. 8 ,of the learned District Munsiff's judgment he observed as follows :

"Even apart from any such agreement, the plaintiff is entitled to appropriate the Rs. 500 advance towards the paddy and cash rent for 1919 due from defendant. This is what has been done in the plaint."

On appeal, the lower appellate Court in para. 8 of its judgment disposed of the contention raised by the defendant in these words :

"I agree with the lower Court in finding that this agreement to give time was true and that the claim in respect of these two items is not time barred. Besides, the respondent, with whom the appellant had deposited an advance amount of Rs. 500 was perfectly entitled in law and equity to appropriate these two items out of the advance amount in his hand."

It was contended that the plaintiff was not entitled to make the appropriation and certain decisions were quoted before me to the effect that amounts coming into the creditor's hands without reference to the debtor could not be appropriated by the creditor towards the debt due to him. A passage from the judgment of Bosanquet, J. in *Waller* v, *Lacy* (1) at p. 252 (*of* 133 *E. R.*), was quoted. There the learned Judge observed as follows :

"The doctrine of appropriation cannot apply to the present case, where money has come to the plaintiff's hands, not by the act of the defendant, but by the act of a third party."

Similarly Coltman, J.. observed :

"All the decisions in which this point has been considered have been cases where payments have been made by debtors to creditors and it has been held that if the party making a payment neglect to direct its application, the right to appropriate it devolves on the party by whom it is received. But here there was no payment at all by the plaintiff to the defendant."

The decision in *Waller* v. *Lacy* (1), was to the following effect :

"An attorney who has several demands against his client, some of which are barred by the statute of limitations, has no right to appropriate, in payment of the demands so barred, a sum received by him on account of his client for damages recovered in an action."

Section 59, Contract Act, lays down the rule to be applied as regards the appropriation of payments "where a debtor makes a payment to the creditor." In the case before me, however, it is clear that the amount of Rs. 500 was paid by the defendant as advance for the last year's rent i. e., for fasli 1329.

The lower appellate Court specifically finds that "the appellant had deposited an advance of Rs. 500 with the respondent" (para. 8 of its judgment). The present is therefore not a case where money belonging to the defendant came into the hands of the plaintiff without reference to the defendant which was the case in *Waller* v. *Lacy* (1). Here the defendant himself paid this advance. That is the finding and the circumstances appearing in the case supporting the finding. Therefore the decision quoted by the learned advocate for the appellant does not apply to the present case. When an advance amount is paid by the tenant to the landlord under a stipulation that the same is to be applied towards the last year's rent due under the tenancy (that I think, is the effect of Exs. A and B), the landlord is entitled to appropriate the same towards the rent due for the instalments due for the final year, though a suit for rent due in respect of such instalments might be barred by limitation. The circumstance that at the date of the suit the instalments for rent for the final year in respect of which the landlord appropriated the advance were barred by limitation is no bar for the landlord in doing so. In the present case the

(1) 1 Man & G 54=1 Scott (N. R.) 186=4 Jur. 435=9 L. J. C. P. 217=8 D. P. C. 563=153 E. R. 245.

plaintiff has given credit to the sum of Rs. 500 towards the rent due for fasli 1329 in October and November 1919, and as the said rent did not exhaust the whole of the Rs. 500, he has appropriated the remaining portion of Rs. 500 towards the rent due in March and June 1920 and it is only for the balance of rent due for fasli 1329 that the suit has been decreed by the lower Court. I think the landlord was perfectly right in having done so, and therefore no question of limitation arises in the present case. In this view it is not necessary to discuss the other ground mentioned by the lower Courts in support of their view that the claim for rent which fell due in October and November 1919 was not barred by limitation.

The lower appellate Court found that the time for payment of the said rent was extended by agreement between the parties and the said portion of the rent was to be paid along with the other portion of the rent payable in the months of March and June 1920. It was argued by the learned advocate for the appellant that mere extension of time for payment does not give a fresh starting point of limitation when the agreement was not in writing but was only an oral one. The provisions of S. 19, Lim. Act (and in fact the policy of the law), it was urged would be against such a view. On behalf of the respondent it was argued that there was a fresh agreement entered into between the parties in lieu of the original agreement. In this connexion the following cases were cited in the course of the argument: *Harada Karibasappa* v. *Gadigimuddappa* (2), *Dagdusa Tilakchand* v. *Shamad* (3), *Amuthu* v. *Muthayya* (4), *Ramamurtha* v. *Gopayya* (5) *at p.* 705, *Marimuthu* v. *Saminatha Pillai* (6), *Aiyasami Chetty* v. *Chinnia Nainar* (7) *Chinnasami Naidu* v. *Venkatasami Naidu* (8), *Srinivasa* v. *Raghunath* (9), *Ganga Prasad* v. *Ram Dayal* (10), *Ibrahim Mallick* v. *Lalit Mohan Roy* (11). This raises a rather interesting question of law as to how far such an agreement could be said to be a new agreement in substitution of the old agreement and whether such new agreement would be supported by legal consideration as required by law.

As I have found that the appeal should fail on the first point discussed by me above, I do not think it necessary to discuss the second question raised by the learned advocate for the appellant. The finding of the lower appellate Court is not clear whether in the present case there was only an extension of time granted by consent of parties or whether there was a fresh contract in substitution of the prior one. The question whether there was consideration for the second contract has also not been discussed by the lower appellate Court. I could not discuss the question of law in the absence of the necessary findings which should form the basis for the discussion of the question of law. In these circumstances, I do not propose to discuss this second question raised by the learned advocate for the appellant. As I have overruled the first contention raised in the appeal it follows that the second appeal should fail.

Two other minor matters were discussed before me one relating to the price of paddy and the other relating to the rate of interest awarded by the lower appellate Court. The former is a question of fact and though both the appellant and also respondent in his memorandum of objections, questioned the rate of interest allowed by the lower appellate Court, I think, I should not in the circumstances interfere with the said rate of interest. I must accept the lower appellate Court's finding that a sum of Rs. 500 was paid to the mutt by the defendant in 1920 as pleaded by him, and not in 1925 as pleaded by the plaintiff. I see no reason to interfere with the rate of interest allowed by it. The result is that both the second appeal and the memorandum of objections are dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

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(2) 6 M. H. C. 197.
(3) [1834] 8 Bom. 542.
(4) [1893] 16 Mad. 339.
(5) [1917] 40 Mad. 701=31 M. L. J. 231=25 I. C. 575=4 M. L. W. 48.
(6) [1898] 21 Mad. 366.
(7) [1916] 3 M. L. W. 338=34 I. C. 431.
(8) [1910] 7 M. L. T. 372=6 I. C. 719.
(9) [1902] 4 Bom. L. R. 50.
(10) [1901] 23 All. 502=(1901) A. W. N. 150.
(11) A. I. R. 1924 Cal. 383=50 Cal. 974.

A. I. R. 1930 Madras 597

BEASLEY, C. J. AND CURGENVEN, J.

Kandunni Nair—Defendant—Appellant.

v.

Ittunni Raman Nair and *others*—Plaintiffs—Respondents.

Appeal No. 453 of 1928, Decided on 22nd January 1930, from decree of Sub-Judge, Ottapalam, in Original Suit No. 32 of 1925.

(a) Court-fees Act, S. 5—No decision by taxing officer about sufficiency of stamps—Court can take notice of deficiency at hearing.

Where there has been no decision by the taxing officer under S. 5 as to the sufficiency of the court-fee stamp, the Court is not precluded from taking notice of the deficiency in stamp duty at the hearing, nor is the respondent precluded from raising an objection of this character: 20 *Mad.* 393; *A.I.R.* 1925 *Cal.* 1201 and *A.I.R.* 1927 *Mad.* 940, *Dist.*; 21 *Mad.* 269, *Rel. on.* [P 598 C 1]

(b) Court-fees Act, S. 7, (v) (a) and (c)—Parties members of same tarwad—Defendant's possession of certain tarwad properties alleged to be adverse to tarwad—Relief of possession being essential in suit by manager of tarwad court-fee is payable for suit as well as for appeal under Ss. 7, (v) (a) regarding revenue-paying land and on 15 times mesne profits on revenue free land under S. 7 (v) (c).

Where a manager of a tarwad in a suit against a member claims certain property as having passed to the tarwad by inheritance and the plaint clearly alleges that the defendant's possession is adverse to the tarwad and not permissible from the tarwad nor in any other way constructively and there is no ground for supposing that the tarwad at any time had possession in any form, a prayer for possession is necessary and court-fee for the suit as well as for the memorandum of appeal must be paid according to S. 7 (v) (a) as to land assessed to land revenue and as to sarvamanyam or revenue-free land on 15 times the mesne profits of the land claimed under S. 7 (v) (c): 21 *M.L.J.* 21; 43 *Mad.* 396; 17 *Mad.* 232, *Dist.*; 37 *M.L.J.* 544 and *A.I.R.* 1925 *Mad.* 468, *Appr.* [P 599 C 1, 2]

(c) Court-fees Act, Sch. 1, Art. (1)—Valuation of appeal—Amount of mesne profits not determined by preliminary decree—Appeal against the decree—No court-fee as regards mesne profits is payable: (*Obiter.*)

Where the preliminary decree for partition merely declares plaintiff's right to mesne profits and makes provision for its subsequent determination payment of court-fees in respect of the mesne profits is not payable in an appeal against the preliminary decree even where the decision as to mesne profits is challenged in the appeal: 52 *M.L.J.* 128, *not Appr.* [P 599 C 2]

P. Govinda Menon—for Appellant.

K. P. Krishna Menon—for Respondents.

Judgment.—Defendant 1 is the appellant. He is a junior member of a tarwad of which the plaintiff is the manager appointed under a karar. Jointly with a younger brother, defendant 1 acquired a certain property, and the younger brother subsequently died. The plaintiff brought the suit as manager of the tarwad for partition and recovery of the younger brother's half share of the property, on the ground that it had passed to the tarwad by inheritance. There was also a prayer for mesne profits from the date of the younger brother's death. In his written statement defendant 1 alleged that the younger brother's name was only nominally added in the assignment deed and that in fact the whole property was acquired by himself alone. The learned Subordinate Judge has disbelieved this allegation and has given a preliminary decree for partition, which directs that the amount of mesne profits due to the tarwad shall be determined at the time of passing of final decree. The judgment decides that only three years' mesne profits are awardable, but this decision is not carried into the decree.

The plaintiff as respondent raises the preliminary question of the sufficiency of the court-fee paid on the memorandum of appeal. The appellant disputes his right to raise an objection of this character, and refers to the procedure laid down in Chap. 2, Court-fees Act, so far as it applied to a High Court. S. 4 provides that court-fees must be paid before any of the documents specified in Sch. 1 or 2 of the Act are fileed S. 5 states that when a difference arises between the officer whose duty it is to scrutinize the sufficiency of the court-fee and a suitor or attorney, the question shall be referred to the taxing officer, whose decision shall be final unless he considers the question of sufficient importance to refer it to the Chief Justice. In the Madras High Court the officer who has to ensure that the court-fee has been duly paid, is the Deputy Registrar, appellate side, and the taxing officer is the Master. It is conceded that in the present case the procedure permitted by these sections was not availed of. Not only so, but it is very difficult to see what opportunity a respondent would have of setting it in operation. The case for which S. 5 ordi-

narily provides is when the officer who has to admit the appeal finds the court-fee paid insufficient and calls upon the appellant to pay the deficit. If then the appellant contests the correctness of the requisition, the officer makes a reference to the taxing officer. In such a case, no doubt, the taxing officer's decision is final, and even though the respondent was unrepresented when the correct court-fee was finally fixed, it may well be, as appears to have been decided in *Ranga Pai* v. *Baba* (1), that he cannot raise the question at the hearing of the appeal. We have been referred to no authority, however, for the position that where no recourse has been had to S. 5 he is still debarred from so doing. In *Bhubaneswar Triguna..., In the goods of* (2), all that was decided was that where in a probate case a taxing officer's certificate as to the sufficiency of the duty is produced, although it may have been given after no such "difference" as is contemplated by S. 5, it is still final. This part of that decision was followed by one of us in *Swaminatha Aiyar* v. *Guruswami Mudaliar* (3). There is, however, a direct decision in *Kasturi Chetty* v. *Deputy Collector, Bellary* (4), that where there has been no decision by the taxing officer under S. 5, the Court is not precluded from taking notice at the hearing of the deficiency in the stamp duty. "Otherwise," the learned Judges say:

> "there would be no remedy for the most obvious error, or even for a deliberate trick to defraud the stamp revenue, unless detected by the routine establishment in the first instance, and before the admission of the appeal or the reception of the paper, as the case might be."

We think that this is the correct view and following it we have allowed the respondent to address us on the question of court-fee.

The appellant has placed his own valuation on the appeal, valuing the half share at Rs. 75 and one year's mesne profits at Rs. 350, and endeavours to justify this course by showing that the suit falls either under S. 7 (4) (b), as a suit to enforce the right to share in the property on the ground that it is joint family property, or alternatively under Sch. 2, Art. 17 (6) which provides for a suit or appeal where it is not possible to estimate at a money-value the subject matter in dispute, and which is not otherwise provided for by the Act. The respondent on the other hand urges that the suit is one for possession as provided for by S. 7 (5).

It appears to us that the question must depend upon whether the plaintiff, at the time he brought the suit, was in or out of possession, actual or constructive, of the suit property. If he was in constructive possession, the suit would resemble in nature one filed by a coparcener in joint possession of the family property for partition, and it has been held by a Full Bench of this Court in *Rangiah Chetty* v. *Subramania Chetty* (5), that such a suit is governed by S. 7, Cl. (4) (b) of the Act, on the theory that what the plaintiff really asks for is the conversion of his joint possession of the whole, whether actual or constructive, into separate possession of his share. Similarly, as has been held in *Gill* v. *Varadaraghavayya* (6), a suit by a cotenant for partition is governed by Sch. 2, Art. 17 (4), because it would not fall under S. 7 (4) (b), the property not being joint family property. Mr. Govinda Menon for the appellant further relies upon *Padamah* v. *Themana Ammah* (7), which related to an invalid kanom of tarwad property granted by the karnavathi to two junior members. It was found that although there had been an attornment of the tarwad tenants to the kanomdars, possession really remained with the karnavathi, and consequently it was enough for the plaintiff, who sued as a junior member of the tarwad to upset this arrangement, to ask for a declaration that the kanom was invalid. If, however, the kanom had been granted to a stranger who was in possession, the learned Judges add, then possession also must be sought as a relief consequent upon the declaration. This decision has been considered and explained in *Cheria Kunhi Pocker* v. *Malikaimal, Valia Bappolty* (8), where the circumstances were closely similar. "There

(1) [1897] 20 Mad. 398.
(2) A.I.R. 1925 Cal. 1201=52 Cal. 871.
(3) A.I.R. 1927 Mad. 940.
(4) [1898] 21 Mad. 269.
(5) [1910] 21 M.L.J. 21=8 I.C. 512=(1910) M.W.N. 755 (F.B.).
(6) [1920] 43 Mad. 396=38 M.L.J. 92=11 M.L.W. 174=55 I.C. 517=(1923) M.W.N. 124.
(7) [1894] 17 Mad. 232.
(8) [1919] 37 M.L.J. 544=10 M.L.W. 496=53 I.C. 771=(1919) M.W.N. 815.

are no doubt observations in that judgment," the learned Judges say:

"about unity of possession of the tarwad etc. But they must be read with the facts of the case and do not support the contention that under no circumstances can a junior member of the tarwad sue for possession if the tarwad had parted with possession."

They further remark:

"the character in which an alienee anandravan holds possession will depend upon how far he ousts the tarwad and not upon whether he is a member of it or not. "If the tarwad is ousted then the possession of the ouster, whether he be a member of it or not, is as injurious to the tarwad as ouster by a stranger and the member in possession must be sued, as if he was a stranger."

The same principles have been followed by Wallace, J., in the case of a Hindu coparcenary in *Ramakrishna Iyer* v. *Muthuswamy Iyer* (9). It is accordingly necessary here to decide upon the plaint, the terms of which must determine the nature of the suit and the amount of court-fee to be paid, whether it was incumbent or not upon the plaintiff to sue for possession. There is an averment in para. 4 that after the death of the younger brother defendant 1 had been collecting and appropriating the whole of the income of the property, in para. 7 that although he had been requisitioned that the property should be divided he has refused to comply through selfish motives and with a view to defraud the tarwad, and in para. 8 that the tenants were in possession of the property. The prayer is accordingly for a decree directing the division of the property into two equal shares and that one of these shares be caused to be surrendered and given delivery of to the plaintiff. It appears to us that these allegations clearly amount to saying that defendant 1 is holding the half share of the property, which since his younger brother's death belongs to the tarwad, not permissively from the tarwad or in any other way constructively, but wholely adversely. The property was in origin self-acquired, and there appears to be no ground for the view that the tarwad at any time had possession in any form. The plaintiff was assessed to court-fee on the footing that the suit was one for possession and we consider that this is clearly right and that the appellant must pay a fee upon his memorandum accordingly. So far then as the prayer for possession is concerned the fee will be assessed, as regards items 1 to 3, which are assessed lands, upon one half of ten times the assessment, or Rs. 150, under Cl. (a), S. 7 (v); on the remaining items (Nos. 4 to 13) which are sarvamanyam or revenue-free, upon one-half of 15 times the mesne profits, or Rs. 4,387-8-0 under Cl. (e) of the same section. Therefore on this part of the memorandum the fee will be payable on Rs. 4,387-8-0.

There remains the question of mesne profits. In his judgment the learned Subordinate Judge has found that the claim to mesne profits prior to three years before suit is barred although he does not in express terms award mesne profits for this period. He adds that the rate will be determined at the stage of the final decree. The preliminary decree embodies this latter direction but makes no reference to the term of three years. There is accordingly no sum certain fixed in this respect upon which the court-fee can be paid by the appellant. The alternatives seem to be either that he should pay no fee at all or, as was held, we think obiter, in 52 *Madras Law Journal* 128, that he should pay it on the valuation given in the plaint. With much respect to the learned Judges who expressed that view, we can find no sufficient justification for adopting this latter course. The decree which we must follow in preference to the judgment, contains no more than a direction for the determination of the mesne profits and accordingly it is difficult to apply the terms of Sch. 1, Court-fees Act, where it is said that the fee is to be payable on the amount or value of the subject matter in dispute. Mr. Govinda Menon for the appellant asks us to adopt the position that in the case of all decrees for possession and mesne profits it is only necessary to appeal against that part of the decree which awards possession, because if it be set aside the award of mesne profits must necessarily go with it. We need not go so far as to discuss the tenability of this view. Where, however, a preliminary decree only makes provision for the subsequent determination of the mesne profits we think that the apt occasion for requiring a defendant to pay a court-fee in this respect would be if and when the profits have been determined by a final decree. To require him to pay now a

(9) A.I.R. 1925 Mad. 468.

court-fee upon the profits as estimated in the plaint, where there is as yet no question as to their amount but only as to the right of the plaintiff to receive them, appears not only difficult to justify on principle but also to lead to the difficulty that if the defendant subsequently has to appeal against the amount of mesne profits awarded by the final decree, he would pay court-fee twice over. We do not think therefore that at the present stage the fee payable should comprise this item.

We give the appellant three months to pay the court-fee as settled above. The appeal will be posted for hearing immediately the court-fee is paid. In default of payment the appeal will stand dismissed with costs.

P.R.S./J.M. *Order accordingly.*

A. I. R. 1930 Madras 600

KUMARASWAMI SASTRI AND WALSH, JJ

Municipal Council, Tiruvarur—Plaintiff—Appellant.

v.

P. R. Kannuswami Pillai and *another*—Defendants—Respondents.

Appeal No. 223 of 1925, Decided on 25th November 1929, from decree of Sub-Judge, Tiruvarur, in O. S. No. 2 of 1924.

(a) Madras District Municipalities Act(5 of 1920), S. 69—Contract not fulfilling requirements of S. 69 is null and void, even if wholly executed.

Any contract made by a Municipal Council which does not fulfil the requirements of S. 69, is absolutlely null and void and mutually unenforceable. This disability is not shaken off even if the contract had been wholly executed. [P 601 C 1]

(b) Evidence Act S. 115—Bid by one and deposit by another representing himself as partner—Partner becomes co-contractor or co-lessee and cannot deny his liability.

Where one person bids at an auction sale and after acceptance of his bid another person representing himself to be a partner with the first joins him in making initial deposit, the second person becomes a co-contractor or co-lessee and not a sub-lessee or transferee and is estopped from denying his liability thereunder. [P 601 C 2]

T. R. Venkatarama Sastriar—for Appellant.

Advocate-General, K. V. Krishnaswami Iyer, V. *Balasanduram Iyer* and *S. Varadachariar*—for Respondent.

Walsh, J.—The plaintiff in this case is the Municipal Council of Tiruvarur represented by its Chairman. On the 6th February 1922 the Municipal Council held an auction of the right to collect tolls in the municipality for the year 1922-23 and to defendant 1 was knocked down the right to collect tolls for Rs.19,925. The printed notice under which the auction was held required the successful bidder, within ten days of the acceptance of his bid, to make a deposit of two months rental as security and pay the amount due in twelve equal instalments, the security deposit being adjusted in the rental of the last two months. The notice further provided that for any amount due, the bidder should pay the interest at the rate of one anna per diem for every hundred rupees or fraction thereof. Defendant 1 bid for and accepted the lease of the toll gates subject to the above conditions.

On 28th February, 1922 defendants 1 and 2 jointly put in a petition to the Chairman of the Municipal Council in which they represented that though the bid stood in the name of the defendant 1 Kannuswami Pillai, it was really made on behalf of and for the benefit of both petitioners, namely, defendants 1 and 2. They further stated that they made a deposit on that day of Rs. 660-6-8 (by defendant 1) and Rs. 1,660-6-8 (by defendant 2) and prayed that a muchilika might be taken from both of them jointly and both might be treated as lessees of the toll gates. This petition was accepted and ordered by the Chairman accordingly. For some reasons or other no muchilika was executed by either of the parties though the tolls were being collected by the defendants, and it was not until the close of the official year 1922-23 that a notice was issued to the defendants to execute a muchilika. The defendants in the meantime had been complaining by petitions to the council about certain greivances. The council brings this suit for the balance of the lease amount due Rs. 4,497-15-8 plus Rs. 108-10-0 balance of interest for irregular payments and Rs. 742-8-0 interest on the balance of the lease amount, making a total of Rs. 5,346-1-8. Defendant 1 pleaded that there was no completed contract between himself and the municipality, that the plaintiffs were not entitled to appropriate, as they had done, the amount of Rs. 293-12-0, towards interest as it was no

paid as such, that the plaintiffs cannot claim interest and the rate claimed is penal, that there was no wilful default on the part of the defendants to execute the muchilika and that (for certain reasons which are given) the defendants were subjected to loss on account of the negligence of the municipality and they were further subjected to heavy loss owing to unforeseen heavy rains and high floods in the rivers and the consequent absence of traffic by roads. Defendant 2 stated that as he did not bid at the auction he had incurred no liability to the Municipal Council, that he adopted the other defences raised by defendant 1 and that in any event, he cannot be made liable for the full amount claimed in the plaint and at the worst he can be made liable only for a moiety of the suit amount.

The following issues were raised:

1. Whether there has been a complete contract between the parties as set out in the plaint and if not whether the suit is sustainable?

2. Whether the suit is sustainable in the absence of a muchilika as required by S. 69. Madras District Municipalities Act ?

3. What is the exact amount due from defendant 1 ?

4. Whether plaintiff is entitled for interest, and if so, to what amount ?

5. Whether the appropriation by plaintiff of Rs. 293-12-0 for interest, is lawful and warranted ?

6. Whether there was a default on the part of the defendants to execute a muchilika as alleged in para 8 of the plaint, or was the default to take the same due to the plaintiff as pleaded in paras. 8 and 12 of the written statement.

7. Whether defendants are estopped from pleading non-liability as alleged in para. 9 of the plaint ?

8. To what equities are plaintiff and defendants entitled ?

9. Whether plaintiff is entitled to any and if so, to what relief ?

10. Whether defendant 2 who was not a bidder at the auction can in any way be made liable for the suit claim ?

The most important issues are issues 1 and 2. S. 69, Cl. 1, Madras District Municipalities Act of 1920, lays down that every contract made by or on behalf of a council shall be in writing and shall be signed by two Municipal Councillors. This admittedly was not done. The lower Court finds that both the parties were to blame for the non-execution of muchilika and that finding has not been canvassed before us. The learned Subordinate Judge held on issue that there was no completed contract and on issue 2 following the decision in *Raman Chetty* v. *Municipal Council of Kumbakonam* (1), that the suit was not sustainable under S. 69 of the Act. He gave findings on the other issues also. As regards issue 10 he found that defendant 2 was not liable. As regards issues 4 and 5 his finding is as follows:

"The plaintiff claims interest at one anna per Rs. 100 per diem as laid down in Ex. A-1. But the council had accepted the amounts without charging that interest as can be seen from pp. 7 and 9 of Ex. J and the balance also has been struck as Rs. 4,204-3-8. It is argued that there having been no contract in writing, the plaintiff has no right to ignore some conditions and enforce other conditions. If it is an implied contract then the plaintiff will only be entitled to charge interest at a reasonable rate, that is, at 6 per cent per annum. I find that if plaintiff is entitled to any amount as lease arrears, defendant 1 will be liable to pay interest on the arrears at 6 per cent per annum and not for the late payments accepted by the plaintiff without any demur. The plaintiff has no right to appropriate Rs. 293-12-0 subsequently, since the entries in page 7 show that no appropriation for interest for late payment had been intended."

As regards issue 7 he held that there was no estoppel. As regards issue 8 he appears to hold that the plaintiff introduced a new restriction after the lease was granted by which collection of tolls on cattle was prohibited, that if the defendants are entitled to claim any damages in respect of that and other irregularities, they must do so by a separate suit and that they are not entitled to any equities in this suit. As regards issue 3 he says that there is no prayer in the suit for damages for use and occupation and that the plaintiff would be entitled to get only what the defendants had derived from the toll income. As regards issue 9 he held that the plaintiff is not entitled to any relief and dismissed the suit directing each party to bear his costs owing to non-execution of the muchilika. The plaintiff Municipal Council has appealed.

The important question in this case is whether the contract is null and void and the suit unsustainable because the terms of S. 69, District Municipalities Act, were not complied with. The matter has come up several times before the Courts in England and India. In India we are governed by the District Municipalities Act and as the decisions in India on the particular point in question are practically all in favour of the

(1) [1907] 30 Mad 290.

view taken by the learned Subordinate Judge and as the matter has been very often discussed in various judgments, we do not think it necessary to enter into a very lengthy examination of the authorities here. I shall first take the cases directly on the point where the want of compliance with the statutory obligations has been admitted as a defence to a suit brought by a municipality. We have two cases in Madras. One is *Raman Chetty* v. *Municipal Council, Kumbakonam* (1). In that case the municipality sued to recover damages and arrears from the defendant, a toll contractor who had purchased at public auction the right of collecting tolls for three years.

The defendant, though he entered on possession and was collecting tolls, did not execute the written agreement which was required by the provisions of S. 45, Municipalities Act. Disputes arose between the plaintiff and defendant and after about 17 months of enjoyment, the defendant was put out of possession and a re-sale of the remainder of the term resulted in a loss to plaintiff. The plaintiff sued to recover the loss sustained by the re-sale and the arrears due. The defendant pleaded inter alia that, there being no contract fulfilling the requirements of S. 45, plaintiff's suit was unsustainable. The Subordinate Judge held that the agreement though not binding on the municipality, was binding on the defendant and gave a decree for plaintiff. The learned Judges held that the view of the Subordinate Judge that it does not bind the Municipal Council but does bind the other party is erroneous. They quoted *Ahmedabad Municipality* v. *Sulemanji* (2). This Madras case in so far at least it was a claim for arrears, is exactly on the same footing as the present case. This decision was followed in the *Madura Municipal Council* v. *Veeranna Kone* (3), another Madras case. The only decision to the contrary in this Presidency is *Srirangam Municipal Council* v. *Bodi* (4) decided by Krishnan,J., sitting alone. In that case, the defendant had bought in auction the right to collect fees for slaughtering cattle in the municipal slaughter house. The suit was for balance of money due and was dismissed by the lower Court on the ground that no written contract was executed as required by S. 45, old District Municipalities Act, 4 of 1884. It was argued that though no claim could be made on the basis of the written contract, a decree should have been given, at any rate, on the footing of executed consideration, the defendant having been found to have enjoyed the right for the whole year. The learned Judge held that the authority quoted *Lawford* v. *The Billericay Rural Council* (5) was in favour of such a decree being given. He also quotes *Douglass* v. *Rhyal Urban Council* (6), as confirming the view taken in *Lawford* v. *The Billericay Rural Council* (5). He says that the decision in *Raman Chetty* v. *Municipal Council, Kumbakonam* (1), does not really deal with the question and that the observation in *Ramaswamy Chetty* v. *Municipal Council, Tanjore* (7) is based on *Young & Co.* v. *Mayor etc., of Royal Leamington Spa.* (8). As was pointed out in *Madura Municipal Council* v. *Veeranna Kone* (3), the learned Judge seems to have failed to note that the cases he relied on were not cases where the contract was governed by any statute. One other Indian case is relied on for the appellant and that is *Abaji Sitarama* v. *Trimbak Municipality* (9). The remark in that case is obiter. The issue on which the case was tried was whether the remission of a certain sum out of the amount due under a contract with the municipality was valid; and it was found that the meeting which granted the remission not being properly summoned, such remission was invalid. The learned Judges observe:

"This discussion leads us to consider a point, which was raised before us for the first time, and then only as a result of investigation made in the course of the hearing before us. It appears that the contract under which defendant 1 became entitled to levy and collect the tolls was not under seal, and so failed to comply with S. 30 (Bombay Act 2 of 1884), to which I have already alluded. The Advocate-General, relying for this purpose on

(2) [1903] 27 Bom. 618=5 Bom. L.R. 592.
(3) [1912] 16 I. C. 890.
(4) A. I. R, 1924 Mad, 162.
(5) [1903] 1 K. B. 772=51 W. R. 630=72 L.J. K. B. 554=88 L.T. 317.
(6) [1913] 2 Ch. 407=82 L. J. Ch. 537=29 T. L. R. 605=109 L. T. 30=77 J. P. 373 =57 S. J. 627=11 L. G. R. 1162.
(7) [1906] 29 Mad. 360.
(8) [1883] 8 A. C. 517.
(9) [1904] 28 Bom. 66=5 Bom. L. R. 689

S. 23, Contract Act, has asked us to hold that there was no contract at all under which the plaintiff municipality can claim. Apart from the fact that this is travelling outside the pleadings of the parties, we think, there is another reason why we cannot give effect to the contention. It is well recognized law in England that though a contract by a corporation must ordinarily be under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed."

This is really obiter as the Judges held that the plea was travelling outside the pleading of the parties. As in *Srirangam Municipal Council*.v. *Bodi* (4) the distinction between a contract made under a statute and one not made under a statute appears to have been lost sight of. On the other hand the most recent case on the point is *Mahomed Ebrahim Moll* v. *Commissioners for the Port of Chittagong* (10), where it was held that a suit brought by the Port Commissioners of Chittagong on an agreement entered into in contravention of the mandatory provisions of S. 29, Chittagong Port Act 1914, must be dismissed as the contract was not enforceable. This judgment contains a very useful and succinct summary of the law on the point to which we will allude presently. In view of the fact, therefore, that the particular matter before us had been decided twice by two Benches of this Court against the appellant's contention and also by the Calcutta High Court, while on the other side there are only the decision of a single Judge in *Srirangam Municipal Council* v. *Bodi* (4) and the remark in *Abaji Sitaram* v. *Trimbak Municipality* (9), a very brief summary of the argument put forward by the learned advocate for the appellant will be sufficient.

He admits that there is no English case which holds that, where the right to contract is given by a statute, a statutory body can maintain an action on a contract though the provisions of the statute have not been complied with while such non-compliance will be a defence to an action brought against them on the contract., What has been held with regard to corporations is that, when such bodies are not contracting under a statute, they can maintain a suit on a partly executed contract though it has not been given under seal while they cannot do so as regards an executory contract. The matter has been succinctly put in *Mahomed Ebrahim Moll* v. *Commissioners for the Port of Chittagong* (10) at p. 208 (of 51 *Cal.*). The learned Judges say:

"It is a rule of common law in England that with certain exceptions, a corporation is bound by those contracts only which are made under the corporate seal. The exceptions are: (1) where the contract is executed, (2) in small matters of very frequent occurrence and (3) where it is impossible to affix the seal, as in cases of great urgency."

It has been clearly laid down in a number of cases, of which the leading cases are *Young & Co.* v. *Mayor etc., of Royal Leamington Spa.* (8) and *Hunt* v. *Wimbledon Local Board* (11), that where a corporation enters into a contract under a statute and the terms of the statute are not observed, the contract cannot be enforced against the corporation. But no English case has been quoted in which it was held that this is not mutual and that the corporation can on their side enforce such a contract. It is unnecessary to discuss the rulings which deal with statutory corporations which do not contract under a statute. The learned advocate, however, relied on two cases to show that a corporation could enforce a contract which did not comply with the statutory provisions. These were *Bournemouth Commissioners* v. *Watts* (12) and *Brooks Jenkins & Co.* v. *Tarquay Corporation* (13). These cases, however, are distinguishable. In *Bournemouth Commissioners* v. *Watts* (12), the first case, it was a third party who sought to take advantage of the want of formality in the contract and it was held that there was nothing to prevent the local authority paying for the work of which it had the benefit and as regards the fact that the contract was not sealed this did not excuse the third party who was liable for such work and did not afford a defence to such third party. In the second case it was held that the municipal seal had been affixed in time and hence the requirements of S. 174, Public Health Act, had been complied with and by reason of this a new con-

(10) A. I. R. 1927 Cal. 465=54 Cal. 189.

(11) [1879] 4 C. P. D. 48=48 L. J. C. P. 207=27 W. R. 123=39 L. T. 35.

(12) [1884] 14 Q. B. D. 87=54 L. J. Q. B. 93=49 J. P. 102=51 L. T. 823=33 W.R. 280.

(13) [1902] 1 K. B. 601=71 L.J.K.B. 109=65 J. P. 293=85 L. T. 785.

tract had been entered into of which the part execution of the old contract could be taken to be consideration.

The learned advocate for the appellant argues that in India the position is peculiar and that, while a body contracting under a statute cannot enforce an executed contract when all the terms of the statute are not complied with, yet when the contract has been wholly executed, the position is that, while they can urge this as a defence in a suit brought against themselves on the contract, it cannot be urged as a defence to a suit brought by them on the contract. For this he relies on the difference in the wording between S. 174, Cl. 5, Public Health Act, and S. 69 (2), District Municipalities Act. While the former runs:

"Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed . . . ."

Section 69, District Municipalities Act, puts the matter negatively. It says:

"A contract executed or made otherwise than in conformity with the provisions of this and the last preceding section shall not be binding on the Municipal Council."

It is argued that we should infer from this difference in language that a contract executed otherwise than in conformity with the provisions of the District Municipalities Act, while it will not bind the municipality, will bind the other party to the contract. It is certainly somewhat remarkable that this negative language should have been employed in that Act; but on the other hand, it has been pointed out that though the Act was revised after the decisions in *Raman Chetty* v. *Municipal Council, Kumbakonam* (1) and *Madura Municipal Council* v. *Veeranna Kone* (3), had been given, no change was made in the section. If the meaning sought to be attached to it on behalf of the appellant is correct, these decisions are opposed to such interpretation. In view of the fact that all the decided cases on the point excepting *Srirangam Municipal Council* v. *Bodi* (4), are opposed to such an interpretation, we do not think that this argument can be accepted. It is difficult to see if the argument be accepted, how an executory contract would differ from one executed.

Another argument adduced is that these formalities are only necessary in the interests of the ratepayers and that it is not open to anyone else to take advantage of them. The case of *Frend* v. *Dennet* (14) is quoted for this purpose. What was held in this case was what has been so frequently decided that want of formality in making a contract is a defence to a suit brought against the corporation. The remark of Cockburn, C. J., which is relied on:

"I think the Local Board had no power to contract so as to bind the rates, unless they did so in the manner pointed out by the statute',

cannot be held to imply that they can enter into contracts enforceable by themselves but not enforceable by the other party. We, therefore, agree with the finding of the learned Subordinate Judge that the contract is not enforceable. This settles most of the other issues. But we cannot help observing that we are unable to agree with the remarks of the lower Court on issue 8 and with its decision thereon. As the learned Subordinate Judge has made some severe remarks against the municipal manager in this connexion, we will on this issue have to see if the Municipal Council introduced restrictions with regard to tolls on cattle which did not appear at the time of the original contract. It is certainly difficult to see why the defendants should not plead such a breach of the contract in this suit if it is true and why they should be driven to file a fresh suit. But it seems to us clear that the defendants knew of this restriction at the time of the contract. The learned Subordinate Judge relies on the fact that the G. O. granting this exemption is dated only 25th April 1922 while the contract was on 6th February 1922 and says the council had no right to grant the exemption beforehand. We are not concerned here with the question whether the council had any right to grant this exemption but whether in fact that exemption was known at that time of the contract to the defendants. The learned Subordinate Judge finds that the manner in which this exemption was entered in the resolution book is suspicious but we have the letter Ex. 7-c written by the defendants on 5th April 1922, i. e., only five days after the defendants

(14) 140 E. R. 1217.

started collecting tolls, to the Municipal Chairman. In that letter they state:

"In pursuance of an order of Government, tolls are being levied for cattle at the Municipal toll gates in Tanjore, Kumbakonam, Mannargudi and Negapatam in the Tanjore District, in the Municipal gates in other Districts and in all the local fund toll gates in the Tanjore District. The yield of paddy in the taluks of Nannilam, Negapatam, and Tiruturaipundi is very low this year. When we, who have taken a lease at a high rent, think over the probable collections during this festival season, we are led to apprehend much loss.

I therefore solicit orders for the levy of fees, except in the case of local cattle, for all cattle coming from other places as is being done in all other muncipalities. Great loes will be caused to us if an order be not passed to that effect.

I therefore pray that fees may be ordered to be levied for cattle other than the local ones."

There is no hint that the exemption was not known or declared to the parties at the time of the contract. What they state is that such exemption has been refused by the Government in other places and it ought not to be granted in Tiruvarur specially in view of the bad season. Again the defendants' agent writes in Ex. 7-t repeating that in Tanjore and other municipalities toll is levied for cattle any saying:

"In the taluks of Nannilam, Negapatam, Tiruturaipundi, the produce of paddy is very much less this year. It appears from what was collected during the Utsavam time and what is being collected up to date that there will be a very great loss. An order must therefore be made for collecting toll for the cattle coming from outside except the local cattle as in all other municipalities. We have taken lease for a big amount, are likely to incur a heavy loss. * * * *

I therefore request that an order may be passed for collecting tax for outside cattle except the local cattle now at least."

Here again the claim is not put on any breach of the contract or on the introduction of a fresh term but of what is the practice elsewhere and on the bad season. If the defendants had thought it was contrary to the terms of the contract or was a term newly introduced, they would have certainly said so. It was not till long afterwards in a letter Ex. 7-m written on 5th September 1922, that the agent of defendant 1 wrote:

"After the sale was confirmed in our favour we came to understand later on that the councillors had decided at a meeting that fees should not be levied for cattle. Thereupon we have submitted two petitions to the Municipal Chairman one on 5th April 1922 and the other on 19th June 1922 requesting that, inasmuch as the notice inviting tenders did not mention that fees should not be levied for cattle, the resolution passed at the meeting of the council should be set aside."

It will be seen that the letters of 5th April 1922 and 19th June 1922 raised no such contention that the parties were not aware the of terms of the contract which were altered at a later meeting of the council.

As regards the other acts of negligence alleged by the defendants against the municipality, it is unnecessary to discuss them in view of our finding that the contract is not enforceable.

With regard to issue 10, we cannot agree with the finding of the learned Subordinate Judge that even if the contract was enforceable defendant 2 is not liable under it. The learned Judge says:

"The bidder was only defendant 1. But defendant 2 stated subsequently that he was also a partner with defendant 1 and that his name also should be included as a lessee. Ex. D is that application and even the Chairman did not pass any orders on it accepting defendant 2 as a lessee. Even if the Chairman had done so, it would be invalid since there was no resolution of the council to that effect. The offer by defendant 2 not having been accepted and the bidder having no right to transfer or sublease without the sanction of the council, I have to find that defendant 2 cannot be made liable as a joint contractor or joint-lessee."

Of course on the finding that the contract is not enforceable defendant 2 is not liable under it, but neither is defendant 1. This is not a case of a transfer or sub-lease as imagined by the lower Court but a case of a party after his bid has been accepted representing to the municipality that he bid on behalf of himself and another person and asking that such other person should be regarded as a co-contractor. The second party joins in this and pays money on which the chairman officially "accepts the amount tendered by both." Throughout both have been representing themselves as contractors who have taken a joint lease. Defendant 2, we consider, is clearly estopped by his action from disputing liability under the contract and his contract is enforceable. Both the parties are agreed before us, and they are willing too, that if the contract is found invalid they should accept a decree on a quantum meruit basis. We do not see any reason why this should not be allowed. Similar relief was allowed in *Mahomed Ibrahim Molla* v. *Commrs. for the Port of Chittagong* (5), where it was held that the Port Commissioners could not sue on the contract. Although accounts

(15) A. I. R, 1927 Cal 465=54 Cal. 189.

have been furnished showing profit and loss, we think that they are not sufficiently complete to enable us to fix the correct figure. We will send the case down for disposal to the lower Court on these lines, while reversing the decree, though agreeing with the lower Court on the second issue. Parties may adduce fresh evidence, oral and documentary before the lower Court. The appeal having substantially failed in this Court respondents will recover their costs here from the appellant. Costs in the lower Court will abide the result of the suit. Court-fee will be refunded.

P.R.S./V.B. *Order accordingly.*

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* A. I. R. 1930 Madras 606

WALLACE AND ANANTAKRISHNA AYYAR, JJ.

A. R. R. M. N. Narayanan Chettiar—Defendant—Appellant.

v.

Kadir Sahib and *others*—Plaintiffs—Respondents.

Second Appeal No. 1339 of 1926, Decided on 5th December 1929, from decree of Sub-Judge, Tinnevelly, in Appeal Suit No. 47 of 1926.

* (a) **Tariff Act (8 of 1894), S. 10—Contract for sale of salt—Whole price paid—Subsequent reduction of duty—Purchaser is entitled to recover the difference—Vendor and purchaser.**

Where subsequent to the contract for sale of salt and after payment of the whole of purchase price there is a reduction in the duty, the purchaser is entitled to recover from the seller the difference, in cases where the decrease takes effect from a date prior to the contract: *A. I. R.* 1925 *P. C.* 157 and *A. I. R.* 1924 *Mad.* 236, *Dist.* [P 608 C 2]

(b) Practice—New case—Plaint based upon contract for "sale"—"Agency" cannot be set up in appeal.

Where in a plaint the case set up by the plaintiff is one of sale, he cannot be allowed to set up a new case of agency for the first time in appeal: [P 608 C 2]

V. Rajagopala Ayyar—for Appellant.

T. M. Krishnaswami Iyer, P. N. Marthandam and *T. E. Ramabhadrachariar*—for Respondents.

Anantakrishna Ayyar, J.—Defendant 4 is the appellant in this second appeal. The plaintiff is a salt merchant trading at Erode. The defendants, it was alleged, were trading at Tinnevelly in salt. The plaintiff purchased from the firm of the defendants in March 1922, 400 bags of salt. The salt was sent by the defendants to the several places mentioned by the plaintiff. The plaintiff paid the defendants the price of the salt which included the excise duty of Rs. 2,000 charged on the 400 bags calculated at Rs. 5 per bag according to the rate of excise duty prevalent at the time. The transaction took place on 5th March 1922. Subsequently the Government of India reduced the excise duty on salt from Rs. 5 to Rs. 2-8 per bag. It was to have effect from a date prior to 5th March 1922. The defendants' firm accordingly obtained refund from the Government of Rs. 1,000 representing the difference in the excise duty at the rate of Rs. 2-8 0 per bag in respect of the 400 bags. This amount was received by the firm of the defendants on 1st April 1922. The plaintiff instituted the original suit in the Court of the District Munsiff of Tinnevelly claiming this sum of Rs. 1,000 which the defendants got from the Government with interest thereon. The plaintiff also alleged in the plaint that there was a specific agreement between the parties at the time of the transaction that in case the Government should reduce the excise duty on salt, then the plaintiff should have the benefit of the said reduction and the defendants who dealt directly with the Government should, on obtaining such refund, pay the same over to the plaintiff.

The defendants in their written statement denied the specific agreement set up by the plaintiff. Defendant 4 pleaded that he was not a partner in the firm of defendant 1. With reference to the general allegation in the plaint that under the Tariff Act, the plaintiff was entitled to this sum of Rs. 1,000, even though the specific agreement set up by him be not proved; the defendants contended that on a proper construction of S. 10, Tariff Act, the plaintiff was not entitled to the refund of the same. Both the lower Courts held that defendant 4 was a partner in the firm of defendant 1. They also found against the specific agreement set up by the plaintiff with reference to the revision of the salt duty at the instance of the Government. Both the lower Courts therefore decreed the claim of the plaintiff on the ground, that on a proper construction of S. 10, Tariff Act 8 of 1894, in cases where subsequent to the contract of sale there

is a reduction of duty on salt, the purchaser is entitled to the benefit of such reduction. The lower appellate Court further found that the defendants must be taken to have purchased the salt from the Government as agent of the plaintiff and in that view also the defendants were bound to refund to the plaintiff the sum of Rs. 11,000 which they got from the Government. This second appeal has been preferred by defendant 4 and on his behalf his learned advocate raised two contentions before us. The first was that the lower appellate Court was in error in having allowed the plaintiff to set up a new case of agency, whereas in the plaint the case set up was one of sale. The learned advocate drew our attention .to the plaint where there are no allegations regarding any agency and also to the circumstance that no issue had been raised with reference to this question of agency.

The second contention that he raised related to the construction of S. 10, Tariff Act. He drew our attention to the corresponding section of the English Finance Act of 1901 and he argued that though the Act purports to revise the terms of the contract between the parties, the legislature has taken as the critical period with reference to which adjustment has to be made the time of delivery of the goods. He drew our attention to S. 10 "English Act" where the word "delivery" is used. He also drew our attention to S. 20, Customs Consolidation Act of 1876 where the words, used are "time of clearance or delivery." He also drew our attention to certain decisions where the Court while dealing with the Indian Act used the word "delivery" in the course of the judgment. S. 10, of the Act, which .evidently was taken from the English Act, does not use the word "delivery" or "clearance". The difference in language, and omission of these words, is rather significant. It may be that as a matter of convenience the point of time relating to delivery may be convenient point with reference to which adjustment of rights of parties could be regulated But we feel ourselves bound in construing S. 10 of the Inian Act to be guided by the express terms of the Act. As the terms "delivery" or "clearance" have been, as we take it, intentionally omitted in the Indian Act, we are led to infer that there has been some change of policy in the Indian Act from that of English Act. The learned advocate for the appellant then argued that the test to be applied is whether the transaction between the parties had been, as he said, "closed" or not. Here again the wordings of the section do not in our view lend support to this contention. As we read Cl. (a), S. 10, that gives to the seller, in cases where the duty had been enhanced after sale, the right to recover such additional duty from the purchaser. This clearly, in our opinion contemplates a case where the accounts between the parties had been settled and the purchaser had paid the seller the whole of the price agreed between the parties. If with reference to Cl. (a) a seller is entitled under this Act to recover from the purchaser, even though the transaction had been "closed" the amount of the extra duty that he had to pay, one fails to see why a different policy must be taken to have been adopted with reference to Cl. (b) of the same section. Cl. (b) of the section gives the purchaser the benefit of any decrease of duty.

It declares that the purchaser may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty. and it proceeds further to enact that "he shall not be liable to pay or be sued for in respect of such deduction." The learned advocate drew our attention to the change of language used in Cls. (a) and (b) of the section and he argued that, while it is specifically mentioned in Cl. (a), that the seller in case of increase of duty is given the right to sue for and recover such addition from the purchaser, Cl. (b), according to his suggestion, does not specifically entitle the purchaser to sue for and recover the difference. But Cl. (b) contains the words: "But a purchaser shall not be liable to pay or be sued for in respect of such deduction." It contemplates a case where, when a suit is instituted against him, he can plead that in respect of this difference he is not liable. In our opinion the words "he shall not be liable to pay" also cover a case where he (the purchaser) might have already paid the whole of the amount originally agreed to. When the Act declares that he shall not beliable to pay a particular

amount, it would follow that, if he had in fact paid the same, the general law would allow him to recover back what he has paid but was not bound to pay. We think that no sufficient grounds, have been shown why the section should be construed in favour of the seller in one way, but against the purchaser in another way. We think that, reading Cls. (a) and (b), it is reasonably clear that the intention of the legislature was to revise the terms of the contract between the parties so as to give to the one or to the other the benefit of the increase or the decrease of duty in such cases.

With reference to the decisions that were quoted before us we may at once say that no direct case in which the question that has been raised before us arose for decision has been quoted to us. The decision in *Probhu Das* v. *Ganidada* (1) was a case where the question arose whether a purchaser would be entitled to the benefit of the revision of tariff valuation. The Privy Council held that revision of tariff valuation was quite different from revision of tariff duty. That was also the case in *Hajee Shakoo Gani* v. *Sabapathi Pillai* (2), though the actual decision in that case should not be taken to lay down correct law after the decision of the Privy Council in the case reported in *Probhu Das* v. *Ganidada* (1). With reference to the use of the word "delivery" in those two cases we think that the word "delivery" should not be taken to have been used with a view to be an authoritative ruling on S. 10, Tariff Act, on the question now before us. We are, after all, governed by the wording of the Indian Act. In the case reported in *Hajee Shakoo Gani* v. *Sabapathy Pillai* (2), the learned Chief Justice remarked that the Indian statute drafted bodily in S. 10 the wordings of the English Act. But a reference to the wordings of S. 10 of the Indian Act would make it clear that, except in a very general way, that observation is not strictly correct with reference to the particular question we have to decide in the present case. In any event we feel ourselves bound to construe S. 10 of the Indian Act according to its wordings; and for the reasons we have mentioned we feel ourselves unable to accept the contention raised by the learned advocate for the appellant on this point. On the question of delivery being the test, there is one other point which would be against the view suggested by the learned advocate for the appellant. It is not uncommon that according to mercantile contracts deliveries are stipulated for and in fact made, long before the time when price is to be paid. In cases therefore where delivery is made earlier and the price is agreed to be paid later say, a month after the date of delivery, under S. 10 (a) of the Act the seller would be entitled to claim the increased duty which in the meantime had been imposed by the legislature. This also goes against the contention of the learned advocate for the appellant, that the time of delivery is to be taken as the critical point in construing S. 10, Tariff Act.

For these reasons we think that the purchaser was entitled to the benefit of the reduction in the duty in the present case.

No question of limitation arises because the suit was filed within three years from the date of the defendants' getting the refund from the Government. Under the Act, whenever a seller receives a refund of such duty he has to pay the same to the purchaser; and that being so, we find that the plaintiff had a cause of action in this suit and that the defendants were bound to refund to the plaintiff the sum of Rs. 1,000. For these reasons we hold that the lower appellate Court was right in its construction of S. 10.

On the question of agency found by the lower appellate Court, we are clear that it was not open to it to allow a new case of agency to be set up by the plaintiff for the first time in appeal, and we do not agree with the learned advocate for the respondents that the judgment of the lower appellate Court could be sustained on that ground.

We, however, agree with the lower appellate Court as regards the construction of S 10.

In the result, second appeal fails and is dismissed with costs.

P.R.S./J.M. *Appeal dismissed.*

(1) A. I. R. 1925 P. C. 157=52 Cal. 644=52 I.A. 196 (P.C.).
(2) A. I. R. 1924 Mad. 230=47 Mad. 222.

A. I. R. 1930 Madras 609

KUMARASWAMI SASTRI AND
WALSH, JJ.

(*Sri Rajah Vyricherla*) *Narayana Gajapatiraju Bahadur Garu*— Defendant—Appellant.

v.

Sree Rani Janaki Rathayyammaji Garu—Plaintiff—Respondent.

Appeal No. 199 of 1928, Decided on 28th November 1929, from decree of Addl. Sub-Judge, Vizagapatam, in O. S. No. 55 of 1924.

(a) Easements Act, S. 13 (e)—Easement of necessity—Right of way over another property cannot be claimed where other mode of access exists.

An easement of necessity being an easement without which a property cannot be used at all and not being one merely necessary to the reasonable enjoyment of the property, a plaintiff cannot claim on the ground of necessity a right of way over the land of another where another mode of access to his property exists. 28 *Mad.* 495 and 33 *All.* 467, *Foll.*; 18 *Bom.* 616 and 48 *I. C.* 670, *Ref.* [P 610 C 2, P 618 C 1]

(b) Easements Act, S. 13 (f)—Continuous and apparent easement — Right of way is apparent but discontinuous easement even where road is formed and metalled — English cases are not applicable in face of the Act.

A right of way to a house over the land of another is a discontinuous easement although it is apparent and even though such right is claimed over a formed and metalled pathway; and in the face of the provisions of the Easements Act it is not open to the Courts to follow English decisions : 28 *Mad.* 495; 33 *Mad.* 327; and 15 *All.* 270, *Foll.* (*Case-law Discussed*).
[P 618 C 1]

S. Varadachariar, *P. Somasundaram* and *K. Umamaheswaran*—for Appellant.

Advocate-General—for Respondent.

Judgment.—This appeal arises out of a suit filed by the plaintiff for a declaration that she has a right of way over a road called the " Circular Road " leading to the premises known as the Uplands House in Waltair. The Rajah of Kuruppam who was the owner of this property died leaving the plaintiff his daughter, the defendant and the zamindar of Kuruppam, his sons. After his death the property was partitioned between the plaintiff, the defendant and his brother. The plaintiff got the block marked *A* in the plan annexed to the plaint. The property is a very extensive one. According to the plan there is what is called a circular road leading from the Beach Road to the main building which according to the evidence was being used as a means of access to the building during the lifetime of the Rajah of Kuruppam. On the north there is a municipal road and the suit property abuts that road. According to the evidence there was a way leading from that road to this building which was used for the purpose of carrying materials when the temple in the compound was built about the year 1902. This road was not subsequently used except as servants' entrance. It is, however, clear from the plan that so far as the plaintiff's portion is concerned, there is a mode of access to it from the northern side and it cannot be said that the right to use the road known as the Circular Road from the beach side is an easement of necessity in the sense that there could be no reasonable mode of access to the portion which fell to the share of the plaintiff except through the road now in dispute. The plaintiff's claim is that the road of which she claims easement is a continuous, well-formed, gravelled and metalled road leading from the Beach Road into the bungalow compound partly through the defendant's and partly through her share, and that this road has always been the only road by which access was had from the Beach Road into the bunglow and was used and enjoyed for this purpose from the time of construction of the house by the owners of the Uplands House, the predecessors-in-title and interest of the plaintiff and the defendant and the zamindar of Kuruppam, and by them also until the date of partition in the year 1920.

In para. 3 (d) the plaintiff says :

" By virtue of the partition and even otherwise by implication of law and commonsense the plaintiff is entitled to the free and un-interrupted user of the said road by her and her representatives, servants, etc., in the same manner in which it was being enjoyed prior to the partition and the same is reasonable, necessary and essential for the proper enjoyment of the portion of the house and grounds which fell to the plaintiff's share as it was being enjoyed prior to the partition."

She says that the defendant obstructed her use of the road.

In para. (f) the plaintiff says :

"The Beach Road is the most important road in the whole town and the usual customary and constant approach ingress to and egress

from the Uplands House has always been from the said road and the value of the plaintiff's share of the house depends substantially upon the existence of such right of user of the road leading from the Beach Road into the Uplands House. The denial of such right. or interference therewith will not only highly inconvenience the plaintiff and prejudice the reasonable and proper enjoyment of the house and grounds by her but will as well affect seriously their value."

In para. (g) she states :

"The plaintiff is also entitled to the said right as an easement of necessity."

The defendant denied the plaintiff's right to use the road either by virtue of the partition or on any of the other grounds alleged in the plaint. According to him, a portion of the property marked in the plan and measuring about 44 cents which did not originally fall to the plaintiff's share was under the direction of the arbitrators given to the plaintiff on partition in order to allow her means of access to her portion from the North Beach Road because the defendant refused to allow her access over the road now in question. He denied that the use of this road was necessary or passed to the plaintiff by implication of law. He says that any user of this road after partition was by his consent. He says that the plaintiff has access to her bungalow from the municipal road on the North.

The Subordinate Judge found that the right to use the circular road which the plaintiff claims in the suit was neither recognized nor specifically prohibited at the partition. He also found that the plaintiff's claim to use the circular road as an easement of necessity could not exist because there is another means by which she can have access to the property, viz., the northern road which abuts the share which fell to the plaintiff. Referring to the plaintiff's claim as an easement of necessity the Subordinate Judge observes:

"This aspect of the case was not pressed before me very much by the plaintiff's vakil as there is evidence on record to show that the portion of the plaintiff's share in Uplands House can be reached from the municipal road on the northern side of the plaintiff's share of the building through her ground. Plaintiff's vakil only relied upon Cl. (f), S. 13, Easement Act, and claimed the right to use the circular road as an easement apparent and continuous and necessary for enjoying the share of the plaintiff's portion of the Uplands House as it was enjoyed before the partition took effect, inasmuch as there was no different intention expressed or necessarily implied when the partition took place."

So far as the claim as an easement of necessity is concerned, it is difficult to find on the evidence and the plan that the easement is one of necessity.

As regards easements of necessity the law is clear. In *Krishnamarazu* v. *Marraju* (1), the learned Judges in dealing with Cl. (e) to S. 13, Easements Act observed :

"We think the word "necessary" must be construed in its ordinary sense. If *A* has a means of access to his property without going over *B's* land, *A* connot claim a right of way over *B's* land on the ground that it is the most convenient means of access."

In *Sukhdei* v. *Kedar Nath* (2), it was held that the easement of necessity was an easement without which a property cannot be used at all and not one merely necessary to the reasonable enjoyment of the property. A similar view was taken in *Chunilal Mancharam* v. *Mani Shankar Atmaram* (3), as to the meaning of "easement of necessity." In that case the Easement Act was held not applicable as it was not extended to the Bombay Presidency till Act 8 of 1891 was passed.

As regards the claim of the defendant that at the partition it was expressly agreed that there should be no right of way, we agree with the Subordinate Judge in thinking that it is not made out.

The main ground on which the argument for the defendant is based is that the plot of land measuring 44 cents was not originally included in the division as falling to the plaintiff's share, that without it she could not enter the portion of the main building which was allotted to her although she could enter the other portions by the northern road and that this piece of land was given for that purpose to avoid any right she may claim to enter the main building from the circular road.

In this case unfortunately the partition is not by any deed. It was effected by two arbitrators Mr. Forbes who was then the District Judge of Vizagapatam and defendant's witness 2, Mr. Appa Rao who was chairman of the Vizagapatam Municipality. As the 44 cents would have allowed the plaintiff direct access from out-houses to the portion that fell to her share without

(1) [1905] 28 Mad. 495=15 M. L. J. 255.
(2) [1911] 33 All. 467=9 I. C. 628=8 A. L. J. 280.
(3) [1894] 18 Bom. 616.

her making any structural alteration, it is probable that these 44 cents were granted to her for that purpose. We are not satisfied on the evidence that this was due to the defendant's refusal to allow her access by the main road at the time of the partition and this refusal being accepted by the arbitrators and altered arrangement being made to give the plaintiff another means of access.

The position therefore is as put by the Subordinate Judge that it was neither allowed nor prohibited. The question has therefore to be dealt with as a question of law as to the rights of parties under the Easements Act.

Section 13, Easements Act (5 of 1882) refers to easements of necessity and quasi easements in cases where a person transfers or bequeaths property to another and in cases where a partition is made of the joint property of several persons. The portion of the section which is relevant to the present case which is one of partition runs as follows:

"Where a partition is made of the joint property of several persons.

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement."

The easements mentioned in Cls. (a) (c) and (e) of this section are called easements of necessity.

Section 5 defines continuous easements and apparent easements and it runs as follows:

"Easements are either continuous or discontinuous, apparent or non-apparent. A continuous easement is one whose enjoyment is or may be continual without the act of man.

A discoutinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which upon careful inspection by a competent person would be visible to him.

A non-apparent easement is one that has no such sign."

Illustration (b) to this section is this:

A right of way annexed to *A's* house over *B's* land. This is a discontinuous easement."

It is therefore clear from the Easements Act that a right like the present is a discontinuous easement although it is apparent. The effect of S. 13 is this that in cases of partition if an easement is one of necessity a person to whose share certain property falls is entitled to the easement apart from any question of its being apparent or continuous but that if the easement is not one of the necessity but is merely one necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, then such an easement should be apparent and continuous. A distinction is clearly drawn between what was actually necessary and what though not actually necessary in the sense of there being no other mode of enjoying the property is required for the purpose of enjoying it as it was enjoyed when the partition took place.

The Easements Act was passed in 1882 and when it was passed it only extended to the territories administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg. It was subsequently extended to Bombay and the United Provinces in 1891 but has not been extended to Bengal. It is important to bear this in mind in dealing with the decisions of the Calcutta High Court where the learned Judges are not trammelled with the provisions of the Easements Act and the definitions contained therein and the decisions of the Bombay and Allahabad Courts before the Act was in force there (1891).

So far as the Madras High Court is concerned, the authorities are to the effect that a right of way over a road is not an apparent and continuous easement and that unless it is an easement of necessity it will not pass merely on the ground of its being necessary for the use of the house as conveniently as it was before the partition.

In *Krishnamaraju* v. *Marraju* (1) it was held that where a person has a means of access to his property without going over another's land, he cannot claim a right of way over the other's land on the ground that it is the most convenient means of access and that the law under S. 13 Cl. (e), Easements Act is the same as the Law in England. In dealing with Cl. (f) S. 13, Easements Act Sir Arnold White, C. J. and Davies, J. observed:"

"It is admitted that the respondent has a means of access to his property without going over the appellant's land and we must accordingly hold that he has no easement of neces-

sity. He is not entitled to an easement under Cl. (f) of the section since the easement which he claims is not apparent and continuous. The respondent failed to establish any right by agreement."

This was a case where the plaintiff and the defendant who were brothers effected a partition by which amongst other things they divided certain houses and open sites.

In *Esa Abbas Sait* v. *Jacob Haroon Sait* (4), it was held by Sir Ralph Benson, O. C. J, and Krishnaswami Aiyar, J. that a right of way is not an apparent and continuous easement within the meaning of S. 13, Easements Act. This was a case where there was a lane running to the east of the plaintiff's house and west of the defendant's house from north to south which was enjoyed in common by the plaintiff and the defendants and their predecessors-in-title and the plaintiff claimed it as an easement. As regards the right of way claimed, the learned Judges observed:

"A right of way is not a continuous easement: see illustration (b) to S. 5, Easements (Act 5 of 1882). And therefore even assuming that it was used as a passage for scavengers at the time when Lazaro owned both the premises there would be no apparent and continuous easement within the meaning of S. 13, Easements Act."

In *Wutzler* v. *Sharpe* (5) the property owned by the plaintiffs and the defendant were at one time united and there was a road which led from one portion of the property which belonged to the plaintiffs to another portion which belonged to the defendant. The plaintiffs claimed the road to be defendant's property for the purpose of getting water and the defendant refused permission. The plaintiffs sued the defendant for a declaration of their right of way over the road. As the plaintiffs did not produce the deed under which they became the owners of the property the learned Judges held that no title by grant can be proved to have passed, and that their only claim could be to claim the easement as an easement of necessity or an easement the intention to grant which should be inferred from the circumstances. It appears from the judgment that the Easements Act was made applicable to the United Provinces on 6th March 1891 and this suit was filed before the Easement Act was made applicable. After dealing with the English cases on the subject and expressing their dissent from the decision of the Calcutta High Court in *Charu Surnokar* v. *Dolouri Chunder Thakoor* (1) the learned Judges held that the right of way did not pass.

In *Sukhdei* v. *Kedar Nath* (2) which was a decision after the Easement Act was made applicable to the United Provinces it was held that an easement of necessity was an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. This case arose out of a partition of immovable property and the question was as regards a passage in the property which fell to the share of the defendant. The learned Judges referred to the English cases as to what would be an easement of necessity. There was no suggestion in that case that where the Easements Act applies a right of way which is not an apparent and continuous easement will pass under Cl. (f), Easements Act, in case of partition of properties but it is open to the remark that in this decision the applicability of Cl. (f) has not been considered.

In *Daroga Lal* v. *Devi Lal* (7), it was held that an easement of necessity can only arise when the property cannot be used at all without the easement, and not where the easement is merely necessary to the reasonable enjoyment of the property.

Reference has been made by the learned Advocate-General for the respondent to the decision in *Charu Surnokar* v. *Dolouri Chunder Thakoor* (6), *Kadambini Debi* v. *Kali Kumar Haldar* (8) and *Purnendu Narain Roy* v. *Dwijendra Narain Roy* (9), at 292. As the Easements Act is not applicable to Calcutta, the learned Judges of the Calcutta High Court were not bound by any statutory definition or any statutory provisions and they were at liberty to follow the trend of the English decisions which as we shall point out later practically gave a right of way though not of absolute necessity in respect of

(4) [1910] 33 Mad. 327=20 M. L. J. 291=4 I. C. 425=(1910) M. W. N. 246.
(5) [1893] 15 All. 270=(1893) A. W. N. 151.
(6) [1888] 8 Cal. 956=10 C. L. R. 577.
(7) [1915] 48 I. C. 670.
(8) [1891] 26 Cal. 516=3 C. W. N. 409.
(9) [1903] 8 C. L. J. 289.

continuous properties in the case of well formed and metalled roads.

In *Charu Surnokar* v. *Dolouri Chunder Thakoor* (6), the land held by the plaintiff and the defendant originally belonged to the same owner. A path had been made by the original owner. The District Judge was of opinion that the case fell under S. 26, Lim. Act, and that the defendant had not proved 20 years' peaceable, open and uninterrupted exercise of the right of way. The High Court was of opinion that the easement may be acquired not only under S. 26, Lim. Act, but by virtue of the presumed grant. In their view the right of way may pass a quasi easement. The learned Judges observed :

"This implied grant might arise in one of two ways (1) to use the path and ghat might be absolutely necessary to the enjoyment of the defendant's tenement. in which case, there would be an easement of necessity; (ii) the use of the path and ghat. though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance and in this case if the easement were apparent and continuous there would be a presumption that it passed with the defendant's tenement. This latter case is discussed in the books under the principle of the disposition of the owner of two tenements (destination du pere de famille) : see Gale on Easements, Edn. 5, pp. 96, 97 and the following pages, and as to right of way, p. 103 note, p. 124, note and *Pyer* v. *Carter* (10). This principle is just and fair and accords with common sense. It is in consonance with the rule of justice, equitys and good conscience, which must guide the Courts in the absence of positive direction by the legislature."

So far as the passage in Gale cited is concerned, the passing of easements on the analogy of the principle of destination du pere de famille was disapproved of by Lord Westbury in the case of *Sheffield* v. *Crown* (11) which was decided in 1864. After referring to Gale on Easements the learned Lord observes:

"But this comparison of the disposition of the owner of two tenements to the destination du pere de famille is a mere fanciful analogy. from which rules of law ought not to be derived."

Moreover in the *Charu Surnokar* v. *Dulouri Chunder Thakoor* (6) the learned Judges themselves point out that the principle of justice, equity and good conscience on which they purported to act can only be applicable in the absence of positive direction by the legislature. And under S. 5, Easements Act it is clear that a right of way is not an apparent and continuous easement.

In *Ram Narain Shaha* v. *Kamala Kanta Shaha* (12), the suit related to a right of way. There were two properties which originally belonged to the same owner but subsequently there was a severance, the plaintiff being entitled to one portion and the defendant to another portion. It was held that implication of a grant of easement upon the severance of a tenement may extend to a way but that it will do so only where there has been some permanence in the adaptation of the tenement from which continuity could be inferred. The learned Judges in dealing with the contention based on the decision in the *Charu Surnokar* v. *Dulouri Chunder Thakoor* observed (6) :

"We are, however, of opinion that the contention is not sound, and that the case cited is distinguishable from the present. The presumption in favour of the grant of an easement upon the severance of a heritage by its owner into two or more parts arises primarily with reference only to continuous and apparent easements ; and a way is evidently neither a continuous nor always an apparent easement."

"It is true that in certain cases referred to in text books on the subject : see Gale on Easements, Ed. 6, pp. 108 to 128 and Goddard on Easements, Edn. 5, pp. 174 to 186, implication of a grant of an easement, upon the severance of a tenement, has been held to extend, under certain circumstances, to a way but that is so only where there has been some permanence in the adaptation of the tenement from which continuity could be inferred. In other words the extention of the rule can held good, if at all only in the case of a formed road to use the language of Lord Justice Fry in *Thomas* v. *Ower* (13). made over an alleged servient tenement. to and for the apparent use of the dominent tenement."

Then the learned Judges say that in that case not only is there no finding of fact that there has been any such permanence of adaptation, any such formed road, but there was no case of an implied grant suggested in the plaint or issues. We may point out that the learned Judges refer to Gale on Easements and are guarded in stating that the rule can hold good if at all, only in the case of 'a formed road'. They do not decide that in the case of 'a formed road' the easement can be said to be an apparent and continuous easement.

(10) [1857] 1 H. & N. 916 = 5 W. R. 371 = 26 L. J. Ex. 258.
(11) 4 De. G. J. & S. 185.
(12) [1899] 26 Cal. 311.
(13) [1888] 20 Q. B. D. 225 = 57 L. J. Q. B. 198=52 J. P. 516 = 36 W. R. 440 = 58 L. T. 62.

There is another case at p. 516 in the same volume (26 *Cal.*) *Kadambini Debi* v. *Kali Kumar Haldar* (8). But that relates to a right of passage of light and air on partition of a family dwelling house. The learned Judges there point out that there being no enactment of the legislature applicable to the case in question, the question will have to be decided and answered with reference to the principle of justice, equity, and good conscience and they think that the rule of English Law of an implied grant of easement on severance of tenements is in accordance with the principle of justice, equity and good conscience and should be followed. Here again we may point out that if the Easements Act were applicable there could be no question of contravening its provisions by the application of the principle of justice, equity and good conscience.

In *Purnendra Narain Roy* v. *Dwijendra Narain Roy* (9), a dispute arose as to a right of way on partition of property between brothers. The District Munsiff decided against the right of way in as much as it was not an easement of necessity. This judgment was confirmed by the District Judge. In dealing with the right of way Mookerjee, J., after stating that the respondent's vakil was not prepared to contend that there was an implied reservation at the time of the change observed :

"In the first place, it is doubtful. according to the finding of the learned District Judge, whether th re was at the time of the partition and exchange an existing right of way, at any rate, there was none which had been used for any length of time : and clearly. as the Munsif finds (which finding does not appear to have been challenged before the District Judge). whatever may there might have been. was not a formed or metalled road but an undefined track."

It is argued from these observations that if there was a formed and metalled way that would pass as an easement. We do not think that this case takes us any farther than *Kadambini Debi* v. *Kali Kumar Haldar* (8).

Reference has been made to *Ranchordas Amthabhai* v. *Maneklal Gordhandass* (14). We may point out that this case was before the Easements Act was made applicable to the Bombay Presidency.

(14) [1893] 17 Bom. 648.

It is argued by the learned Advocate General for the respondent that the distinction between apparent and continuous and non-apparent and discontinuous easements is one which is known to the English as well as the Indian Law, that in determining whether an easement would pass under the Easements Act as regards a right of way, the English Law before the passing of the Act was that in the case of a formed road it was treated as a continuous easement, that the subsequent development of the English Law made it clear that an easement was held to exist when there was a formed road though it was not strictly a continuous easement and that in interpreting the Easements Act it would be relevant to refer to the English decisions on the subject and to apply those decisions to cases where such a right is claimed in India. It is pointed out that in the case of an easement of necessity it has been held that the law in India and England is the same and English decisions have been referred to.

It seems to us that where the law has been codifined we are bound by the Code and it is not permissible for us to refer to the English Law on the subject where the provisions of the Code are clear for the purpose of not giving the words of the Code their plain meaning. We may in this connexion refer to the decision of their Lordships of the Privy Council in *Narendranath Sircar* v. *Kamal Basini Dasi* (15) where their Lordships condemned the course taken by the Subordinate Judge who first of all on a consideration of the English case law and the opinion of the text-writers determined what the law in England was at the date of the Succession Act and then construed the Succession Act on the lines that it was not intended by the legislature to alter the law in India by departing from the law of England. Their Lordships refer to the observations of Lord Herschell in the *Bank of England* v. *Vagliano* (16) with approval.

We may also in this connexion refer to *Rama Nandi Kuar* v. *Kalawati*

(15) [1896] 23 Cal. 563=23 I. A. 18=6 Sar. 663 (P.C.).

(16) [1891] A. C. 107=60 L. J. Q. B. 145=55 J. P. 676=39 W. R. 657=64 L. T. 353.

Kuar (17) and *Mohamed Syedol Ariffin* v. *Yeoh* (18).

In *Rama Nandi* v. *Kalawati Kuer* (17) their Lordships of the Privy Council, after referring to the divergence of opinion in the Courts in India as regards the law and procedure governing cases for revocation of probate owing in part to the introduction into Indian practice of the difference in English Law between the grant of probate in common form and probate in solemn form, observed :

"It is worse than unprofitable to consider how far, if at all, that distinction has been incorporated into Indian Law. It has often been pointed out by this Board that where there is a positive enactment of Indian legislature the proper course is to examine the language of that Statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English Law upon which it may be founded."

In *Mahomed Syedol Ariffin* v. *Yeoh* (18) the question turned on the construction of S. 32, sub-S. 5 of the Straits Settlements Ordinance 3 of 1893 which corresponds to the Evidence Act 1 of 1872. The Courts below excluded evidence of an entry made as regards the date of defendant's birth by his deceased father in a book in which he made similar entries with regard to the family. Their Lordships of the Privy Council after referring to the decisions under the Evidence Act and the fact that such evidence is admissible observed :

"The Courts below have, however, declined to accept this principle. They proceed upon two grounds. In the first place they think that the rule with regard to hearsay evidence adopted in the English case of *Haines* v. *Guthrie* (19) should be followed in the Straits Settlements, and that that rule is not varied by the clause just cited from the Evidence Ordinance. And in the second place they hold that the illustration given in the statute does not in fact illustrate the section. On the first point the view of their Lordships is that the rule and principle of the Colony must be accepted as it is found on its own Evidence Ordinance, and that the acceptanoe of a rule or principle adopted in or derived from English Law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect."

Their Lordships hold that illustrations appended to sections of a statute should be accepted as being of relevance and value in construing the text and should be rejected as repugnant to the section only as the last resort of construction.

Where the provisions of an Indian enactment follow the provisions of an English enactment or a well settled rule of English Law or where the meaning of certain expressions and their legal import are not clear, no doubt reference to English authorities becomes useful and often necessary.

Rash Behary v. *Nritya Gopal Nundy* (20) applies to this class of cases. In that case the question was as to the meaning of the word "refusal" in S. 39, Contract Act, and it was held that though the English Law did not govern the case, the views of eminent English Judges on the meaning of the word "refusal" may well be considered.

Reference has been made to the English decisions on the subject of right of way. In this connexion we may refer to the case law in England as it stood in 1882 when the Easements Act was passed.

In *Glane* v. *Harding* (21) which was decided in 1857 the facts so far as they are material for the purpose of this appeal were these: A land which originally belonged to the Crown was leased to one Merrick for building purposes on certain terms as to the nature of the building. One of the terms was that when he built the houses according to the plan, a separate lease of each house was to be granted to him or to his assigns for 80 years at such rent as the Commissioners of Woods and Forests would agree upon. Merrick built houses in Bainbridge Street, and New Oxford Street and there was a way connecting the two blocks of houses. Merrick mortgaged his interest in the whole of the premises to certain parties and assigned them to the defendant. He then blocked up both the entrances. The question was whether the plaintiff was entitled to the right of way. Bramwell B in dealing with the right of way claimed observed :

"The plaintiff's title was derived from the lease, and unless the lease granted the right of way it did not exist. It did not grant the right in terms, and the only way in which it could grant it was, that the condition of the premises at the time when the lease was granted, showed, that it was intended that the right of way should be exercised upon the

(17) A. I. R. 1928 P. C. 2=7 Pat. 221=55 I. A. 18 (P.C.).
(18) A. I. R. 1916 P. C. 242=43 I.A. 256 (P.C.).
(19) [1885] 13 Q. B. D. 818=53 L. J. Q. B. 521=48 J. P. 756=33 W. R. 99=51 L. T. 645.
(20) [1906] 33 Cal. 477=3 C. L. J. 249.
(21) [1857] 27 L. J. Ex. 283.

principle of law I have adverted to that by the devolution of the tenements originally held in one ownership, a right of way to a particular door or gate would, as an apparent and continuous easement, pass to the owners and occupiers of both of them. But I think that the way in question was not a continuous and apparent easement within that principle of law; and therefore I arrive at the conclusion that there was no evidence of the right of way alleged in this case."

In *Northington* v. *Gimson* (22) which was decided in 1860 the plaintiff claimed a right of way over the land of the defendant. The facts as set out in the report are that a certain land lying partly in one parish and partly in another parish belonged in 1820 to two persons each being entitled in *B* to an undivided half. A right of way existed in *B* from a farm, part of this property, across certain lands to another farm on the said property. The right of way had for many years been used by the occupiers of both the farms. In 1820 one of the co-owners conveyed his undivided half in one parish with all the rights, members, easements and appurtenances. The other co-owner also conveyed his undivided moiety. The deed contained no express reservation of the right of way to either party. Then the plaintiff in this action and the previous occupiers of the farm used the right of way from 1820 to 1859 but were obstructed by the defendant who was then the occupier of the other farm. It was held that the plaintiff could not recover the right of way not passing under the deed of partition and not being an apparent and continuous easement necessarily passing upon the severance of the property, as incident to the separate enjoyment of the portion severed.

At the trial Williams, J., nonsuited the plaintiff even though the jury found that the occupiers of the farm claimed by the plaintiff had enjoyed the way as of fact up to and before the deed of partition and that the way had been enjoyed for 20 years since the partition deed up to the time of the obstruction.

A rule was obtained. It was argued that the way had been constantly and regularly used up to the time of partition, that it was known and apparent to both the parties to the partition and that complete enjoyment of the portion of the property in the occupation of the plaintiff could not then, and cannot now, be had without it.

Wightman, J., was of opinion that it was not an easement of necessity.

Crompton, J., agreed with Wightman, J., and observed :

"In the present case the parties have not used apt words in the deed to express an intention to pass the way in dispute, and the general words which follow the description of the property intended to be conveyed do not add to or alter the previous words of conveyance. It is said that this was passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say, from the nature of a road, whether the parties intended the right of using it to pass. It may, besides, be naturally supposed to have been the intention of the parties, that, on the partition of the property, all ways not incident to the separate enjoyment of each of the severed portions should cease."

In *Langley* v. *Hammon* (23) which was decided in 1868 a question arose as to a right of way. In that case a lessee surrendered to his lessor a part of the demised premises "together with all ways etc. therewith now used, occupied and enjoyed" with a proviso that the defendant should fence off the premises surrendered from those still occupied by the lessee. There had been always unity of seisin and occupation of the whole farm yard and the roadway had been made and used by former occupiers of the yard and by the present lessee for the convenience of carting heavy loads to and from the yard and the farm buildings. There was, however, no existing approach to the premises surrendered from the defendant's land. The question arose as to the right of the roadway as a means of access to the surrendered premises. It was held that no right to use the roadway as a means of access to the surrendered premises passed to the defendant. Kelly, C. B. was of opinion that by a grant of hereditaments with all "ways herewith now used and occupied and enjoyed :"

"those ways only passed which had at some former period been used as of right therewith."

In connexion with this roadway Bramwell B observed :

"Suppose a house to stand 100 yards from a highway, and to be approached by a road run-

(22) [1860] 121 E. R. 232.

(23) [1868] 3 Ex. 161=37 L. J. Ex. 118=16 W. R. 937=18 L. T. 853.

ning along the side of a field, used for no other purpose, but only fenced off from the field which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is that there is here really no definite road."

In *Watts* v. *Kelson* (24), which was decided in 1871 the easement claimed was an easement to the use of a drain. It appears from the facts that the plaintiff and the defendant were the owners and occupiers of two adjoining properties which up to 1863 belonged to a single owner. In that year the owner conveyed to the plaintiff the premises in respect of which the easements were claimed. The premises were conveyed together with all roads, ways, waters, water courses, rights, privileges, advantages and appurtenances whatsoever to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof, held, used, enjoyed or reputed as part thereof or appurtenant thereto. Some months after the first conveyance the owner conveyed to the predecessors of the defendant the property over which the easements were claimed. There was an artificial watercourse which was originally made for the express purpose of supplying the cattle sheds with water and was made by the owner of both properties. There was also a carriage way between two points a few yards from each other and this way used as a way for bringing carts from point A to point B. The defendant obstructed the way alleging that the right of way was only a right of footway.

The Master of the Rolls held that the plaintiff proved the right to the carriage way but dismissed the bill so far as it related to the right of water.

In the course of the argument Mellish, L.J. and James, L.J. were of opinion that *Pyar* v. *Carter* was good law in spite of Lord Westbury's disapproval of it.

During the course of the argument Mellish, L. J. remarked:

"When a man walks over his own land in a particular direction he is not using anything, he is merely going where he pleases on his own property; but when there is a structure erected for a purpose connected with a certain part of his property, the case is quite different. I am not satisfied that if a man constructs a paved road over one of his fields to his house solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field."

This was an observation made by Mellish, L. J., in the course of the argument and reliance is placed upon them by the learned Advocate General for the respondent as being a decision that a paved road although it is not continuous would still pass even though it is not an easement of necessity.

In this judgment Mellish L.J. referred with approval to *Polden* v. *Bastard*, (25) at p. 161. and observed :

In *Dolden Bastard*, Earle, C. J., delivering the unanimous judgment of the Exchequer Chamber says :

"There is a distinction between easements such as a right of way, or easements used from time to time and easements of necessity, or continuous easements. The cases recognize this distinction, and it is clear law that upon a severance of tenements easements used as of necessity or in their nature continuous, will pass by implication of law, without any words of grant; but with regard to easements which are used from to time only, they do not pass, unless the owner by appropriate language shows an intention that they should pass. Then the learned Lord Justice observes that in that case the easement was in its nature continuous so far as the water course was concerned, that the water course was necessary for the use of the tenement conveyed, and that no other supply of water equally convenient or equally pure could have been obtained."

We do not think that this case can be said to be a decision on the question that a paved road was a continuous easement.

It thus appears that when the Easements Act was passed, the English decisions had not established clearly that a formed and metalled road was or may be treated as a continuous easement and it cannot be said that the Easements Act simply codified what was the law in England. It is no doubt true as contended by the Advocate General for the respondent that the framers of the Easements Act preferred to follow the ruling in *Pyer* v. *Carter* (10)which was referred to with approval by Mellish, L. J., in *Watts* v. *Kelson* (24), to the ruling in *Wheeldon* v. *Burrows* (26).

In *Pyer* v. *Carter* (10) it was held that where the owner of two or more

(24) [1871] 6 Ch. 166=40 L. J. Ch. 126=19 W. R. 833=24 L. T. 200.

(25) [1866] 1 Q. B. D. 156=7 B. & S. 130=14 W. R. 196=35 L. J. B. 92=13 L. T. 441.

(26) [1880] 12 Ch. D. 31=48 L. J. Ch. 853=28 W. R. 196=41 L. T. 327.

adjoining houses sells one of them to a purchaser, such a house was entitled to the benefit and was subject to the burden of all existing drains communicating with the other house without any express reservation by the grantor for that purpose.

In *Wheeldon* v. *Burrows* (26), it was held that the case of a grantor express reservation was necessary with certain exceptions as in the case of ways of necessity, while in the case of a grantee of part of a tenement all those continuous and apparent easements over the other part of the tenement which are necessary for the enjoyment of the part granted and have hitherto used therewith would pass as a general rule.

Aldridge v. *Wright* (27), affirmed *Wheeldon* v. *Burrows* (26), and the exceptions in the case of a grantor are given by Greer, L. J., in his judgment.

This departure from the English Law, however, does not in our opinion lead to the conclusion that a departure should be made as regards apparent and continuous easements in dealing with S. 13, Easements Act.

So far as the case law in England subsequent to the passing of the Easements Act is concerned, the trend of the authorities is to treat a formed and metalled road as a kind of apparent and continuous easement. We may refer to *Brown* v. *Alabaster* (28), *Head* v. *Meara* (29) and *Aldridge* v. *Wright* (27). But we are of opinion that having regard to the provisions of the Easements Act it is not open to us to follow the English decisions subsequent to the Easements Act and to hold that a formed and metalled pathway would be an apparent and continuous easement for the purpose of determining the rights of parties under S. 13, Cl. (f), Easements Act.

We are of opinion that the plaintiff is not entitled to the right of way claimed as an easement of necessity and not being an apparent and continuous easement it would not pass under the provisions of S. 13, Cl. (f), Easements Act.

We reverse the decree of the lower Court and dismiss the plaintiff's suit with costs throughout.

P.R.S./J.M. *Decree reversed.*

(27) [1929] 2 K. B. 117.
(28) [1888] 37 Ch. D. 490=57 L. J. Ch. 255=36 W. R. 155=58 L. T. 265.
(29) [1912] 1 W. R. 262.

A. I. R. 1930 Madras 618

BEASLEY, C. J. AND CURGENVEN, J.

Chigurupati Subbanna—Appellant.

v.

District Labour Officer, East Godavari—Respondent.

Appeal No. 253 of 1928, Decided on 8th January 1930, from decree of Sub-Judge, Rajahmundry, D/- 3rd December 1927, in Original Pet. No. 4 of 1927.

(a) Land Acquisition Act, S. 9 (2)—Compensation claim need not be in writing.

Under S. 9 (2) the claimant is not required necessarily to make his claim in writing so long as he makes a claim for compensation. [P 619 C 2]

(b) Land Acquisition Act, S. 9 (2)—Value of land must be specifically claimed.

What the Act does require is that there should be a specific claim namely a claim which states in rupees the value the claimant places upon his property, and where there has been no such claim the provisions of S. 9 (2) cannot be said to have been complied with; *A. I. R.* 1926 *Lah.* 401, *Ref.* [P 620 C 2]

(c) Land Acquisition Act, S. 9 (2)—Material supplied by claimant can be used by Collector in arriving at true value of land—But such supply does not amount to recognition of claim.

The Collector must find out the true value of the land and with this view there is no objection to his using any material, even when it may be supplied by the applicant, without giving rise to the implication that he has recognized that a claim as required by the Act has been preferred. [P 621 C 1]

(d) Practice—Adjournment—Every Court and quasi-judicial officer has power to adjourn.

Every Court and every officer exercising quasi-judicial functions has an inherent power to grant an adjournment. [P 621 C 1]

P. Somasundaram—for Appellant.

Government Pleader—for Respondent.

Beasley, C. J.—The appellant was served with a notice under S. 9, Land Acquisition Act (1 of 1894) Ex. A. The date upon which he was called upon to appear was 21st September 1926. According to the Land Acquisition Officer the appellant did not appear on 21st September. According to the appellant he did not appear but appeared late and the Land Acquisition Officer was angry with him but nevertheless allowed him to make his claim orally at a later date and allowed him to file two sale-deeds in respect of land close by the land under acquisition. On 1st December the Land Acquisition Officer made his award and in that award he commenced by stating:

"The landowner did not turn up and make any claim in response to the notice issued

under Ss. 9 and 10 of the Act. He, however, filed copies of sale-deeds which give a rate of Rs. 2,400 and Rs. 2,450 an acre,"

and then he proceeded to deal with those sales and show how those lands were distinguishable from the land comprised in the award and he eventually valued the land under acquisition at Rs. 1,800 per acre and awarded compensation accordingly with 15 per cent allowance extra under the Act. The appellant was dissatisfied with this award and requested the Land Acquisition Officer to refer the case to the Court. It was accordingly referred by him to the Subordinate Judge of Rajahmundry on 27th January 1927. In that letter of reference the Land Acquisition Officer stated that the landowner did not turn up on the date of hearing fixed for enquiry and hence the amount of compensation awarded need not be enhanced under S. 25 (2) of the Act.

It is quite clear that under S. 25 (2) of the Act if the applicant, the appellant in this case, has omitted without sufficient reason (to be allowed by the Judge) to make a claim the amount awarded by the Court is in no case to exceed the amount awarded by the Collector; and, therefore, the point for consideration by the learned Subordinate Judge was whether the appellant had made any claim for compensation. It is argued here by Mr. Somasundaram on be half of the appellant that the appellant did make a claim. First of all, he contends that the evidence of the appellant is to be accepted on this point, namely, that the Land Acquisition Officer gave him adjournment and that he made a claim and supported it by the filing of these two sale-deeds already referred to. Admittedly two sale-deeds were filed because they were considered by the Land Acquisition Officer and are dealt with by him in his award. But the Subordinate Judge after hearing evidence on the point has not accepted the appellant's evidence that he made any claim. He regards his evidence as most improbable.

This case can be considered in two views: viz. (1) that the appellant did not turn up on 21st September or turned up too late but nevertheless the Land Acquisition Officer said that he might bring forward his claim at a later date and that the applicant made a claim for compensation and as evidence of his claim produced these two sale-deeds, or (2) that having failed to turn up on 21st September, the Land Acquisition Officer nevertheless allowed him to file the two sale-deeds. In the former alternative, I am of the view that the provisions of S. 9 (2) of the Act would have been complied with because the claimant is not required necessarily to make his claim in writing so long as he makes a claim for compensation and it is in the discretion of the Land Acquisition Officer to grant him an adjournment. Supposing he does not make a claim on the first day, the Land Acquisition Officer can, if he chooses, adjourn the hearing and allow him to make a claim and in support of this view we were referred to the decision of the Punjab Chief Court in *Secy. of State* v. *Sohan Lal* (1). In that case the claimant did not put in a claim on the appointed date but subsequently put in a written claim and it was held by the Punjab Chief Court that that was a sufficient compliance with the Act.

But in this case there is no written claim at all and we merely have the evidence of the claimant himself that he made a claim and that evidence has not been accepted by the learned Subordinate Judge; and we see no reason for disagreeing with the view he has taken with regard to that evidence. The case therefore is this that the claimant made no claim at all. He did not appear on the appointed day and, therefore, under the Act, the Land Acquisition Officer had to use the best judgment he could and make his award in the absence of any claim. The mere fact of his having considered the two sale-deeds does not justify the argument that he must be held to have treated the amounts therein as the valuation placed upon the land by the claimant. It was his duty to make use of all the information available. Having made such an award it was not open to the Court to make any award in excess of the amount awarded by the Land Acquisition Officer. But we are asked to say that the filing of the sale-deeds amounted to making a claim for the amount which the sale-deeds show that the adjoining lands were sold for, namely, in the one case Rs. 2,400 and in the other Rs. 2,450 per acre and

(1) [1918] 60 P. R. 1918=44 I. C. 883=76 P. W. R. 1918.

it is contended that that is a sufficient compliance with the provisions of S. 9 (2) which is as follows:

"Such notice shall state the particulars of the land so needed and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than 15 days after the date of publication of notice) and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests and their objections to the measurements made under S. 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent."

In this case the claimant was not required in the notice to make any statement in writing but we are satisfied that he did not like to make any statement orally. He placed no specific value upon the land, he did not state the nature of his interest in the land but merely contented himself with putting in the sale-deeds. Does that justify us in drawing the inference that the amount set out in the sale-deeds was the amount which he was claiming in respect of the land which was under acquisition? I am of the opinion that it is not open to us to do that because S. 25 (1) says:

"When the applicant has made a claim to compensation pursuant to any notice given under S. 9 the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under S. 11."

The claimant has got to claim an amount. I am satisfied from a reading of that section and the other sections that a specific amount has got to be claimed. In these cases it is common for claimants in support of their claims to put in sale-deeds many in number and varying greatly in the amounts of the purchase price. If no claim for specific amount is made, what amount is the Court to infer is claimed by the claimant? It may be the top purchase price or it may be the lowest purchase price or it may be the average purchase price but no specific amount having been claimed if this contention is right it would be open to a claimant after an award has been made by the Land Acquisition Officer or by the Collector to go to the Court and say:

"The amount awarded is less than the amount which I really claimed. It is quite true that the evidence shows that other lands were sold for certain amounts but but my real claim was for more than these amounts and I am entitled to an enhancement of the award made by the Land Acquisition Officer."

In my view, that contention is unsound. What the Act does require is that there should be a specific claim, namely, a claim which states in rupees the value the claimant places upon his property; and there has been no such claim here and in my view, the provisions of S. 9 (2) of the Act have not been complied with. This was the only point of importance which the learned Subordinate Judge had to consider and, disbelieving the evidence of the claimant, he came to the conclusion that no claim had been made and that, therefore, it was not open to him to consider any enhancement of the award made by the Land Acquisition Officer. I agree with him in his findings both on the facts and with regard te the law. The appeal must, therefore, be dismissed with costs.

Curgenven, J.—I agree with my Lord and have little further to add except to point out that the first "point for determination" framed by the learned Subordinate Judge, upon which this appeal has been preferred, does not really set out the scope of the case as it has been presented before us. The terms of that "point" were whether the appellant appeared before the Labour Officer on the date fixed in the notice served on him and if not whether he had sufficient reasons for the omission. I should preferably have so framed it as to refer expressly to the terms of S. 25 (2) of the Act, namely, whether the appellant omitted to make a claim for compensation pursuant to any notice given under S. 9 and if so, whether he had sufficient reason for the omission. The question for our determination, as my Lord has said, is whether what the appellant did amounted to making a claim. There is certainly no evidence that he made any claim on 21st September. As regards what happened on 18th November when he filed the two sale-deeds, he himself has stated in crosss-examination that he filed a statement along with them. But even so, he does not claim that the statement comprised a precise claim to an amount of compensation, and his allegation is contradicted by the evidence of the Revenue Inspector. We must take it accordingly that either the mere filing of the

sale-deeds constituted an implied claim or that no claim at all was made. It seems clear to me that according to the terms of S. 25 (1) a claim must embody a precise amount claimed because that subsection provides that the amount awarded may not exceed the amount so claimed. It may very well be, as decided in *Secy. of State* v. *Sohan Lal* (1), that the mere circumstance that the claim was not made upon the date fixed in the notice does not deprive the Collector of jurisdiction to entertain it. Every Court and every officer exercising qusi-judicial functions has, I think, an inherent power to grant an adjournment.

The case more apposite to the present one is *Orient Bank of India* v. *Secy. of State* (2), which dealt with what was contended to be a claim but which was not in fact a legally sufficient claim, preferred by the Bank in a land acquisition case. There too a sale-deed was filed and it was actually a sale-deed which included the property acquired. I think, therefore, that it is an untenable position to take up here that a claim in accordance with the terms of S. 9 (2) was put in, nor am I prepared to say that in accepting the sale-deeds and in appreciating the evidence which they afforded the Collector waived the necessity for such a claim, whether or not he had jurisdiction to such a thing. Under S. 11 of the Act he is to enquire into the objections, if any, and make his award of the compensation which in his opinion should be allowed. There is never any question of such proceedings going by default. He must to the best of his discretion, find out the true value of the land and I can see no objection to his using any material, even when it may be supplied by the applicant, without giving rise to the implication that he has recognized that a claim as required by the Act has been preferred. I agree accordingly that the appeal should be dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

(2) A. I. R. 1926 Lah. 401=7 Lah. 416.

A. I. R. 1930 Madras 621

WALLACE, J.

A. Venkatasami Naidu—Plaintiff—Appellant.

v.

Agaram Chenga Reddi and *others*—Defendants 1 to 5 and 7—Respondents.

Second Appeal No. 1656 of 1928, Decided on 14th November 1929, against decree of Sub-Judge, Vellore, in A. S. No. 71 of 1926.

(a) Record-of-Rights—Mere registry of land as particular kind of poramboke creates no vested rights in villagers.

The mere registry of land in a village as a particular kind of poramboke creates no vested right in the villagers to hold it as such against Government. Such registry implies no kind of dedication or trust or any recognition of a vested right or user. For, the classification of poramboke, including channel, in village registers, is merely by way of description and confers no title: *Mad. S. A. No. 692 of 1926; A.I.R. 1928 Mad. 1176, Rel. on.* [P 622 C 2]

(b) Easements—Government is bound to supply water to wet fields—But ryots cannot claim any right against Government for it.

Government is no doubt bound to supply water to wet fields, but the ryots have no vested interest in the maintainance of any particular channels for their supply. The ryots cannot claim as against Government any right to take water to their fields by any particular channel: *32 Mad. 141; 34 M.L.J. 425, Rel. on.* [P 623 C 1]

T. M. Krishnaswamy Iyer and *B. C. Seshachala Iyer*—for Appellant.

T. R. Venkatarama Sastriar and *K. R. Venkatarama Iyer*—for Respondents.

Judgment.—The original suit was for ejectment of the defendants and for a permanent injunction restraining them from interfering with the plaintiff's possession of the suit land. The suit land is in the ryotwari village of Machampattu. It was registered in the Government village registers as channel poramboke. In 1922 it was transferred by Government to assessed waste and assigned to the plaintiff on darkhast. The plaintiff alleges that he was put in possession at the time of the darkhast and that the defendants subsequently trespassed on it and dug a channel in it. The defence was that the darkhast of what was channel poramboke was fraudulent and invalid, and that the channel has been in use all along for taking water from the river Palar to irrigate the defendant's lands. The trial Court held that the darkhast was valid and binding on the defendants and decreed

the plaintiff's suit. The lower appellate Court in not a very clear judgment has decided that the "ryots" have acquired a right to preserve the channel as against the Government, and that the grant on darkhast in derogation of the defendant's rights is invalid. It therefore dismissed the suit; and the plaintiff appeals.

Both the Courts agree that the allegation of fraud has not been made out. That part of the defendant's case is therefore concluded and has not been agitated here. The decision of the lower appellate Court is based on the consideration that because the land has been registered all along as channel poramboke and because the revenue authorities who inspected it in 1911 and other years, who say that the land was overgrown with prickly pears which the ryots said they would clear away, did not say that it had ceased to be a channel or was entirely unfit to be used as such, it must have been registered at the resettlement in 1916 as channel poramboke because the ryots wanted it to be reserved for channel. The Subordinate Judge concludes that the ryots have acquired a right as against Government to have the land reserved for a channel because the Government registry was a recognition of the fact that the ryots are entitled to make use of the land as channel. He admits that the channel is not a recognised source of irrigation to any lands in the village but holds that the defendants have, what he calls a "customary right or a right by prescription" to make use of the suit land as a channel. He also finds that the land has not been used as channel since 1903 when it was silted up by an overflow of the river Palar, but he decides that the non-user in the period between 1903 and the suit (1922) does not amount to an abandonment of the right of user.

It is contended for the defendants that this is a finding of fact not to be canvassed in second appeal. It seems to me a mixed question of fact and law, and in any case, as the Subordinate Judge has based his finding entirely on the settlement registry of the land as channel, it appears to me that even if the finding be taken to be one of fact, it rests upon no evidence. The mere registry of the land as poramboke is no evidence which can be used for the purpose of establishing a case of immemorial user as channel. In the first place, such registry does not necessarily imply that the channel is an irrigation channel, although the lower appellate Court assumes so. There are obviously other kinds of channels in a village than irrigation channels; for example, supply channels to tanks or surplus channels from tanks. But apart from that it is now well settled law that the mere registry of land in a village as a particular kind of poramboke creates no vested right in the villagers to hold it as such against Government. Such registry implies no kind of dedication or trust or any recognition of a vested right or user. I have lately considered the law on this subject at some length in my judgment in *S. A. No.* 692 *of* 1926, a case of grazing ground poramboke, and I need not repeat here what I have said there. The latest reported case on the subject is *Secy. of State* v. *Trustees of Sri Kuthalanathaswami Temple* (1), wherein (at *p.* 31 *of* 52 *Mad.*), it is laid down that the classification of porambokes, including channel, in village registers is merely by way of description and confers no title. The defendants seek to make out that the registry of this channel in the Settlement of 1916 was a special kind of registry, because in 1911, the special Revenue Inspector took a statement from the ryots (Ex. 11-A) that they would dig up the channel soon. It is contended that this was a sort of recognition of the immemorial user of the land for an irrigation channel. With that I am unable to agree. The statement itself does not even claim any such user. I see nothing special in the entry of the land as poramboke in 1916 settlement register. No records of the settlement itself are produced to support this view.

The defendants contend further that channel poramboke stands in a class by itself, that the registry of it by Government implies that Government has recognized a customary right to take water for irrigation through that land, which right the Government cannot take away, that it implies that the land has been used and is required for the supply of water to wet lands, which lands are in law entitled to a sufficient

(1) A.I.R. 1928 Mad. 1176=52 Mad. 25.

supply of Government water. Government is no doubt bound to supply water to wet fields, but the ryots have no vested interest in the maintenance of any particular channels for their supply. This is also well settled law: see *Fischer* v. *Secy. of State* (2); *Mahankali Lakshmian* v. *K. Narayanappa* (3). It follows that the ryots cannot claim as against Government any right to take water to their fields by any particular channel. The defendant's present contention is really the general contention once a poramboke, always a poramboke and this contention cannot be accepted. I have already pointed out this has been negatived in *Secy. of State* v. *Trustees of Sree Kuthalanathaswami Temple* (1). The Subordinate Judge's view on this point is therefore erroneous.

It is admitted that the suit channel is not and has never been, so far as records show, a recognised source of irrigation for the defendant's lands, or, for the matter of that, for any land in the village. There is no suggestion in this case that Government has not supplied and is not supplying sufficient water to the defendant's fields by the recognised channels entered in the village register as their sources of irrigation. But even if it were so, the defendant's remedy would lie in a suit against Government, and even if they made out their case that the supply was insufficient, it could not be open to them to claim that Government must give them their supply through this particular channel. They cannot dictate to Government that any particular channel shall be the source of their irrigation. The plea that they had not been receiving a sufficient supply of water through the recognised sources can hardly be advanced in view of the fact that this channel has been disused since 1903, and that, although the ryots themselves promised to put it right in 1911, they have never taken the trouble to do so. It is true that there is a claim in the written statement and a certain amount of evidence by the defence witnesses that the channel was being used all along up to the date of the suit, but the trial Court rejected that evidence and the lower appellate Court ignores it and evidently does not rely upon it, and very properly as it is obviously false. Had it been true, such petitions as Exs. E-2 and 3, as latsly as 1921, in which the ryots admit that they had until then given up the idea of digging the channel and were then (in 1921) digging it up, could not have been put in. Nor could there have been such unanimity in the reports of the revenue authorities that the channel as a channel had ceased to exist: see, for example, the evidence of the Tahsildars and the Revenue Inspectors, D. W. 6 in 1911, P. W. 5 in 1920 and P. W's. 1, 2 and 4 in 1923. Both the lower Courts in fact agree that since 1903 the channel has been out of use as such. There has therefore not been any withdrawal of any real source of irrigation which has recently been used as such. In these circumstances, it was open to Government, having due regard to the needs of the village, to decide that this land was no longer required as a channel and to transfer it to assessed waste and assign it under the rules contained in the Board's Standing Orders. There is no suggestion in the case that the assignment was not in accordance with the rules or was in this sense ultra vires.

It is contended but not really pressed, that Government should have been a party to the suit and therefore the suit is bad for non-joinder. The trial Court held that Government was not a necessary party. No ground of appeal on this part of the case was taken by the defendants before the lower appellate Court. I am not able to see how defendants have been prejudiced by the Government not being a party, and I therefore see no reason to interfere on the ground of non-joinder. The decree of the lower appellate Court, for these reasons, cannot be supported. I reverse it and restore the decree of the District Munsif with costs to the plaintiff throughout in all the Courts.

P.R.S./V.S. *Appeal allowed.*

(2) [1909] 32 Mad. 141=2 I.C. 325=9 M.L.J. 131.

(3) [1918] 34 M.L.J. 425=45 I.C. 80=(1918) M.W.N. 276.

A. I. R. 1930 Madras 624

KUMARASWAMI SASTRI, AND WALSH, JJ.

(*Appana*) *Venkatasubba Rao* and *another*—Appellants—Defendants.

v.

Ripley & Co. and *others*—Plaintiffs—Respondents.

Appeal No. 86 of 1928, Decided on 15th November 1929, against decree of Sub-Judge, Vizagapatam, in Original Suit No. 14 of 1926.

Contract Act, S. 73—Contract for delivery of jute—Failure by promiser to deliver jute within contracted date—Delivery continued even after contract date—Time and damages should be assessed as per extended date.

Under a contract dated 3rd September 1925 a merchant promised to a firm to delivery 224 candies of jute at Rs. 90 per candy, delivr to be completed before 30th September 1925. A portion of the goods was delivered before 30th September 1925 and after that date some further quantity was delivered, in all upto 31st October 1925, 111 candies were delivered. The firm brought a suit claiming as damages in respect of the undelivered goods the difference between the market price on 30th November 1925 and the contract price. The defence was that there was no contract to extend the time and that damages should be assessed as on the 30th September 1925. The trial Court assessed damages as on 31st October 1925. [P 625 C 2]

Held: that on evidence that there was an extension of time granted, that goods were being delivered at the request of the firm by the merchant and that he was specifically told that he must complete the contract before 30th November 1925 and in default proceedings would be taken against him; in these circumstances there was an implied contract to deliver goods and time was extended. [P 625 C 2]

Held further: that as delivery was going on it was not open to the merchant to fall back upon the 30th September 1925 as the date for assessing damages. *A. I. R.* 1922 *Bom.* 203; 24 *Bom. L. R.* 142, *Dist.*

V. Suryanarayana—for Appellants.

The Advocate-General—for Respondents.

Judgment—This appeal arises out of a suit filed by plaintiffs against the defendants claiming Rs. 6,215 as damages for non-performance of a contract to deliver jute. The contract sued upon is marked as Ex. A and is dated 3rd September 1925. Under that contract the defendants promised to deliver 224 candies of jute at Rs. 90 per candy of 506 lbs delivery to be completed before 30th September 1925, A portion of the goods was delivered before 30th September 1925 and after that date some further quantity was delivered. According o the plaintiffs, defendant 1 delivered from 17th September 1925 to 31st October 1925, 111 candies. In para. 5 of the plaint the plaintiffs state:

"Defendant 1 has been domanded by letter dated 25th November 1925 to deliver the balance of jute on or before 30th November 1925 but defendant 1 has not complied with the same and has committed default in fulfilling the terms of the contract."

Then the plaintiffs claim as damages in respect of the undelivered goods the difference between the market price on 30th November 1925 and the contract price, the market price being Rs. 145 per candy. The plaintiffs filed an additional statement dated 21st February 1927 stating that although the delivery was fixed for 30th September 1925 time was extended to 30th November 1925 at the request of defendant 1. They then state that defendant 1 met one C. Sanjiva Rao Naidu and asked him to extend the time. Finally they state:

"In the month of November in Bimilipatam defendant 1 met Mr. Manfield in the street and was asked by him when he would complete his contract. Defendant 1 replied that he need not trouble. Mr. Manfield said he did trouble because very little jute left and that if the contract was not completed within the next few days a registered notice would be sent. The plaintiffs waited till 25th November 1925 and issued a notice demanding delivery on or before 30th November 1925."

In the written statement defendant 1 admits that he did not deliver more than 111 candies. He does not deny the fact that dellveries were continued to be made after 30th September, the date fixed in the contract for performance. His case is that there was no contract to extend the time and that damages should be assessed as on 30th September 1925. The Subordinate Judge assessed damages on 31st October 1925 on the ground that there was extension of time till that date, the defendant making deliveries and the plaintiffs accepting them till then, and passed a decree for Rs. 3,955. Against this decree the defendants appeal.

It is clear from the facts that deliveries were being taken after 30th September 1925, that the dubash of the plaintiffs was pressing the defendants for delivery and that defendant 1 was making promises to deliver. The dubash has been examined as P. W. 2. He says:

"Deliveries were made by defendant 1 till 30th October 1925 though the date fixed was 30th September 1925. I used to demand delivery from defendant 1. According to my re-

quest he delivered till the end of October 1925. I wrote letters Ex. B and B-1 to plaintiff."

Then in cross-examination this is what he says:

"The price of jute rose by the end of September 1925. I have only the power to recommend for extension of time. I cannot extend the time without referring the matter to plaintiffs. The plaintiffs never wrote to me that they granted extension of time. The head clerk of plaintiffs gave instructions for preparing the plaint. When extension is granted letters were taken from those who asked for extension. Defendant 1 deals very largely with plaintiffs for the last ten years. Although the time for delivery was fixed in the contract subsequent deliveries are taken at the option of plaintiffs. The deliveries were made in my presence."

Although defendant 1 in examination-in-chief states that he never asked P. W. 2 Sanjiva Rao Naidu to extend the time, nor Mr. Manfield he also states:

"The person with whom I entered into contract used to receive the goods even after the expiry of the time for performence."

Then in cross-examination he says:

I delivered goods even after the time fixed for performance. 'The practice is to receive goods even after the time fixed for performance had expired. They will ask us for deliveries. We will deliver the goods after the time. Sanjiva Rao Naidu did not meet me before 8th November 1925. They will be usually asking my clerk to make deliveries.'

Exs. B and B-1 are letters written by P. W. 2 to the plaintiff. Ex. B is dated 8th November 1925. Referring to defendant 1 this is what he says in that letter:

"I met and asked this man for our jute deliveries. He also told me that he had sent his clerk to upcountries and it would be brought to Bimli on Wednesday. He will deliver his contracts at Bimli only.

On 19th November 1925 he wrote Ex. B-1 in which he says as follows:

We have been daily insisting on him for deliveries. They told me that their men once went to upcountries and returned. I again made them go to upcountries today. I told him plainly that I got orders first to issue registered notices and buy jute against their contracts at the market rate.

All that defendant 1 says in cross-examination is that he did not meet P. W, 2 before 8th November 1925. He does not state that he never met him afterwards; nor does he deny what Sanjiva Rao Naidu states in Exe. B and B-1 although they were filed in Court during P. W. 2's examination. The matter does not stop here because we find that sixteen days afterwards on 25th November 1925, the plaintiffs state in their plaint and it is not contradicted, that registered notice was sent to defendant 1 calling on him to deliver the balance of jute on or before 30th November 1925. They say that he did not comply with their request. Taking these facts together it seems to be clear that there was an extension of time granted, that goods were being delivered at the request of the plaintiffs by the defendant and that he was specifically told that he must complete the contract before 30th November 1925 and in default proceeding would be taken against him. The Subordinate Judge was right in these circumstances in finding that there was an implied contract to deliver the goods and time was extended. He, however, seems to have fallen into an error in thinking that the plaintiffs did not in their plaint start their case with an implied extension of time; for reading para. 5 of the plaint and the additional statement it is clear that the plaintiffs distinctly told defendant 1 that if the goods were not delivered they would take steps and further a definite date was fixed. Reference was made to *Toya Meaki Kaiesha Ltd.*, v. *Chabildas Nathubai* (1) and *The Phoenix Mills Ltd.* v. *Madhavdas Rupchand* (2). But we think that the facts here are distinguishable. This is not a case where the defendants at their own option went on delivering goods after breach and the plaintiffs accepted them. Here the defendants were making deliveries and the plaintiffs distinctly told them that they will not wait after a specific date. We do not think that it can be laid down in a case like the present where delivery was going on as in this case that it is open to the defendant to fall back upon 30th September as the date for assessing damages. There is no cross-appeal as regards the date for damages to be fixed as 30th September 1925 instead of 31st October, and although that would be the proper date to be fixed for damages there is no hardship on defendant 1 because the damages assessed are less than what they would otherwise have been. In these circumstances we think that the decree of the lower Court is right. The appeal is dismissed with costs.

P.R.S./V.S. *Appeal dismissed.*

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(1) A. I. R. 1922 Bom. 203.
(2) [1916] 24 Bom. L. R. 142.

A. I. R. 1930 Madras 626 (1)

JACKSON, J

D. B. Vedavalli Ammal—Petitioner.

v.

K. S. Ganapathy Iyer and *another*—Respondents.

Civil Revn. Petn. No. 1399 of 1929 Decided on 20th December 1929, from order of Sub-Judge, Trichinopoly, D/- 21th October 1928.

(a) Madras High Court Civil Rules of Practice R 20— R. 20 is confined to conduct of pleader in suit or connected proceedings —Connexion must be direct.

Rule 20 of the Civil Rules of Practice is confined to the conduct of pleaders in a suit or connected proceedings but to attract the provisions of this rule the connexion must be direct and not merely indirect through the facts being similar. *A. I. R.* 1921 *Mad.* 666 *Dist.* [P 626C 2]

(b) Madras High Court Civil Rules of Practice R. 20—Case unconnected—Counsel has discretion regarding acceptance of brief —Acceptance causing embarrassment to counsel and obvious scandal—General Council of Bar can interfere—Legal Practitioner.

A counsel ought not to accept a brief in any case in which he would be embarrassed in the discharge of his duty by reason of the confidence reposed in him by the other party in a previous though unconnected case, and if his embarrassment is self-evident and his action an obvious scandal, it can be brought before the General Council of the Bar. [P 626C 2]

George Joseph and *M. V. Ramaswami Naidu*—for Petitioner.

K.G. Srinivas Iyer and *A.V.Narayanaswami Iyer*—for Respondents.

Judgment.—The petitioner seeks to revise the order of the Subordinate Judge of Trichinopoly declining to restrain an advocate, Mr. K. S. Ganapathy, Iyer, from appearing on behalf of the plaintiff, in O. S. No. 170 of 1924, in which petitioner is defendant 1. The petitioner in the lower Conrt relied upon deliberate abuse which the learned Judge has condemned in language which is none too strong and which I endorse. When private quarrels are put into professional hands the proceedings must conform to the forms of courtesy common among gentlemen, and it is surprising that an affidavit like that of P. V. Manikkam Pillai was ever filed in a Court of law. In this Court Mr. Mockett has very properly entirely disassociated himself from its allegations.

Mr. Ganapathy Ayyar was briefed in O. S No. 114 of 1913 on behalf of one Vedavalli who sued to set aside the adoption of one Rajaratnam. She succeeded. In O.S. No. 170 of 1924 the brother of Rajaratnam sues to declare this adoption valid, and Mr. Ganapathy Ayyar has accepted a brief on his behalf. R. 20 of the Civil Rules of Practice is confined to the conduct of a pleader in a suit or connected proceeding and affords no guidance for the conduct in an entirely different suit. In *Ramakrishna Pillai* v. *Balakrishna Ayyar* (1), the rule is read as referring to a subsequent suit if it is connected with an earlier one. Presumably, the connection must be direct, such as, for instance, a suit to set aside the former suit on plea of fraud. An indirect connexion through the facts being similar would not, I think, attract the provisions of the rule.

Therefore, in a case like the one before me, guidance must be sought from the practice of the Bar in England. In Halsbury, Vol 2, page 407, it is laid down that counsel ought not to accept a brief in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other party. The matter seems to be left to the good feeling of the advocate, but presumably if it was one where the advocate's embarrassment was self-evident, and his action an obvious scandal, it would be brought before the General Council of the Bar.

In the present case eleven years had elapsed since the filing of the previous suit, and as the plaintiff in that suit was only seeking to prove a negative, it is difficult to imagine what confidence she could have imparted which would embarrass Mr. Ganapathy Iyer.

There is no reason not to accept his affidavit. I therefore decline to interfere with the lower Court's order.

The petition is dismissed with costs.

D.R.S./J.M. *Petition dismissed.*

(1) A. I. R. 1921 Mad. 666.

A. I. R. 1930 Madras 626 (2)

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Vulcun Insurance Co. Ltd. – Appellant.

v.

Corporation of Madras - Respondent.

Civil Ref. No. 15 of 1928, Decided on 26th November 1929, made by Chief Judge of Sm C. C. Madras, in Municipal Taxation Appeal No. 9 of 1928.

(a) Madras City Municipal Act, Sch. 4, R. 7—Company not transacting business in year preceding year of taxation can claim benefit of proviso to R. 7 and claim assessment on gross income and not on capital.

For the application of the proviso to R. 7 it is not incumbent on the company to show that it actually did business in the city in the year prior to the taxation. The decisive test is whether the company transacted or not its business in the city. A company which has no office within the city, but begins to transact business within the city in the year of taxation through an agent and which has not in any manner transacted business or received any income from the city during the year immediately preceding the year of taxation can claim the benefit of proviso to R. 7 and the taxation should be on gross income as provided by R. 7 and not on capital of the company.

[P 627 C 1 ; P 629 C 1]

(b) Words and Phrases — Income means periodical receipts from one's work, lands etc.

Income is not confined to receipts from business only and means periodical receipts from one's work, lands investments etc. : *A. I. R.* 1921 *Mad.* 427 (*S.B.*), *Ref.* [P 628 C 2]

(c) Interpretation of Statutes — Taxing statute, interpretation doubtful—Benefit of doubt is right of subject.

A statute relating to taxation, if it is doubtful or difficult of interpretation, is subject to the rule that no tax can be imposed except by words which are clear and the benefit of doubt is the right of the subject. [P 628 C 2]

A. V. Seshiah and *S. Rangachari*—for Appellant.

S. Rajamanikkam—for Respondent.

Order of Reference.—Case stated under R. 17, Sch. 4, Madras City Municipal Act of 1919, by the Chief Judge of the Court of Small Causes, Madras, in Municipal Taxation Appeal No. 9 of 1928, on the file of the said Court, preferred against the decision dated 8th September 1928 of the Standing Committee of the Corporation of Madras for the decision of the High Court on the following question of law involved in the case :

"Can a company which has no office within the city but begins to transact business within the city in the year of taxation through an Agent and which has not in any manner transacted business or received any income from the city during the year immediately preceding the year of taxation, claim the benefit of the proviso to R. 7 Sch. 4 of the Taxation Rules under the Madras city Municipal Act."

This case coming on for hearing on Wednesday and Thursday 20th and 21st November 1929, upon perusing the Letter of Reference (Letter No. 2218 dated 8th December 1928, from the Registrar of the Court of Small Causes, Madras) the Judgment and order dated 14th November 1928 and passed by the Court of Small Causes, Madras, in the said Municipal Taxation Appeal No. 9 of 1928, and the other material papers and upon hearing the arguments of Mr. R. Viswanahtan on 20th November 1929, and Mr. K. Bhashyam Ayyangar, advocate, on 21st November 1929, for Mr. A. V. Seshaiah, advocate for the appellant, and of Mr. S. Rajamanikam, advocate for the respondent, and the case having stood over for consideration till this day, the Court expressed the following.

Opinion

Venkatasubba Rao, J.—This is a case referred to us for decision by the Chief Judge of the Court of Small Causes under R. 17, Sch. 4, Madras City Municipal Act (4 of 1911). The Vulcan Insurance Company was assessed to a license fee under S. 110. The contention of the corporation is, that the company is liable to pay Rs. 500 under the scale prescribed on the capital basis : the latter asserts, on the contrary, that it is to be assessed on the basis of gross income and is liable to pay only Rs. 25. The material part of S. 110 reads thus :

"Evey incorporated company transacting business within the city for profit or as a benefit society shall pay by way of license fee in addition to any other licence fee that may be leviable under this Act a half yearly tax on its paid up capital on the scale shown in the taxation rules in Sch. 4 but in no case exceeding Rs. 1,000 if and as soon as it has transacted business in the city for the period prescribed in S. 113."

Explanation :

" Whenever a company has an office, agent or firm to represent it for the purpose of transacting business in the city, such company shall be deemed to transact business in the city and such office, agent or firm shall be liable for the tax in respect of the company's business, whether or not such office, agent or firm has power to make binding contracts on behalf of the company."

Rule 7, Sch. 4 provides :

" Companies shall be assessed by the Commissioner on the following scale :

	Paid up Capital Lakhs of Rupees	Half yearly tax Rs.
A.	Twenty and more than twenty ...	1,000
B.	Ten and more than ten, but less than twenty	500
C.	Five and more than five, but less than ten	250
D.	Three and more than three, but less than five	150

E.	Two and more than two, but less than three	100
F.	One and more than one but less than two	50
G.	Less than one	30

Provided that any company, the head office or a branch or principal office of which is not in the city and which shows that its gross income received in or from the city has not in the year immediately preceding the year of taxation exceeded.

		Rs.
(a)	Twenty-five thousand rupees shall pay only	125
(b)	Fifteen thousand rupees shall pay only	75
(c)	Five thousand rupees shall pay only	25

The company contends that the case falls within the proviso referred to above. The question is, does it or does it not apply? The learned Chief Judge has decided the point in favour of the Corporation of Madras.

The company has a paid up capital of about 15 lakhs of rupees. In the second half year of 1925-26, it, for the first time, began to transact business in the city, through a local agent without having at Madras, "the Head Office or a branch or principal office." What is the proper amount which the company is liable to pay at its very first assessment under the Act? Two conditions must be satisfied under the proviso. The first requirement is fulfilled, as it transacted business in the year of assessment, only through a local agent. Then, is the second condition satisfied or not? The proviso speaks of two years, the year of taxation and the year preceding it. This company started business for the first time in the year of taxation. It says it received no income from the city in the year preceding it and on that ground claims the benefit of the proviso. In my opinion its contention is well founded.

According to the learned Judge it is incumbent on the company to show that it actually did business in the city in the preceding year. But to this effect there are no words in the proviso and why should they be imported into it? Mr. Rajamanickam very strongly urges that the right construction is that adopted by the learned Judge. He asks us to read into the proviso certain words occuring in s. 110 of the Act, in other words, to amplify the expression "any company" by reading it as "any company transacting business within the city." So far, he is perfectly right. Supposing these words are added, what follows? The reference to the transacting of the business is to the year of taxation and not the preceding year. Mr. Rajamaniakam's contention cannot prevail if we add in the proviso merely the words to which I have referred. Much more has to be done. We must introduce another set of words, namely, "from business transacted in the city" after the phrase "from the city." How can such a course be possibly justified? Let us suppose that the company did transact business in the City in the preceding year but that its income was "nil," does the proviso apply or not? Mr. Rajamanickam concedes that it does. That also seems to be the view of the learned Judge. The distinction, according to them, is not between no income and some income, but the decisive test is, whether the company transacted or not its business in the city. The argument on behalf of the corporation ignores also the distinction between the words "in" and "from" in the proviso. Granting that the expression "income received from the City" applies only to the transacting of some business, the word "in," cannot have the same significance. Moreover, income is not confined to receipts from business only. As pointed out in *Secretary to the Board of Revenue* v. *Arunachala* (1), income, is described in the Oxford Dictionary as "periodical receipts from one's work, lands, investments etc." I find no difficulty therefore in construing the proviso in favour of the company. But granting that the words are ambiguous, the true canon of construction is the following:

> "If it be doubtful or difficult of interpretation, which I do not think it is, the Finance Act is subject to the rule that no tax can be imposed except by words which are clear, and the benefit of the doubt is the right of the subject." Per *Fitz Gobbon, L. J.*—In *re* Finance Act 1894, and Studdert (2).

To the same effect is the following passage from Halsbury (Vol. 27, Page 180 Para. 345).

> "If the Crown, seeking to recover tax, cannot bring the subject within the letter of the law the subject is free, however much within the spirit of the law the case might otherwise

(1) A. I. R. 1921 Mad. 427=44 Mad. 65 (S.B.)
(2) [1900] 2 Ir. R. 400.

appear to be. There can be no equitable construction admissible in taxing statutes."

The contention of the company is, in my opinion, well founded and I answer the reference accordingly.

Madhavan Nair, J.—It appears to me that the respondent's contention that the" proviso" does not apply to the assessee in this case is not without force. But on the face of it the language of the proviso is also open to the construction sought to be put upon it by the appellant. As the proviso is very ambiguously worded, I think that, following the time honoured rule the benefit of the doubt should be given to the assessee in this case. I, therefore, agree with the order made by my learned brother.

P.R.S./J.M. *Reference answered.*

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* A. I. R. 1930 Madras 629

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Narayanasami Mudali and *others*—Defendants—Appellants.

v.

President, Board of Commissioners for the Hindu Religious Endowments, Madras and *another*—Plaintiffs—Respondents.

Appeal No. 108 of 1929, Decided on 6th November 1929, against order of Dist. Judge, South Arcot, D/-12th February 1929.

(a) Civil P. C., O. 23, R. 3—Compromise voluntarily made—Court must recognise it if it is not unlawful.

In the case of private individuals the only question the Court asks itself is, has there been in fact a compromise and if so, is the adjustment a lawful one? Even if it sees reason to think that one of the parties was foolish in the agreeing to certain terms it has no option but to recognise and give effect to the compromise voluntarily made. [P 630 C 2]

*** (b) Civil P. C., O. 23, R. 3—Suit regarding public and charitable trust—Power of Court in recognizing compromise enunciated.**

There is nothing to prevent cases regarding public and charitable trusts from being compromised like the other cases, but it is plain, that in such cases the Court has plenary power to subject the terms to scrutiny and reject the compromise for valid reasons. Further if any party opposes a compromise from sordid motives or on improper grounds, the Court, even then, has a right to take suitable action. [P 630 C 2]

(c) Civil P. C., O. 23, R. 3—Compromise sacrificing interest of trust is unlawful.

In the case of a public trust, no compromise can be said to be lawful which sacrifices its interests : 38 *Mad.* 850 ; 8 *C. W. N.* 404 ; 18 *C. W. N.* 1264 ; 37 *M.L.J.* 489 and 31 *Mad.* 236 (*P. C.*), *Rel. on.* [P 630 C 2]

M. Patanjali Sastri—for Appellants.

P. Venkataramana Rao—for Respondents.

Venkatasubba Rao, J.—This suit has been brought by the Board of Commissioners for the modification of a scheme under the Madras Religious Endowments Act. The plaintiff compromised the suit with certain of the defendants and asked the Court to recognise the compromise and pass a decree accordingly. The learned District Judge refused to comply with the request on the ground that the compromise was not in the interests of the temple in question. The reasons for the step taken by the learned Judge are to be gathered from two orders made by him on the same date.

This appeal is filed by defendants 1, 2, 5 6 and 7. The present attitude of the Board is different from what it was in the lower Court. It now says that the compromise was entered into under a certain misapprehension and ought not therefore to be recognized. In the plaint, serious charges were made against defendants 1 and 2 who were alleged to have misappropriated sums amounting to about Rs. 60 to 70 thousands. There is one very definite allegation with which we are directly concerned. It is asserted that defendant 1 sold his property worth about Rs. 2,500 to the trust for about Rs. 10,000 and received the purchase money from the funds of the temple. It is similarly asserted that defendant 2 selling his own property worth about Rs. 3,000 to the institution for Rs. 12,000 received that sum. In the last mentioned case, it is also alleged that the property is subject to a usufructuary mortgage which was never disclosed.

That the trustees sold their own properties to the trust is not denied. Nor is it disputed that there is a mortgage outstanding in respect of the property sold by defendant 2. In the circumstances, the learned District Judge observe thus :

"Unless defendants 1 and 2 are prepared to take back their lands and pay to the plaint temple Rs. 10,000 and Rs. 12,000 respectively, I find it impossible to give leave to the plaintiff to enter into any compromise."

This brings us to the question, what are the terms of the compromise? It is

unnecessary to state them in detail, but their effect may be shortly stated. The two sales mentioned above are adopted. The charges against defendants 1 and 2 are wholly withdrawn. The scheme under the compromise provides for the appointment of new trustees, defendants 6 and 7 (alleged to be the partisans of defendants 1 and 2) being among the first trustees to be so appointed.

One Venkatachala, before the compromise was actually effected, presented to the Court an application asking that he should be made a party plaintiff. He alleged that the Board was intending to compromise the suit on terms not favourable to the trusts, that he was himself interested in the temple, that it was inter alia at his instance that the suit was filed and that, therefore, it was just that he should be added as a party. In spite of this warning, the Board entered into the compromise. It now recognises that it was not prudent on its part to have entered into it and the District Judge says that it was due to an error of judgment that it compromised the suit. As a matter of fact, when the Judge refused to recognise the compromise, defendants 1 and 2 by their pleader offered, if sufficient time was granted, to bring into Court, the entire sum of Rs. 22,000. Incidentally we may mention that it was by suppressing this fact, they obtained an interim order from a learned Judge of this Court staying the trial of the suit. The temple gets no advantage from the compromise; on the contrary, the defaulting trustees obtain every possible benefit. We may also remark that some of the defendants were not parties to the compromise. Defendant 4 is opposed to it. We do not wish to prejudge the case, but it is obvious that the right of none of the defendants to represent the temple is admitted. How, then, can the objection of defendant 4 be ignored if it is well founded?

Mr. Patanjali Sastri, for the appellants, contends that it is incumbent upon a Court under O. 23, R. 3, to pass a decree in terms of the compromise, unless it comes to the conclusion that it is not a lawful agreement. He in effect argues that in suits relating to public institutions (for example, in what are known as suits by relators), the powers of a Court in this respect are exactly those as in suits between private individuals. With this proposition we are unable to agree. When a compromise in a suit like the present is submitted to a Court, it not only has the power, but is under a duty, to scrutinise its terms with a view to make sure, that the interests of the public trust are properly safeguarded. In the case of private individuals the only question the Court asks itself is, has there been in fact a compromise and if so, is the adjustment a lawful one? Even if it sees reason to think that one of the parties was foolish in agreeing to certain terms, it has no option but to recognise and give effect to the compromise voluntarily made. But does this rule apply to the case of public or charitable trusts? The Court cannot shirk its duty by simply saying that the agreement is lawful in the narrow sense of the term. Cases of collusion between the relators filing the suit and the defaulting trustees are not infrequent. Then, owing to gross negligence, the interests of the trust may be sacrificed. We are somewhat surprised that Mr. Patanjali Sastri has contended with persistence that in such cases the Court is powerless. There is nothing to prevent cases of this kind from being compromised like the other cases; but it seems to us plain, that in such cases the Court has plenary power to subject the terms to scrutiny and reject the compromise for valid reasons. We would go further and say that if any party opposes a compromise from sordid motives or on improper grounds the Court, even then, has a right to take suitable action. These, in our opinion are the principles that should guide the Courts. But we may rest our judgment on narrower grounds. In the case of a public trust, no compromise can be said to be lawful which sacrifices its interests; on the ground therefore, that a compromise entered into without due regard to the trust, is under O. 23, R. 3 an unlawful agreement, our conclusion may be supported. It matters little how the question is viewed; the same result follows.

This seems to rest on principle and reason. Apart from that, the case on the point clearly shows that Mr. Patanjali Sastri's contention is entirely untenable.

In *Sundarambal Ammal* v. *Yogarana Gurukkal* (1), the suit was in respect of a half share in the archaka miraz in a Saivite temple. The parties entered into a compromise by which one of them alienated a portion of his right to the office for a pecuniary benefit. The learned Judges refused to pass a decree in accordance with the compromise. Sadasiva Aiyar J. points out that the primary right is that of the deity to have certain services performed and the right of the office-holder to receive emoluments is but subsidiary. The observations made by him seem to be very pertinent to this case:

"The Court itself has certain duties in connexion with a case in which a judgment in rem has to be pronounced, or in a case which involves the right of the public or the right to a religious and charitable office, or the right of a minor or other incapacitated person."

It is noteworthy that the learned Judge treats for this purpose a public trust as on the same footing as a minor or other incapacitated person. In *Gyanananda Aasram* v. *Kritho Chandra Mukerjee* (2) a compromise was refused to be recognized which affected prejudicially the interests of a Hindu temple. The judgment of Maclean, C. J. furnishes a conclusive answer to the contention urged in this case for the appellant. The learned Chief Justice points out that S 355 of the Code (corresponding to O. 23, R. 3) does not apply to the case of a religious endowment at all; he then adds, that even if it does, an agreement made in disregard of its interests, is an unlawful one within the section. In *Abdul Karim* v. *Abdul Subhan* (3) the principle enunciated in this case was referred to as being in accordance with common sense.

In *Muthukrishna Naicken* v. *Ramachandra Naicken* (4), it is assumed, without discussion, that the Court can reject a compromise detrimental to a trust. (See p. 492). In the well known Kamudi case (*Sankaralinga Nadar* v. *Rajeswar Dorai* (5), the Judicial Committee acted on the same principle. Admitting Nadars and Shanars into a Hindu temple is, of course, not strictly illegal; the rejection of the compromise recognising such a right, could be only on the ground that the trustee betrayed his trust and was not acting in its interests.

The point is clear beyond doubt and the Courts ought not to give countenance to the doctrine so strenuously contended for in this case, that their duty consists in merely registering a compromise, however detrimental it may be to a public trust.

It only remains to add that there is no substance in the argument that the lower Court's finding in not borne out by evidence. It is idle to contend that a Court cannot act upon affidavits in a case of this kind and that it is bound to call on the parties to adduce oral evidence. The order of the lower Court is confirmed and the appeal is dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

(1) [1914] 38 Mad. 850=26 M. L. J. 315=1 M. L. W. 276=23 I. C. 72=(1914) M. W. N. 286.
(2) [1904] 8 C. W. N. 404.
(3) [1914] 18 C. W. N. 1264=26 I. C. 360.
(4) [1919] 37 M. L. J. 489=47 I. C. 611.
(5) [1908] 31 Mad. 236=35 I. A. 176=18 M. L. J. 337 (P.C.).

A. I. R. 1930 Madras 631

JACKSON, J.

(*Vonti Kommu*) *Rami Reddy* and *others* —Accused—Petitioners.

v.

Emperor

Criminal Revn. Case No. 688 of 1929, and Criminal Revn. Petn. No. 624 of 1929, Decided on 28th November 1929, against judgment of Sess. Judge, Cuddappah, in C. A. No. 19 of 1929.

Criminal P. C, S. 235—Trial for rioting with common object of hurt—Charge of rioting found unsustainable—Further trial for hurt in absence of direct charge vitiates trial

A man cannot be convicted of hurt unless he is charged with hurt nd hence if from the charge as originally framed, accused are charged with rioting with the common object of causing hurt, and the Court finds the charge of rioting with the said common object unsustainable, on acquitting the accused of the said charge of rioting, the Court cannot proceed to find them severally guilty of grievous or simple hurt without framing a direct charge. The omission to frame a direct charge vitiates the trial : 27 *Cal.* 5 6 ; *A. I. R.* 1925 *Mad.* 1 (*F. B.*), *Ref.*, 47 *Mad.* 746, *Dist.*

[P 631 C 1]

V. L. Ethiraj for Petitioners.

Public Prosecutor—for the Crown.

Order.—The petitioners have been sentenced: petitioner 1 to six months rigorous imprisonment under S. 325 I. P. C., and petitioners 2, 3 and 4 to

four months' rigorous imprisonment under S. 324, I. P. C.

They were originally charged generally that some one or other of them caused the hurt, and all were guilty by reason of S. 149, I. P. C. from the fact that they were rioting and the hurt was likely to be committed in prosecution of their common object.

The appellate Court has found that they did not riot and had no common object and then proceeds to find them severally guilty of grievous or simple hurt. A man cannot be convicted of hurt unless he is charged with hurt. As the charge stood accused were not in the least concerned in sifting who caused each particular injury; for all were to be held liable for the act of each. Therefore it cannot be said that the omission to frame a direct charge occasioned no failure of justice. *Theethumalai Gounder* v. *Emperor* (1) is distinguishable. There the accused were charged under Ss. 326 and 149, I. P. C. and could have been convicted under those sections, but the Judge convicted under S. 326 alone. But here the accused could not be convicted under S. 149. The case bearing more closely upon the present case is *Abhi Misser* v. *Lachmi Narain* (2), *I. L. R* 27 *Cal.* 566 which is affirmed in *Theethumalai Gounder* v. *Emperor* (1) at 754 (*of* 47 *Mad.*).

The petition must be allowed and petitioners acquitted. Their bail is released.

P.R.S./V.B. *Petition allowed.*

(1) A. I. R. 1925 Mad. 1=47 Mad. 746(F.B.).
(2) [1900] 27 Cal. 566=4 C. W. N. 546.

A. I. R. 1930 Madras 632 (1)

JACKSON, J.

Sadayan Chetti and *others* —Accused —Petitioners.

v.

Emperor

Criminal Revn. Case No. 718 of 1929. and Criminal Revn. Petn. No. 650 of 1929, Decided on 13th December 1929, from judgment of Sub-Divl. First Class Magistrate, Salem, in Criminal Appeal No. 15 of 1929.

Criminal P. C,. S. 257 — Discretionary powers of Magistrate in allowing witnesses to be cross-examined explained.

A Magistrate has a large discretion under S. 257. When, however, the accused clearly explains that he wanted an adjournment because his vakil was ill and if the witnesses are subsequently present there is no reason for not letting them be cross-examined.

[P 632 C 2]

S. Ranganatha Ayyar — for Petitioners.

Public Prosecutor—for the Crown.

Order – A Magistrate has a large discretion under S. 257, Criminal P. C. and if *Lakshmayya* v. *Emperor* (1) goes so far as to hold that once a Magistrate has summoned witnesses under S. 257, he is bound to compel their attendance although he is satisfied that it is unnecessary for the purposes of justice, I respectfully disagree.

However, in the present case the accused clearly explained that they wanted an adjournment because their vakil was ill, and as the witnesses were subsequently present there is no apparent reason for not letting them be cross-exmained. The sentence is cancelled and the case ordered to be taken up as from when the cross-examination was refused. Fines will be refunded.

P.R.S./V.S. *Case remanded.*

(1) A. I. R. 1927 Mad. 129.

A. I. R. 1930 Madras 632 (2)

BEASLEY, C. J., AND PANDALAI, J.

Sankaralinga Tevan—Accused –Appellant.

v.

Emperor

Criminal Appeal No. 541 of 1929, and Referred Trial No. 153 of 1929, Decided on 9th December 1929, against judgment of Sess. Judge, Tinnevelly Division.

(a) Evidence Act, S. 157—First information report—Statements are admissible only for corroborating or contradicting witness and not as substantive evidence—Criminal P. C., S. 154.

Statements in first information report can be used for the purpose of corroborating or contradicting a witness but are inadmissible for the purpose of proving that the facts alleged therein are correct: 17 *C.W.N.* 1213; *A.I.R.* 1925 *All.* 303 and *A.I.R.* 1927 *Cal.* 17, *Foll.* [P 634 C 1, 2]

(b) Criminal Trial — Evidence — Circumstantial evidence must be conclusive.

In criminal cases based only on circumstantial evidence that evidence should be so strong as to point very clearly to the guilt of the accused. [P 635 C 1]

K. S. Jayarama Ayyar for *J. S. Vedamanickam* for Accused.

K. N. Ganapathi for *Public Prosecutor*—for the Crown.

Beasley, C. J.—The appellant was convicted by the learned Sessions Judge of Tinnevelly of the murder of his father Thandava Thevan and sentenced to death.

Thandava Thevan was undoubtedly murdered on the night of 2nd June last. He was stabbed on the chest and died of that stab. He was aged 55 years. The accused, aged 24, is his only son. The deceased had a second wife, P. W. 2, who is the stepmother of the accused. Both the accused and his father owned a bandy and earned their livelihood by letting it on hire and the motive for the murder is alleged by the prosecution to have been a quarrel between Thandava Thevan and his son on this night with regard to the collection of money due from persons who had hired the bandy. As a result of this quarrel it is alleged that the accused stabbed his father and ran away. He surrendered himself to the Magistrate of Srivaikuntam on 14th June.

The evidence against the accused is purely circumstantial. There are no eyewitnesses to the occurrence. The evidence against him is that of P. W.'s 2 and 3 coupled with his absconding from the village.

P. W. 2's evidence is that after she had served the evening meal to the deceased and the accused in the house which they all three occupied and the deceased and the accused had gone outside the house on to the pial, she bolted the door and remained inside. Sometime later she heard the father and son quarrelling with each other about the collection of bandy hire. The deceased was accusing the accused of not accounting for the money collected by him from persons who had hired the bandy and pointed out the difficulty this occasioned in his maintaining the family. The accused retorted that he was not bound to account to him for the money whereupon the deceased said that the accused should not touch the bandy from the next day, that he would have no food at his house and that he must earn his own living. Then, according to her evidence at the Sessions trial, there was a lull lasting about a naligai. At the end of that time she heard the cry of the deceased 'I have been stabbed.' She lighted a lamp, went outside and there found the deceased lying on the ground holding his side where the wound was and she supported him inside the house. Her foot, according to her, struck against a knife and its sheath on the floor. This knife and sheath, however, have not been proved to belong to the accused. Hearing the cries people came to the spot, amongst them being P. W.'s 3 and 4 and two others who did not give evidence at the Sessions trial and some women.

P. W. 3 lives in a house just to the south of the deceased only a few feet away, a lane separating the northern side of his house from that of the deceased. His evidence is that he saw the deceased and the accused sitting on the pials outside the house, the deceased sitting on the eastern pial and the accused on the western. He went inside his house and later on, having occasion to go outside, he heard the discussion spoken to by P. W. 2 going on between the deceased and his son. He says he recognized their voices. Then he went inside and slept and after an interval which he states to be three naligais he woke up on hearing a cry "My son has stabbed," opened the door and came out and there saw the deceased lying wounded on the ground. P. W. 2 carried the deceased inside the house and put him on a cot.

Another witness P. W. 4 went to the scene of the occurrence on hearing cries. He immediately went to the village Magistrate to make a report. He reached the village Magistrate at about 2 a. m. and the village Magistrate took a statement from him, Ex. B, and then proceeded to the house of the deceased where he took a statement from P. W. 2. The statements of P. Ws. 2 and 4 are incorporated in the first information report.

That is the whole of the evidence in the case and we have got to consider whether, it being purely circumstantial evidence, it is sufficient to say that it proves the case against the accused beyond all reasonable doubt. The first point to be considered is, is it true that there was this dispute between the deceased and the accused on the pial that night? With regard to this, we have the evidence of P. W.'s 2 and 3 and we are satisfied that the evidence of P. W. 2 on this point is to be accepted and also that of P. W. 3. The next

thing to be considered is—and it is the most important matter—whether there was any interval of time between the quarrel and the stabbing and if so what that interval was. P. W. 2 puts it at one naligai and P. W. 3 on the other hand puts it at 3 naligais. Even if it was one naligai, it is sufficiently long interval and the murder obviously could not have been in the heat of the moment. If the accused was the murderer then he must have sat for at least a naligai thinking about the matter, giving himself time to cool down or have gone away from the house and returned. But at the same time that interval of time does make it possible—we do not say probable—that some one else may have come to the spot and have committed the murder. If, on the other hand, the stabbing had followed the quarrel immediately, that, together with the absence from the village of the accused pointing to flight, would in our view, establish the case beyond all reasonable doubt. The circumstantial evidence would then be very strong indeed. It has been contended before us that P. W. 2 was trying to lighten the case against the accused at the Sessions trial and was giving incorrect evidence when she put this interval of one naligai between the dispute and the stabbing and the learned Sessions Judge has taken that view of her evidence. We have been asked to contrast that statement with the statement which was taken from her by the village Magistrate, Ex. E. After stating that the deceased told the accused that he should earn his living himself she stated in Ex. E that "at the time she heard the cry of, "he has stabbed," that she at once lighted the lamp from inside the house and came out with it."

That statement obviously means that the stabbing immediately followed the quarrel and, if we are entitled to treat that statement in the first information report as evidence upon this point of P. W. 2, then it is evidence of the very greatest importance. But the question is, are we entitled to make use of that evidence at all as substantive evidence? In our view, statements in the first information report can only be used for the purpose of contradicting or corroborating a witness and for no other purpose. If a witness in the Sessions trial makes a statement different to that attributed to the witness in the first information report, that discredits the evidence of the witness to that extent in the Sessions Court but does not make the statement in the first information report the evidence upon that matter in the case. We have been referred to three cases upon this point. The first is *Autar Singh* v. *Emperor* (1). On a difference of opinion between two Judges on this precise point, it was decided that the first information, although a document of great importance which is in practice always and very rightly produced and proved in criminal trials, is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate or contradict the author of it. In *Emperor* v. *Chittar Singh* (2), it was held that a report of the commission of an offence made at a thana or even the deposition of a witness previously made would be admissible for the purpose of corroborating a witness or of throwing doubt on his statement in Court but would be inadmissible for the purpose of proving that the facts stated in it are correct. In *Azimaddy* v. *Emperor* (3), at p. 258 (*of* 44 *C.L.J*)., it was observed that first informations do not prove themselves but have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and the first information is to be tendered as corroboration under S. 157, Evidence Act. In this view, with which we agree, there is no evidence that the stabbing took place immediately after the quarrel ended. On the contrary the only evidence is that it took place either one naligai afterwards as P. W. 2 says or three naligais afterwards as P. W. 3 says. With regard to the evidence of the latter, we think that his statement that he heard a cry of "My son has stabbed" is not to be accepted as in his previous statement he stated the cry to be "I have been stabbed."

The defence set up by the accused, of course, is not a very satisfactory one because he has pleaded that he was at a place some 40 miles away collecting outstandings having been sent there by

(1) [1913] 17 C.W.N. 1213=21 I.C. 882=14 Cr.L.J. 642.
(2) A.I.R. 1925 All. 303=47 All. 280.
(3) A.I.R. 1927 Cal. 17=54 Cal. 237.

his father. He summoned five witnesses at the Sessions trial but his pleader did not examine any of them. Previously these witnesses were summoned to support his defence of alibi but they did not go into the witness-box to do so. He, therefore, set up an alibi which has not been supported by any evidence.

This is a case of very grave suspicion but it still leaves a loophole and that is the loophole provided by the interval of time between the end of the quarrel and the stabbing. It is during that time that some one else might have murdered the deceased. In cases based only on circumstantial evidence, the circumstantial evidence should be so strong as to point very clearly to the guilt of the accused

The appeal is allowed and the conviction and sentence are set aside and the accused is ordered to be set at liberty.

P.R.S./J.M. *Appeal allowed.*

A. I. R. 1930 Madras 635

KUMARASWAMI SASTRI AND REILLY, JJ.

Pannaji Devi Chand and Co., Gadag —Defendant—Appellant.

v.

Sanaji Kapur Chand—Plaintiff—Respondent.

Appeal No. 211 of 1925. Decided on 6th February 1930, against the decree of Sub-J., Bellary, in O. S. No. 2 of 1924.

(a) Limitation Act, S. 23 — Wrongful seizure of moveable property is not continuing wrong.

Wrongful seizure of moveable property is not a continuing wrong within the meaning of S. 23, although the party is deprived of the possession and use of the property during the period it is taken out of his possession. [P 637 C 1]

(b) Limitation Act Art. 29 — Time runs from actual wrongful seizure and not when seizure is declared wrongful by Court

Under Art. 29 time bagins to run from the date of the actual seizure and not from the date the seizure is declared wrongful by a competent Court. For the seizure is wrongful ab initio. It does not become wrongful when declared to be so by the Court : 19 *W. R.* 333; 23 *Mad.* 621 and 31 *Mad* 431, *Rel. on.* [P 637 C 1]

(c) Limitation Act, Art. 29— Art. 29 applies to all attachments before judgment— Such attachment is wrongful both when Court has no jurisdiction and is on insufficient grounds – It is immaterial whether property is of defendant or of stranger.

Article 29 applies to all cases of attachment before judgment where specific property is seized, and the seizure is wrongful not only when the Court had no jurisdiction, but also when the attachment was obtained on insufficient grounds. Further it makes no difference whether the property attached belongs to the defendant or to a third party. 19 *Mad.* 80, *Expl.* 38 *M. L. J.* 321 and *A. I. R.* 1921 *Cal.* 774, *not Foll.*, 23 *Mad.* 621,; 31 *Mad.* 431 and 8 *Bom.* 17; 29 *All.* 615; 42 *Cal.* 85, *Relon.*, 6 *Bom. L. R.* 704. *Dist.* [P 638 C 2]

V. S. Narasimhachari — for Appellants.

C. Sambasiva Rao—for Respondent.

Kumaraswami Sastri, J. — Defendants are the appellants. This appeal arises out of a suit filed by the plaintiff firm against the defendant firm claiming a sum of Rs. 10,000 as damages which the plaintiffs alleged they sustained by reason of the defendants having wrongfully attached before judgment the properties in the defendant firm.

The plaintiffs and the defendants were merchants who were carrying on business in partnership. The plaintiffs were carrying on business at Bellary and the defendants were carrying on business at Gadag. It is alleged that the plaintiffs filed a suit in the Bellary District Court for winding up the business and for taking accounts. The defendants brought a suit against the plaintiffs and two other firms in the Court of the First Class Subordinate Judge of Dharwar for a breach of contract claiming rupees three lakhs twelve thousand odd. The defendants filed an affidavit on 30th March 1920 and applied for attachment before judgment of certain properties of the plaintiffs in Bellary and obtained conditional order. The Subordinate Judge after hearing the parties confirmed the attachment before judgment on 21st April 1920 and ordered the plaintiffs to give security on failure of which the attachment was to continue. It is alleged in the plaint that both in getting this order and in carrying out the attachment the defendants were guilty of various acts of misconduct. The plaintiffs appealed to the High Court of Bombay against the order of the Subordinate Judge holding that the defendants did not establish any proper grounds for the attachment before judgment. The judgment of the Bombay High Court is reported in *Sanaji Kapur Chand* v. *Pannaji Devichand* (1).

The defendants filed a written statement stating that they acted bona fide.

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(1) A. I. R. 1922 Bom. 276=46 Bom. 431.

They denied that in carrying out the attachment they acted in any illegal manner as alleged in the plaint. They denied that the plaintiffs were entitled to any damages and stated that the suit was barred by limitation.

The Subordinate Judge held that the plaintiffs did not prove the various acts of misconduct alleged in the plaint but he was of opinion that the plaintiff were entitled to damages on the ground that the attachment was not obtained bona fide. He observed:

"In the result I find that the attachment made from 10th to 12th April 1920 was malicious in the sense that it was songht not under an apprehension that the plaintiffs were closing the shop to defeat the debt due to the defendants but in order that it may be easy for the defendants to realise their moneys in case they obtained a decree."

As regards damages he awarded Rs. 3,000 damages and directed the parties to pay and receive proportionate costs. As regards limitation, the point was considered by the District Judge before the suit was transferred to the Subordinate Judge and the District Judge on the authority of *Manavikaraman* v. *Avisilian Koya* (2) was of opinion that, where the moveables of the defendants were attached before judgment, the seizure cannot be regarded as wrongful and that Art. 29 did not apply. The District Judge applied Art. 49 and as the date of the seizure was 9th April 1920 i. e., within three years before the suit he held that the suit was in time. The Subordinate Judge said that that ruling concluded the matter but he also added that as it was necessary for the plaintiffs to prove that the prior proceedings terminated in their favour, limitation began to run from that date, that the attachment was a continuing wrong and that S. 23, Lim. Act, would apply. Hence the appeal.

In appeal it is contended that the suit is barred by limitation and that the Judge was wrong in holding on the facts that the attachment before judgment was obtained maliciously and without reasonable cause and that in any event the damages are excessive. As regards limitation I am of opinion that the suit is barred by limitation. The order of the Subordinate Judge of Dharwar was on 31st March 1920 and the attachment is said to have been on 10th and 11th April 1920. The suit was filed on 26th October 1921. The suit was one for damages for obtaining a wrongful attachment of the properties of the plaintiffs.

Article 29, Lim. Act, runs as follows:

"For compensation for wrongful seizure of moveable property under legal process, one year, the date of the seizure."

It is contended by the appellants that this case falls within Art. 29 that the suit is for compensation for wrongful seizure of moveable property under legal process, that the period is one year commencing from the date of the seizure that according to the allegations in the plaint the seizure was wrongful from the date when the property was seized, that the fact that it was held to be wrongful by the High Court of Bombay on 14th September 1921 does not convert a proper seizure into an improper seizure and that consequently the date of the order of the High Court of Bombay has nothing to do with limitation. It is also argued that seizure which is wrongful is not a continuing wrong within S. 23, Lim. Act.

For the respondents it is argued that there is difference between cases where the property of the defendant is attached and cases where the property of third parties is attached, that Art. 29 only applies to cases where the property of third parties is attached, and that if the property of the defendant is attached the proper article would be Art. 36 which provides for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not specially provided for by the Limitation Act, and a period of two years is prescribed, the period commencing from the date when the malfeasance, misfeasance or nonfeasance takes place, or Art. 49 which provides for compensation for wrongfully taking or injuring or wrongfully detaining moveable property where three ysars is the period of limitation beginning from the time when the property is wrongfully taken or injured or when the detainer's possession becomes uulawful. It is also argued that wrongful attachment is a continuing wrong until the property is released from attachment in which case the suit was not barred by limitation as it is admittedly within one year of the

(2) [1896] 129 Mad. 80=6 M. L. J. 11

release order of the High Court setting aside the attachment. It is also contended that as in actions for malicious attachment under legal process the termination of the proceedings is necessary, limitation begins to run from the termination of the proceedings or the period when the proceedings were going on should be excluded in computing the one year.

The difficulty of applying either of the Arts. 36 or 49 is that before these articles can be attracted it has to be shown that the specific Art. 29 which applies to suits for compensation for wrongful seizure of moveable property under legal process is not applicable. I do not think it can be held that wrongful seizure of moveable property is a continuing wrong. No doubt the party is deprived of the possession and use of the property during the period it is taken out of his possession but it seems to me that that does not make it a continuing wrong within the meaning of S. 23.

No authority has been cited for holding that in such actions limitation does not begin to run until the plaintiff obtains a restoration of the property. I do not think the wrongfulness or otherwise of the seizure depends upon the adjudication of the Court on an objection taken by the person whose property is attached. If unless certain facts are alleged and proved the attachment is an invasion, the wrongful nature of the attachment does not depend upon the adjudication of the Court on the objection. It is not rightful when the Court makes an order on allegations which are subsequently found to be .unproved and becomes wrongful only when the Court on investigation of the facts holds that the plaintiff had no jurisdiction in attaching the properties. It is wrongful ab initio.

As regards the argument that there is no cause of action until the attachment has been declared to be wrongful and that the plaintiff must allege and prove the termination of the proceedings in his favour, the effect of upholding this contention would be to read into Art. 29 words that are not there. The period of limitation runs from the date of the seizure and not from the date when the seizure is declared wrongful. It should be noted that in other articles where termination of proceedings is necessary to give the plaintiff a cause of action, the Limitation Act specially provides for that contingency. For example in Art. 19 which refers to compensation for false imprisonment, the period of limitation begins to run from the date when the imprisonment ends. In Art. 23 which refers to compensation for malicious prosecution the period of limitation runs from the date when the plaintiff is acquitted or the prosecution is otherwise terminated. In Art. 42 which refers to compensation for injury caused by an injunction wrongfully obtained the period of limitation is three years commencing from the time when the injunction ceases. The legislature has, however, in dealing with compensation for wrongful seizure of moveable property under legal process fixed the period as one year from the date of seizure. I may also point out that Art. 28 which refers to compensation for illegal, irregular or excessive distress gives one year from the date of the distress. Having regard to this marked distinction I do not think I would be justified in reading into Art. 29 words which are not there. And even assuming for purposes of argument that it is necessary in case of compensation for wrongful attachment to allege and prove that the attachment proceedings have been terminated in favour of the plaintiff, it is difficult to see how the period during which the proceedings regarding the attachment are alleged to be pending can be excluded. Under S. 9 when once time has begun to run, no subsequent disability or inability to sue stops it and none of the sections in Part. 3, Lim. Act, relating to computation of period of limitation have any application to cases like the present. I find it difficult to see why any distinction should be drawn between cases where the property of the defendant is attached and cases where the property of third parties is attached. Both the cases fall under Art. 29. There is wrongful seizure of moveable property under legal process and the seizure is no less wrongful because it is the property of the defendant. The distinction to my mind is purely artificial. The hardship is the same.

Turning to the authorities there are no doubt some cases which draw this

distinction but there are other decisions where Art. 29 has been applied to cases where defendant's property has been distrained or attached. In *Hughes* v. *Chairman of the Municipal Commissioners, Howrah* (3), the suit was for the recovery of damages on account of a fine imposed by the Municipality of Howrah and the detention of an omnibus. The fine was set aside by the High Court and the detention pronounced to be wrongful. The question was as to when the cause of action arose and as to the period of limitation, the Calcutta Municipal Act giving a period of three months. Sir Richard Cough, C. J., observed :

"The cause of action was the seizure of the omnibus, which took place on 5th July. Either that seizure was a lawful one by virtue of proceedings to recover the fine which had been legally imposed by the Municipal Commissioner, acting as a Magistrate, or it was a seizure without any justification, in which case there would be a cause of action The Judge of the Small Cause Court is mistaken in supposing that the cause of action arose upon the order of the High Court being made. It is a mistake to suppose, as I observe, is often done, that where a proceeding is illegal and may be a cause of action, the cause of action does not arise until the proceeding has been set aside by the Court. There may be cases in which before an action can be brought it is necessary to have the proceedings set aside but where there is an entire want of jurisdiction, where the alleged wrong-doer is not acting judicially and would have no protection from his judicial capacity. it is not necessary to wait until his illegal and unfounded proceedings are set aside. In this case if the plaintiff had any cause of action, it accrued upon the seizure of the omnibus, and he was bound to bring his suit within three months from the time of the seizure. He could not, under the circumstances, treat the continued detention of the omnibus as fresh causes of action from day to day."

In *Jagjivan Javherdas* v. *Gulam Jillani* (4), it was held that a suit to recover money wrongfully taken under a decree is governed by Art. 29, Lim. Act of 1877 and that the same article applies to cases where compensation for the loss of interest on the money is claimed. This was a case where the property of the defendant was attached. In *Surajmal* v. *Manekchand* (5), the suit was for damages for wrongful attachment and the question was which article was applicable. The property attached was the property of the plaintiff and not the property of a third person. It does not appear from the facts stated in the judgment that there was any actual seizure of the property. There seems to have been only a prohibitory order. Batty, J., in considering the articles applicable observed:

"I do not think the present suit can be described without strain of words as one for specific moveable property or for compensation for wrongfully taking or detaining the same Nor can it be said that the rubies in suit were injured. The injury if any was done to the plaintiff by affecting his power of dealing with them. I therefore think Art. 36 would govern the case, unless there be any other article which could apply. Art 29 does not appear to do so, for it implies actual seizure under legal process. The only other article besides 36 that can be cited as appropriate is Art. 42 which relates to suits for compensation for injury caused by an injunction wrongfully obtained. *Nand Kumar* v. *Gouri Shankar* (6), has been cited in this connexion; but that case dealt with an injunction under S. 92, Act 8 of 1859, which corresponds with S. 492 present Code, rather than with Ss. 484, 485, 486 and 268 under which the attachment now in question purports to have been made."

In *Murugesa Mudaliar* v *Jattaram Davay* (7), certain properties in the hands of a third person were attached on 12th June 1895. The plaintiff filed a claim which was disallowed. Thereupon he filed a regular suit to establish his right which was decreed in his favour. He then filed a suit in 1899 for recovering damages. The defendants among other pleas contended that the suit was barred by limitation. The plaintiff contended that the period of limitation should be calculated from the time when his rights were finally declared by the High Court or at any rate that the time occupied in the proceedings connected with the Small Cause Court should be deducted under S. 14, Lim. Act. It was held by Sir Arnold White, C. J., and Subramania Ayyar, J., that the suit was barred and that the plaintiff was not entitled to have the time spent in prosecuting the previous suit deducted from the period of limitation. The learned Judges observed:

"In our judgment the plaintiff's cause of action accrued on 12th June 1895. The present suit was instituted on 26th April 1899. Unless, therefore, by virtue of the earlier proceedings taken by the plaintiff he can claim the benefit of S. 14, Lim. Act, the question whether the period of limitation is the one year's period prescribed by Art. 29 or the three years' period prescribed by Art. 49 is immaterial."

(3) 19 W. R. 339.
(4) [1884] 8 Bom. 17.
(5) [1904] 6 Bom.L.R. 704.
(6) 5 B L.R. Ap. 4=13 W.R. 305.
(7) [1900] 23 Mad. 621.

After holding that the period under S. 14 cannot be excluded the learned Judges observed:

"But it has been argued on behalf of the plaintiff that a distinction must be drawn between a claim for compensation for wrongful seizure of moveable property where the compensation sought is merely the value of the goods seized, in which case it is argued that Art. 49 applies, and a claim for compensation by way of damages which are consequential on the wrongful seizure and are independent of any question of compensation for the value of the goods, in which case it has been argued the period of limitation is one year under Art. 29. There is no reason in principle for this distinction and, in our judgment, the legislature never intended that any such distinction should be drawn. Art. 29 is quite general in its terms and we think it was intended to apply to all cases where the alleged wrongful seizure was made under legal process. The case of *Manavikraman* v. *Avisilam Koya* (2) may be distinguished on the ground that, in that case, the wrong complained of was the institution of a suit without reasonable grounds followed by an attachment of the goods of the defendant in the suit; whereas in the present case the goods belonged to a person who was not a party to the suit in which the attachment was made."

In *Narasimha Rao* v. *Gangaraju* (8) it was held by Sir Arnold White, C. J., and Pinhey, J., that Art. 29, Sch. 2, Lim. Act, applied to suits for damages for wrongful attachment. This was a case where the goods of a third person were attached. He preferred a claim which was dismissed but he succeeded in a suit under S. 283, Civil P. C. The attachment was on 10th December 1899. The suit was finally decided in plaintiff's favour on 7th February 1903 and the suit for damages was instituted in 1903. Sir Arnold White, C. J., was of opinion that Art. 29 applied and he followed the decision in *Murugesa Mudaliar* v. *Jattaram Davay* ( ). The learned Chief Justice observed :

'The lower Court have dealt with the case on the footing that the attached property was moveable property and I deal with the case on the same footing. I am of opinion that the appropriate article is Art. 29, since this is the only article which refers specificially to wrongful seizure under legal process. This was the view taken by this Court in *Murugesa Mudaliar* v. *Jattaram Davay* (7) at p. 624. I do not think this article should be construed as limited to claims for consequential damages and as not applicable where the plaintiff seeks only to recover the value of property seized, or the sale proceeds, if the property has been sold. This is obviously not the sense in which the word is used in Arts. 30 and 31, and I do not see why it should be construed in this restricted sense in Art. 29. If Art. 29 applies, the law is express and the time is one year from the date of the seizure. No doubt S. 283 of the Code makes provision for a special procedure whereby a claimant to property which has been seized in execution may establish his right, but I fail to see how the provisions of this section can have the effect of postponing the time when limitation begins to run, or suspending the time which has begun to run, when the Limitation Act makes express provision in the matter. Further I can see no ground for holding that time does not run so long as the property remains in custodia legis. The damage to the plaintiff is the seizure of his property. True he may eventually succeed in showing the property is his and in the meantime the property is safe, but he is none the less damaged by being deprived of the enjoyment of his own property."

Sankaran Nair, J., was of opinion that so long as the property remained in the custody of the Court the plaintiff cannot be said to have lost it and is therefore not entitled to any compensation for its loss, and that Art. 29 does not apply. He was of opinion that Art. 62 or Art. 120 applied. With this difference of opinion the matter came before Pinhey, J., who was of opinion that Art. 29 applied to the case. The learned Judge observed :

"If the seizure was not wrongful there was nothing wrongful in the payment. It is conceded that the seizure was wrongful This is not a continuing wrong, Later manifestations of the original damage done and consequent upon the injury originally sustained do not give rise to a new cause of action. The cause of action therefore was the original seizure and time began to run from that date. The article of Sch. 2, Lim. Act that governs the case would appear to be either Art. 29 or Art. 49."

After referring to the view of the learned Chief Justice that the distinction between Art. 29 and Art. 49 is that the former article applies to a case of wrongful seizure made under legal process whereas the latter applies when the wrongful seizure is made by a private person, the learned Judge observed :

"There is much to be said in support of this view, but it seems to me unnecessary, now, to decide which of the two articles applies, for the suit is admittedly barred whichever article is applied, if the wrongful seizure is taken as the starting point for limitation, and no allowance is made for the time spent in litigating the title under S. 283, Civil P. C.'

This case seems to me to be authority for two propositions :

1 that the starting point for limitation in case of wrongful seizure of goods under legal process is the wrongful seizure and not when the plaintiff obtains a declaration of his rights as to the property seized and,

(8) [1903] 31 Mad. 431=18 M. L. J. 590.

2. the time spent in the previous litigation cannot be excluded in computting the period of limitation Having regard to the reasoning of the learned Chief Justice and Pinhey, J., nothing turns on the fact that the property attached in the present case was the property of a third person and not the property of the plaintiff.

Madras Steam Navigation Co. Ltd. v. *Shalimar Works Ltd.* (9) was a case where the property of the plaintiff was attached. The suit was for damages. It was held that a suit for damages for wrongful seizure under legal process is governed by Art. 29, Lim. Act. In this case the plaintiff was a company carrying on business in Calcutta and certain repairs to a steamer owned by the company were carried out by the defendants. The defendants filed a suit for the recovery of the money due to them and the ship was attached on 4th June 1910. The suit was dismissed for want of jurisdiction and the ship was released from attachment on 31st January 1912. The suit for damages for the wrongful arrest of the steamer was filed on 4th June 1912. Then the question arose as to whether the suit was barred by limitation. Jenkins, C. J., and Stephen, J., held that the suit was barred. As regards limitation the learned Chief Justice after holding that the attachment cannot be said to be a nullity owing to want of jurisdiction to try the suit observed :

"It has been further contended that as this was a trespass to goods, Art. 36 should be applied; but Art. 29 is specific and fits the case, and it is a rule of construction of long application that a general article does not govern where there is a particular article which dovers the case. Nor do I think can Art. 49 be treated as governing this case rather than Art. 29. It was the seizure, if wrongful, that was the cause of action and the plaintiff cannot treat the suit as one for trespass apart from the seizure for the purpose of evading Art. 29 The conclusion then to which I come is, that this suit as framed is based on malice or its equivaient that in the absence of proof of malice or its equivalent the suit if treated as one for trespass will not lie in the circumstances of this case; and that if such a suit did lie it would fall under Art. 29 and would be barred."

In *Yellammal* v. *Ayyappa Naick* (10) it was held by a Full Bench of this Court that in order to attract the provisions of Art. 29 there should be actual seizure and that neither attachment of a debt nor voluntary payment of it to Court would constitute seizure of moveable property under legal process within the meaning of Art. 29, Lim. Act. In *Pandiri Veeranna* v *Mandavilli Subba Rao* (11) moveables already attached and seized at the instance of *A* were further attached by the issue of a prohibitory order at the instance of the defendant. A suit for damages was filed against the defendant who further attached the properties and it was held that a suit for damages for compensation for such attachment was governed by Art. 29 or 36, Lim. Act and not by Art. 42, 49 or 120. In dealing with the second attachment which was admittedly not by seizure, Sadasiva Ayyar, J., referred to *Yellammal* v. *Ayyappa Naick* (10) and his view seems to be that if there was actual seizure Art. 29 would apply. He was also of opinion that if there was actual seizure there was no continuing wrong. In *Ram Narain* v. *Umrao Singh* (12) it was held that Art. 29 is the article to be applied to a suit for damages on account of an unlawful attachment before judgment of a shop belonging to the plaintiff, and that the attachment was not a continuing wrong within the meaning of S. 23, Lim. Act.

I may in this connexion refer to *Sm. Sarat Kamini Dasi* v. *Nagendra Nath Pal* (13) where the question arose whether Art. 109 could be applied to cases where a mortgage sale which was held on 6th May 1913 was not confirmed till the 28th January 1914 owing to an infructuous application to set it aside and a suit was filed on 16th September 1916 by the auction-purchaser to recover sums realized by the defendant as rents from the tenants of the land. It was held that under Art. 109 limitation began to run from the date of the receipt of the rents and that the action was barred.

In dealing with Art. 109, Mukerji, J., observed :

"A careful study of Col. 3 of the schedule reveals an outsanding fact which cannot be ignored, namely, that the starting point of limitation does not always snychronise with the cause of action ; in many oases it does, but

(9) [1915] 42 Cal. 85=28 I. C. 462.
(10) [1914] 38 Mad. 972=26 M. L. J. 166=1 M. L. W. 162=22 I. C. 870=(1914) M. W. N. 348 (F.B.).
(11) [1916] 31 M. L. J. 257=35 I. C. 98.
(12) [1907] 29 All. 615=4 A. L. J. 548=(1907) A. W. N. 194.
(13) A. I. R. 1926 Cal. 65.

in others it dates from some specified events which again are either anterior or posterior to the accrual of the cause of action."

The learned Judge after referring to all the authorities and to the argument as regards suspension or extension of time observed :

"In applying the principles of limitation the Indian Courts are not permitted to travel beyond the articles and the exceptions and provisos embodied in the Act itself, and that apart from the provisions of the Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions."

The argument that there is a difference between cases where the property attached belongs to the defendant and cases where the property attached belongs to a third party is based upon the decisions in *Manavikraman* v. *Avisilan Koya* (2), *Arjun* v. *Abdul* (14), *Manga* v. *Changa Mal* (15) and *Sokkalingam Chetti* v. *Krishnaswami Ayyar* (16). I can find no principle on which a difference should be made whether the attachment was of the defendant's property or the property of a third person. And Mr. Sambasiva Rao for the respondent is unable to point to any ground on which such a distinction can be based.

In *Manavikraman* v. *Avisilan Koya* (2) the suit was in respect of timber attached before judgment in November 1888. The suit was dismissed in October 1889 and an appeal by the plaintiff was dismissed in July 1890. The defendant in that suit filed a suit in September 1892 against the plaintiff who obtained the attachment for damages occasioned by the attachment before judgment. The case was one where the property was claimed by two persons and for the purpose of preserving the property, the property was attached by the Court. But that makes no difference in principle. The learned Judges thought that Art. 36 applied and that the suit was barred by limitation. In dealing with the contention that Art. 29 would apply the learned Judges observed :

"We agree with them (the Courts below) that Art. 29 does not apply since this is not a case of wrongful seizure, but it is argued for the appellant that the case falls under Art. 36 and that the suit should be regarded as one for misfeasance independent of contract, and that it falls under the description of a tort for which a limitation of two years is generally provided. See the judgment of Farran, J. in *Essoo Bhayaji* v. *The Steamship 'Savitri'* (17)."

After discussing the scope of Art. 49 the learned Judge thought that Art. 36 should be applied. In *Sokkalingam Chetti* v. *Krishnaswami Ayyar* (16) the learned Judges draw a distinction between cases where the property of a third person is attached and cases where the property of the defendant is attached, and were of opinion that Art. 29, Lim. Act, was restricted to cases in which the seizure is intrinsically wrongful but did not apply to cases where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process but by misrepresentation to the Court. They think that Art. 36 would apply in cases where the property attached belongs to the defendant and distinguish *Murugesa Mudaliar* v. *Jattaram Davey* (7), *Multan Chand* v. *Bank of Madras* (18), *Narasimha Rao* v. *Ganga Raju* (8), *Pandari Veeranna* v. *Mandavilli Subba Rao* (11) and *Ram Narain* v. *Umrao Singh* (12) on that ground. As regards the decision in *Madras Steam Navigation Company* v. *Shalimar Works Ltd.* (9) they think that the observations are obiter. With all respect, the case in *Madras Steam Navigation Co., Ltd.* v. *Shalimar Works Ltd.* (9), which is a high authority of Sir Lawrence Jenkins, C. J., discusses all aspects of the matter.

In *Arjun* v. *Abdul* (14), the learned Judges held that a seizure cannot be said to be wrongful except where the writ was without jurisdiction or where the writ was executed against a person who was no party to the decree and where the goods were outside the scope of the suit. The learned Judges observed :

"In the present case the writ was issued by the Court and prima facie it was not a wrongful seizure. The writ was not without jurisdiction as the Court had jurisdiction over the subject matter, nor was the writ executed against a person who was no party to the decree, nor with respect to goods outside the scope of the writ. In these circumstances, we think that Art. 29 is inapplicable to the case. This view is supported by the cases of *Manavikraman* v. *Avisilan Koya* (2) and *Sokkalingam Chetty* v. *Krishnaswami Ayyar* (16)."

Then they distinguish the other cases on the ground that the writ was issued against a stranger. As regards the *Madras Steam Navigation Co., Ltd.* v. *Shalimar Works Ltd.* (9) they think that the

(14) A.I.R. 1921 Cal. 774.
(15) A.I.R. 1925 All. 131.
(16) [1920] 38 M.L.J. 324=11 M.L.W. 479=55 I.C. 786=(1920) M.W.N. 192.
(17) [1887] 11 Bom. 133.
(18) [1904] 27 Mad. 346.

observations are obiter. This decision, with all respect, gives no reason why there should be this distinction drawn. It simply purports to follow *Manavikraman* v. *Avisilan Koya* (2) and *Sokkalingam* v. *Krishnaswami* (16). In *Manga* v. *Changa Mal* (15) it was held that Art. 29 applied to a suit for compensation tor wrongful seizure of moveable property and that there could be no wrongful seizure bccause the attachment was made under legal process. The learned Judges thought that Art. 29 would apply only in cases where the seizure was without jurisdiction.

As observed in *Hughes* v. *Chairman of the Municipal Commissioners, Howrah* (3) and the other cases I have referred to, a seizure by the plaintiff on insufficient grounds is wrongful ab initio and cannot be said to become wrongful only when the Court adjudicates on the matter. The balance of authority is in favour of the view that Art. 29 would apply both to cases of seizure under orders passed by a Court without jurisdiction and to cases of seizure under orders passed by a Court having jurisdiction but on insufficient grounds. In fact in all the *Madras* cases referred to,where it was held that Art. 29 applied, the seizure was by a Court having jurisdiction but on insufficient grounds. And even in *Sokkalingam Chetty* v. *Krishnaswami Ayyar* (16) this distinction was negatived.

I am of opinion that Art, 29 applies to all cases of attachment before judgment where specific property is seized and the seizure is wrongful either because the Court had no jurisdiction or because the attachment was obtained on insufficient grounds, that it makes no difference whether the property attached belongs to the defendant or to a third party and that we are not at liberty, having regard to the plain provisions of the article, to read into Col. 3 anything that would make the starting point a different one. In this view it is unnecessary to consider the question as to whether the Court was right in awarding any damages in this case. I would allow the appeal and dismiss the plaintiffs' suit with costs throughout.

Reilly, J.—On 30th March 1920 the defendants obtained from the Subordinate Judge of Dharwar a conditional order against the plaintiffs under R. 5, O. 38, Civil P. C., for attachment of moveables before judgment. The attachment was made on 9th, 10th and 11th April 1920. On 21st April 1920 after hearing the plaintiffs the Subordinate Judge confirmed the attachment. The plaintiffs appealed to the High Court of Bombay, which ordered the attachment to be raised as having been obtained by the defendants on insufficient grounds. That order was made on 16th September 1921. On 26th October 1921 the plaintiffs instituted this suit for damages on account of the attachment. The question before us is whether the suit is time barred, having been brought more than a year after the attachment was effected.

The defendants, who are the appellants here, contend before us that the suit is covered by Art. 29, Sch. 1, Lim. Act, which runs "for compensation for wrongful seizure of moveable property under legal process." Taking those words in their plain meaning they certainly cover the case. But it is contended for the plaintiffs that "wrongful" in this article has something narrower than its ordinary meaning, that it refers only to seizures wrongful because made under the order of a Court without jurisdiction in the matter or in respect of the property of a person who is not party to the proceedings or in excess of the order of the Court. On the face of it that is an arbitrary restriction of the meaning of "wrongful" in the article. It cannot be denied that, if an attachment before judgment is obtained by misrepresentation or on insufficient grounds, it is wrongful in the ordinary sense of the word. If it were not wrongful no suit for damages in respect of it would lie, and that is not contended.

But it is argued that a restricted and artificial sense has been placed on the word "wrongful" in Art. 29 by judicial interpretation. The cases cited before us to show that are *Manavikraman* v. *Avisilam Koya* (2), *Sokkalingam Chetti* v. *Krishnaswami Ayyar* (16), *Arjun* v. *Abdul* (14) and *Manga* v. *Changamal* (15). The last three of these cases rest on the first. The second rests on the first, the third on the first and second and the fourth on the first and second and third. But unfortunately there appears to have been some misapprehension about the first case. When we examine that case, we find it was not con-

cerned, as was apparently thought by the learned Judges who referred to it in the later cases, with an attachment of a defendant's property obtained by a plaintiff before judgment under R. 5 or R. 6, O. 38, Civil P. C., or the corresponding provisions of the previous code. In that case a janmi in Malabar, the Nilambur Tirumalpad, had sued another janmi, the Manjeri Karanamulpad, and a Mappilla to recover possession of a hill : the Mappilla, claiming to have obtained a lease of the hill from the Karanamulpad, had cut some trees on it ; the Tirumulpad who claimed the trees as his own, obtained an order for the attachment of the logs pending the suit. That attachment was obviously not an attachment of the defendant's property to prevent him from disposing of it or removing it in order to obstruct or delay the plaintiff's remedy in execution if he should get a decree, that is an attachment such as is now made under O. 38, R. 5 or R. 6, but an attachment of part of the property in dispute between the parties for its preservation, such as is now made under O. 39, R. 7. As the learned Judges point out in the opening of their judgment, the Tirumalpad got the timber attached on the allegation that it was his. He failed in his suit and appeal. Then in the subsequent suit, which came before the High Court in *Manavikraman* v. *Avisilan Koya* (2), the Mappilla sued him for damages on account of the attachment of timber, which had been found to be the property of the Mappilla. The learned Judges eventually found on second appeal that the Mappilla's suit for damages was time barred ; but incidentally they remarked that the attachment was not a case of "wrongful seizure" within the meaning of Art. 29.

It is not necessary to discuss now whether that view was correct. But obviously that case, when examined is no authority for the proposition that an entirely different kind of attachment, an attachment of defendant's own admitted property, obtained before judgment by misrepresentation or on insufficient grounds is not a wrongful seizure within the meaning of Art. 29. The three subsequent cases, which I have mentioned and in which it has been assumed that *Manavikraman* v. *Avisilan Koya* (2), dealt with the latter kind of attachment, have been built, if I may say so with respect, on a foundation which was not there.

On the other hand there are a number of cases which interpret Art. 29 according to the plain meaning of the words, e. g., *Murugesa Mudaliar* v. *Jattaram Davey* (7), *Narasimha Rao* v. *Gangaraju* (8), *Jagjivan Javherdas* v. *Gulam Jilani Chaudri* (4), *Ram Narain* v. *Umrao Singh* (12) and *Madras Steam Navigation Co. Ltd.* v. *Shalimar Works Ltd.* (9). *Jagjivan Javherdas* v. *Gulam Jilani Chaudri* (4), was a case of money wrongly taken in execution. In *Murugesa Mudaliar* v. *Jattaram Davey* (7), the property of a third party was attached in execution. In *Narasimha Rao* v. *Gangaraju* (8) and *Ram Narain* v. *Umrao Singh* (12) the attachment was before judgment, but it was the property, not of the defendant, but of a third party which was attached. But, whether the attachment complained of is made before judgment or in execution, whether the property attached is that of a defendant or of a third party, if it is wrongful, in my opinion, we cannot exclude it from the scope of Art. 29 unless compelled to do by clear authority. In *Murugesa Mudaliar* v. *Jattaram Davey* (7) it was remarked obiter:

> "Article 29 is quite general in its terms, and we think it was intended to apply to all cases where the alleged wrongful seizure was made under legal process."

In *Narasimha Rao* v. *Gangaraju* (8), where a third party sued to recover the proceeds of his property, which had been wrongfully attached before judgment and sold, though they disagreed on other points. White, C. J., and Sankaran Nair, J., agreed that a suit for damages for wrongful attachment would come within Art. 29. In my opinion we are not compelled by authority to put any artificial or strained meaning on the words of Art. 29 and that article covers the present suit.

But it is contended for the plaintiffs that, even if that article covers the case the suit was in time because the "date of seizure" mentioned in that article as the time from which the period begins to run does not mean, in a case like this, the date of the actual seizure but the date when the seizure was declared wrongful by a competent Court. In this case that

would be the date of the decision of the High Court of Bombay on appeal, viz, 16th September 1921. But that construction obviously does great violence to the language used in the article. Why should the legislature have said one thing and have meant another, which could have been so easily expressed? If we compare Art. 29 with Art. 19 or Art. 23, it becomes still more difficult to believe that, when the explicit words "the date of the seizure" were used in Art. 29, they can have been intended to mean anything but the date of the seizure. The reason for trying to read another meaning into the words of the article is that in some cases, as in this case, there may be hardship because the plaintiff does not get a decision in his favour that the seizure was wrongful until after a year from the date of the seizure has expired. Such cases are unfortunate but I do not see how they could justify us in departing from the plain meaning of the word in the article. There was similar hardship in *Murugesa Mudaliar* v. *Jattaram Davey* (7) apart from the time spent in seeking a wrong remedy and in *Pandari Veeranna* v. *Mandavilli Subb Rao* (11) in respect of the attachment at the instance of defendant 1 in that case; but the learned Judges did not hesitate to apply the article literally on that account. In *Narasimha Rao* v. *Gangaraju* (8), all the learned Judges agreed that under Art. 29 time ran from the date of the actual seizure.

In my opinion nothing but overwhelming auhority or the clearest demonstration that the legislature could not have meant what it said would justify us in reading into the words "the date of the seizure" in Art. 29 the additional words suggested for the plaintiffs. No such justification has been shown. If the period fixed in the article is inconveniently short, that is a matter for the legislature, not for us, to put right. I agree that the plaintiff's suit was time barred under Art. 29 and that therefore this appeal should be allowed and the plaintiffs' suit dismissed with costs in both Courts.

P.R.S./S.N. *Appeal allowed.*

A. I. R. 1930 Madras 644

WALLACE, J.

Ganapathi Bhatta & another—Applts.

v.

Sanna Sedu Beari—Respondent.

Second Appeal No. 991 of 1926, Decided on 28th November 1929.

(a) Transfer of Property Act, S. 82—Suit for contribution by purchaser of part of property—Liability of properties is rateable and all must be brought on.

In a suit under S. 82 for contribution by a purchaser of part of the mortgagsd properties who has paid out the whole of the encumbrance he must bring on all the properties mortgaged so that the contribution may be determined rateably, and he cannot claim to fix the whole liability for contribution on only a portion of the mortgaged property. [P 645 C 1]

(b) Contract Act, S. 70—Enjoying benefit—Dominant motive to save another's property and not enjoyment of benefit by such is essential.

In a suit for compensation where the sole or dominant motive for the payment is not to save another man's property, the payment cannot be said to have been made for such other man and compensation under S. 70 cannot be given. The mere fact that the person can benefit by such payment is not sufficient: 38 *Cal.* 1; 24 *C.W.N.* 1068; 45 *I.C.* 786; *A.I.R.* 1928 *Mad.* 320 and 33 *Mad.* 235, *Ref.* [P 645 C 2]

(c) Contract Act, S. 70—Application under O. 21, R. 89, by purchaser subsequent to Court sale is not "lawful"—Payment by him is not "lawful payment"—Civil P. C. O. 21, R. 89.

In the Madras Presidency the purchaser of a property subsequent to the Court sale cannot properly apply under O. 21, R. 89, to have the sale set aside upon payment of the decretal amount, such application is not lawful and the mere fact that the Court entertained it does not make a payment made thereunder a "lawful payment" *A. I. R.* 1928 *Mad.* 320, *Appr.* [P 645, C 2, P 646, C 1]

B. Sitarama Rao—for Appellant.

K. P. Sarvotham Rao—for Respondent.

Judgment.—The original suit was by the plaintiff for a sum of Rs. 2,115 and odd which he claimed to have been paid by him on behalf of the defendant. The facts of the case are somewhat complicated but it is not necessary to set out more than the following. One Parvathi Amma and C. Lakshmana Rao executed two mortgages, Exs. A and B, in favour of one Sankar Rao. The three items in the present plaint were part of the mortgage property. Item 1 is called Kodipadi arwar property which belonged to Lakshmana Rao, who sold it to Siva Rao, who sold it to the plaintiff. The other items 2 and 3 were brought to sale in execution of a money decree against Lakshmana Rao in favour of the defendant and were

purchased by him. The mortgagee sued on his mortgage, got a decree and brought to sale the Kodipadi arwar property and item 2. The plaintiff who had just bought the Kodipadi arwar property from Siva Rao in order to have the sale cancelled deposited along with Siva Rao the sale amount and had the sale cancelled. He now claims contribution from the defendant towards this amount which he had spent. Both the lower Courts had dismissed the suit and the plaintiff appeals.

The plaintiff in this Court attempted to argue his case first as one for contribution under S. 82, T. P. Act, but not only was that contention not put forward in the lower Courts which both emphasised that the plaintiff rested his case before them solely on S. 70, Contract Act, but the matters necessary for a claim under S. 82, T. P. Act, have not been put in issue. It appears from the Subordinate Judge's judgment that the properties brought to sale under the mortgage are not the whole of the properties mortagaged. For a suit under S. 82 the plaintiff has to bring on all the properties mortagaged, so that the contribution may be determined rateably. He cannot claim to fix the whole liability for contribution on only a portion of the mortgaged property. He cannot therefore be allowed to raise this contention here.

It only remains to decide whether the lower Courts have erred in law in holding that the plaintiff has not proved his case under S. 70, Contract Act. Two points arise: First, whether the payment was for the defendant, and secondly, whether it was lawfully made. Both the lower Courts have held that the payment was not for the defendant. This point may be a mixed question of fact and law, but I see no reason to differ from the lower Courts. Primarily it is quite clear that the plaintiff's payment was to save his own property; and secondly, there is no evidence that he paid for the defendant except the insufficient fact that defendant has benefited by the payment. The Madras High Court's view as to what the phrase "for another person" means is more strict than the view taken in Calcutta set out in *Suchand Ghosal* v. *Balaram Mardana* (1) and *Kangal Chandra* v. *Gopi Nath Pal* (2). The narrowest interpretation, perhaps, is given by Oldfield J, in *Viswanadha Vijia Kumara Rangarao* v. *R. G. Orr* (3), who says it means that but for the existence of that other's interest the payment would not have been made. In *Avudayappa Pillai* v. *Thandavaraya Pillai* (4) the phrase is taken to mean "taking his place as the doer." The interpretation put on the phrase in these cases is narrower than in *Krishnachandra Deo Garu* v. *Srinivasa Charyalu* (5) where it is generally stated that, if a party pays in his own interest, he will not ordinarily be held to have made the payment for another, but whether he did so or not is a question of fact in each case. Certainly the mere fact, that another can benefit is not sufficient to establish that the act was done for his benefit. It is sufficient to say here that there is no fact in the evidence going to show that the sole or dominant motive for the plaintiff's payment was to save defendant's property and therefore the payment cannot be fairly said to have been made for the defendant.

As to the second point, the meaning of 'lawfully' I am not able to say that the lower Courts have committed an error of law. I do not regard the word 'lawfully' as synonymous with 'bona fide' as is suggested in the judgment of Anantakrishna Ayyar, J. in 27 *L.W.* 406. I do not, for example, consider that what has been done contrary to the spirit of the law or to public policy may nevertheless he done lawfully if it was done bona fide, but I need not go here into that matter at any further length. Plaintiff's application, taken by itself, is certainly not in accordance with the law in this Presidency. It is the law in this Presidency that a purchaser of the property subsequent to the Court sale cannot apply under R. 89, O. 21, to have the sale cancelled; so that, if the plaintiff alone had applied, his application could not in law have been sustained. I do not see that it makes his application any the more in

(1) [1911] 38 Cal. 1=12 C. L. J. 566=6 I. C. 810=14 C. W. N. 945.

(2) [1920] 24 C. W. N. 1063.
(3) [1918] 45 I. C. 786.
(4) A. I. R. 1928 Mad. 320.
(5) [1915] 31 Mad. 235=25 M. L. J. 433=26 I. C. 445=(1914) M. W. N. 99.

accordance with law that his vendor, defendant 2 in the mortagage suit, was a co-applicant with the plaintiff. It is suggested that defendant 2 may be taken as having acted as the agent of the plaintiff in the matter but, obviously, an act which is contrary to law for the principal cannot be within the scope of the agency. No case has been cited to me by the appellant in which a payment by a party who acquired his interest subsequent to the sale has been held to be a 'lawful payment,' and I find it difficult to see how the word 'lawfully' can apply to an application which the Court could only accept ignoring the law. But apart from this, appellant fails on the other point noted above. I must therefore hold that the lower appellate Court has committed no error of law. I dismiss this appeal with costs.

P.R.S./J.M. *Appeal dismissed.*

A. I. R. 1930 Madras 646

MADHAVAN NAIR, J.

(*Peddibhotla*) *Venkata Subbayya* and *another*—Defendants—Petitioners.

v.

(*Bhamidipati*) *Venkataramanayya* (*dead*) and *others*—Plaintiffs—Respondents.

Civil Revn. Petn. No. 934 of 1926, Decided on 21st October 1929, against decree of Sub-Judge, Bapatla, in O. S. No. 76 of 1923.

(a) Civil P. C., Sch. 2, Para. 1—Some defendants holding as lessees from other defendants—Plaint asking for relief against them but not parties to reference—Award giving relief against them—Award is illegal.

An award passed on reference to which all the parties interested in the dispute are not parties is illegal and should be set aside.

Defendants 6 to 9 were lessees holding from the other defendants. The plaint asked for relief against them and the award specifically gave relief against them. But they were not parties to the reference.

Held: that defendants 6 to 9 were parties interested in the dispute, and as they were not parties to the reference the award was illegal: 42 *Mad.* 632; *A. I. R.* 1923 *Mad.* 502; 23 *M. L. W.* 769 and *A.I.R.* 1927 *Mad.* 1154, *Rel. on.* [P 647 C 1,2]

(b) Practice — New plea — Some parties interested in dispute not being parties to reference—Objection that award was therefore illegal can be newly raised in revision.

The objection that an award was illegal as some of the parties interested in the dispute were not parties to the reference is one which relates to the jurisdiction of the Court, and so can be raised for the first time in revision. 42 *Mad.* 632; and 23 *L.W.* 769, *Foll.* [P 647 C 1]

(c) Civil P. C., Sch. 2, Para. (15)—Reference empowering arbitrator to dispose of case with or without enquiry—He receiving plaintiff's evidence in defendant's absence—Award is vitiated.

Under the reference the arbitrator was empowered to dispose of the case either with or without enquiry. He received evidence given by the plaintiff in the absence of the defendant.

Held: that the award was vitiated owing to the misconduct of the arbitrator: *Dobson and John Sullon* v. *Groves*, 115 *E. R.* 239; *Harvey* v. *Shelton*, 49 *E. R.* 1141; *Walker* v. *Frobisher*, 31 *E. R.* 943 and *A. I. R.* 1923 *Mad.* 301, *Foll.* [P 647 C 2, P 648 C 1]

V. Govindarajachari—for Petitioners.

Ch. Raghava Rao—for Respondents.

Judgment.—This is an application under S. 115, Civil P. C., to revise the order of the Subordinate Judge of Bapatla making the award passed by the arbitrator in O. S. No. 76 of 1923 a decree of Court. The plaintiff's suit was for a declaration of his title to the properties in the schedule together with mesne profits. There were nine defendants in the suit. Defendants 6 to 9 were alleged to be lessees of the properties holding them from the other defendants. A decree for mesne profits was also asked for in the plaint. After the issues were framed in the course of the suit, the plaintiff and defendants 1 to 5 put in a petition asking the Court to refer the subject matter of their dispute to the decision of an arbitrator under para. 1, Sch. 2, Civil P. C. They

"appointed one Suryanarayana of Bezwada as arbitrator for the purpose of enquiring into and deciding upon the allegations in the plaint and in the written statements"

and they undertook that they

"shall without filing an appeal etc., abide by the award which the said person shall give either after holding an enquiry or without an enquiry."

In due course the arbitrator passed an award and an application was made to the Subordinate Judge to make it a decree of the Court. Objections were filed by defendants 1 to 5. One of them was that the award should not be accepted for the reason that the arbitrator heard evidence of the plaintiff in the absence of the defendants. The learned Judge overruled this and the other objections and passed an order which is the subject matter of this petition.

Mr. Govindarajachari for the petitioners, i.e., defendants 1 and 2, argues that the decree and the award should be set aside on the ground that all the

parties interested in the dispute were not parties to the reference. This argument is based on the fact that defendants 6 to 9 were not parties to the reference. It has been decided in a series of cases in this Court : see *Polita Pavana Panda* v. *Narasinga Panda* (1); *Bhagavanulu* v. *Seetharamaswami* (2); *Venkataramanujacharlu* v. *Vasudeva Acharyulu* (3) and *Rengareddi* v. *Chinasidda Reddi* (4) that an award passed on a reference to which all the parties interested in the dispute are not parties, is illegal and should be set aside. This proposition is not disputed by Mr. Raghava Rao, the learned advocate for the respondents. But he contends that the petitioners should not be allowed to raise this objection now, because that was not raised before the lower Court and that even if they are to be permitted to raise it in this Ccurt for the first time, a decision should not be given in their favour without calling for a finding from the lower Court on the question whether defendants 6 to 9 are interested in the dispute in the suit to which they along with others are parties.

Neither of these contentions can be accepted. The question now raised relates to the jurisdiction of the Court in making the reference to the arbitrator. Sch. 2, para. 1, Civil P. C., clearly states that all the parties interested in the subject matter in dispute should join in asking the Court to make a reference ; it follows that if any of such parties does not join in the application, the Court has no jurisdiction to make the reference and the arbitrator can have no jurisdiction to pass an award on the reference. The question as it relates to the jurisdiction of the Court was allowed to be raised for the first time in this Court in *Polita Pavana Panda* v. *Narsinga Panda* (1) : see also in *Venkataramanujacharlu* v. *Vasudeva Acharyulu* (3). This contention must therefore be overruled.

As regards the second contention that the objection now raised should not be given effect to without a finding from the lower Court see in this connexion. *Bhagavanulu* v. *Seetharamaswami* (2). I agree that it may perhaps be necessary in certain cases that the Court should call for a finding on the question whether the parties who did not join in the reference are really interested in the matter in dispute. But in this case, no finding is necessary as I have no doubt that defendants 6 to 9 are interested in the subject matter of the dispute. As I have already pointed out, the plaint asks for relief against them and the award that has been made by the arbitrator gives relief against them specifically. In view of these facts, I do not think it is open to the counter-petitioners to contend that they are not parties interested in the dispute. This objection also must be overruled.

As the reference has been made without jurisdiction the award passed by the arbitrator is not legal and the Court has no jurisdiction to make the award a decree of the Court ; the entire proceedings should therefore be set aside. This would be enough to dispose of this civil revision petition.

But another point was also argued by the learned advocate for the petitioners, viz., that the award is vitiated by the misconduct of the arbitrator inasmuch as he received the evidence given by the plaintiff in the absence of the defendants. In support of this argument various decisions of English Courts were brought to my notice, viz., *Dobson and John Sullon* v. *Groves* (5), *Harvey* v. *Shelton* (6) and *Walker* v. *Frobisher* (7). These decisions support the petitioner's contention and are referred to in *Sanyasi Rao* v. *Venkata Rao* (8), where the point is dealt with elaborately. It should be held on the authority of these decisions that the arbitrator in this case did not conduct himself properly if the facts alleged against him by the petitioners are true. His conduct was apparently sought to be justified in the lower Court on the ground that under the reference the arbitrator may dispose of the case with or without enquiry. This provision no doubt gives power to the arbitrator to dispose of the matter without holding any in-

(1) [1919] 42 Mad. 632=51 I. C. 155=36 M. L. J. 538.
(2) A. I. R. 1923 Mad. 502.
(3) [1926] 23 M. L. W. 769.
(4) A. I. R. 1927 Mad. 1154.
(5) 115 E. R. 239.
(6) 49 E. R. 1141.
(7) 31 E. R. 943.
(8) A. I. R. 1923 Mad. 301=47 Mad. 30.

quiry at all. But it does not give him any power if he decides to hold an inquiry to take the evidence given by one party in the absence of the other party. On this ground also the award and the decree are liable to be set aside, if the facts alleged by the petitioners that the evidence of the plaintiff was taken in their absence is true. The respondent states that the decree should not be set aside on this ground, without a finding whether the allegation made by the petitioners is true ; but having regard to my decision that the entire proceedings should be set aside as the Court had no jurisdiction to make the reference, I do not think it is necessary to make any investigation as regards the truth of the allegation made by the petitioners and disputed by the respondent. The decree of the lower Court is set aside with costs. The learned Subordinate Judge will take the suit on file to dispose of it in accordance with law.

P.R.S./S.N. *Decree set aside.*

A. I. R. 1930 Madras 648

REILLY AND CORNISH, JJ.

V. M. Raghavalu Naidu & Son—Plaintiffs—Appellants.

v.

Corporation of Madras—Defendants—Respondents.

Original Side Appeal No. 73 of 1928, Decided on 26th November 1929, from decree of Beasley, J., D/- 30th March 1928, in civil suit No. 356 of 1927.

(a) Madras City Municipal Act, S. 349 (2)—Power to frame bye-laws not explicitly extended to refund of taxes—Bye-law is not valid—Interpretation of Statutes—Bye-law.

Subsidiary legislation, by bye-law if it is to be valid must come clearly within the powers given to the body making it by their controlling statute and neither S. 119 (1) nor S. 349 (2) empowers the Corporation to make bye-laws in regard to the refund of taxes. [P 649 C 2]

(b) Interpretation of Statutes—Bye-law—Bye-law framed under wrong provision of law—Body framing it competent to promulgate it under another provision—Bye-law is not invalid.

If a bye-law-making body promulgates a bye-law under a provision which is inapplicable but it still had an authority io make the bye-law under some other provision of law, the bye-law may yet be quite valid : 18 *Mad.* 236; *A. I. R.* 1924 *Mad.* 92, *Rel. on.* [P 650 C 1]

(c) Madras City Municipal Act, S. 349 (29)—Residuary section giving bye-law-making power—Words "carrying out all the purposes of this Act" include the making of refunds of timber tax.

The words "for carrying out all the purposes of this Act" are not controlled by the earlier words in that subsection and include the making of refunds of timber ; the subsection is a general and residual provision conferring bye-law-making power for all the purposes of the Act which have not been specifically mentioned in the Act, [P 650 C 1, 2]

(d) Madras City Municipal Act, Ss. 129(1) and 349 (29)—Bye-law 8—Refund of timber tax on export—Penalty entailing loss of refund in the absence of 48 hours notice prior to export is unreasonable, unauthorized and the bye-law is ultra vires.

Bye-law 8 provides that 48 hours notice prior to the export of timber must be given. A claim to enforce it by refusing refund is unreasonable and the Corporation has no authority to promulgate a bye-law enforceable by a penalty and so as to curtail the statutory right of the exporter to obtain a refund ; the bye-law is therefore ultra vires on these grounds and also on the ground that it effects to impose a penalty of forfeiture without any express power to do so : *Kruse* v. *Johnson*, 2 *Q. B. D.* 91 ; *Queen* v. *Pawlett*, 8 *Q. B.* 491 ; *Queen* v. *Bird*, 2 *Q. B.* 340 ; *Kirk* v. *Nowill*, 1 *T. R.* 118, *Appr.* [P 651 C 1, 2]

(e) Madras City Municipal Act, Ss. 129 (1)and 349(29)—Bye-law14 fixes penalty for breach of bye-laws at Rs. 50—Penalty of forfeiture of refund is not provided in bye-law.

The only penalty fixed by the bye-laws for a breach of them is that contained in bye-law 14, namely liability to pay a fine of Rs. 50 on conviction and power of forfeiture of the right to refund is not conferred by any bye-law for breach of bye-law 8. [P 653 C 2]

(f) Madras City Municipal Act, S. 129 (1)—Bye-law being consistent with S. 129 (1) is ultra vires.

Bye-laws made in pursuance of a delegated authority to that effect must be consistent with the statute under which they came to be made and since a bye-law abridges the right to refund conferred by S. 129 (1) it is inconsistent with it and is ultra vires : 18 *Mad.* 236, *Appr.* [P 654 C 1]

K. Rajah Ayyar and *V. Ramaswami Iyer*—for Appellants.

Vere Mockett for *S. Rajamanickam*—for Respondent.

Reilly, J.—The plaintiffs in this case are a firm of timber merchants trading in Madras. They claimed from the Corporation of Madras refunds of timber tax on a large number of lots of timber, on which they alleged that they had paid timber tax, when importing them into Madras and which they alleged they had afterwards exported from Madras. The Corporation, who are the defendants in this case, refused to make the refunds. The plaintiffs then sued the Corporation

for the total of the refunds claimed by them. The suit was heard by the learned Chief Justice, as Beasley, J., and he dismissed it. The plaintiffs appeal.

In their written statement the defendants maintain that the plaintiffs did not satisfy them that these lots of timber were timber on which tax had been paid when imported into Madras and that the plaintiffs did not comply with certain bye-laws made by the Corporation and that therefore they were not entitled to the refunds claimed. Under S. 98, Madras City Municipal Act, the Corporation may levy a tax on timber brought into the City. Under S. 129 of that Act the tax shall be levied at such rates and in such manner as may be determined by the council of the Corporation, provided that the rates shall not exceed Rs. 5 a ton and provided that, when any timber in respect of which tax has been paid is exported beyond the city, nine-tenths of the tax levied thereon shall be refunded. The plaintiffs, as I have said, applied for these refunds on the ground that they had exported timber on which they had already paid tax when it was imported. The ground of refusal on the part of the Corporation which occupied attention at the trial of the suit and at the hearing of this appeal is that the plaintiffs did not make their application for refund 48 hours before the timber was exported, as required by a certain bye-law made by the Corporation. That bye-law is bye-law 8, published in a notification with other bye-laws in the Fort St. George Gazette on 27th September 1921. It runs :

"Such application (that is an application for refund of timber-tax) shall be made at least 48 hours before the date of the intended export beyond the limits of the city and shall be accompanied by the original receipt granted on import thereof."

That last word "thereof" is a little peculiar ; but we need not spend any time on that. The defendants say that they can enforce that bye-law, which according to them is a valid bye-law, by refusing to give the refund if it is not complied with. The plaintiffs contend that the bye-law in the sense in which the defendants wish to enforce it is beyond the power of the Corporation to make.

Now that bye-law with the other bye-laws in the same group in the notification I have mentioned purports to have been made under Ss. 129 (3) and 349 (2), Madras City Municipal Act. I think it is quite clear that that bye-law cannot have been made and could not be made under S. 129 (3) of the Act, which runs:

"The council may make bye-laws for the seizure and sale of timber in respect of which the tax due is not paid."

Could it have been made under S. 349 (2) ? The learned Chief Justice is of opinion that it could be made validly under that section. With respect I feel bound to differ from him on that point. Subsidiary legislation, by bye-law, if it is to be valid, must come clearly within the powers, given to the body making it, by their controlling statute. S. 349 (2) of the Act runs :

"The council may make bye-laws, to provide for the regulation of the time and mode of collecting the taxes, duties and tolls under this Act."

The learned Chief Justice says in his judgment:

"In my view the words 'collecting the taxes, duties and tolls under this Act' must include the question of refunds of the tax so collected."

With that opinion I am unable to agree. The collection of taxes to my mind is one thing ; the refund of taxes is quite another thing. In respect of many taxes which are collected there is no right in anybody to claim refund. If the legislature gives any subordinate body the power to impose a tax, that is a power to require some person to pay the tax, the duty in that case is upon the tax-payer. If the legislature gives the tax-payer the right to claim a refund in certain circumstances, then the duty is upon the other party, upon the body which collects the tax. And to give power to make bye-laws regarding the collection of taxes, the time and manner in which they are to be paid by those persons from whom they are due, appears to me an entirely different thing from giving power to make bye-laws about the conditions on which the Corporation or other body concerned is required to perform its duty of refunding the tax. I cannot find any authority in S. 349 (2) empowering the Corporation to make bye-laws in regard to the refund of taxes.

Then could the Corporation make this bye-law under any other section of the Act ? It has been suggested for the plaintiffs that as the Corporation purported to make these bye-laws under

Ss. 129 (3) and 349 (2) of the Act, it is of no interest to us whether they could have made bye-law 8 under any other section of the Act and that they must be confined to the power to which they themselves have appealed and under which they have purported to make the bye-law. On the other hand, Mr. Mockett for the defendants has contended that, if a bye-law-making body quotes, when promulgating a bye-law, some provision which is inapplicable, that bye-law may yet be quite valid; provided the bye-law-making body had authority to make it under some other provision of law misquoting their authority by oversight or mistake does not take away any authority given by law. On that question I agree with Mr. Mockett's contention. That is clearly the view which was taken by a Full Bench of this Court in *Rajam Chetty* v. *Seshayya* (1), and it is the view which was adopted and applied by Krishnan, J., in *Secy. of State* v. *Appa Rao* (2). No authority to the contrary has been quoted before us.

Let us see then whether this bye-law could have been made by the Corporation under any other provision of the Act. The learned Chief Justice is of opinion that it could have been made by the Corporation under S. 129 (1) of the Act. That subsection provides :

"The tax on timber brought into the city shall be levied at such rates and in such manner as may be determined by the council."

There again I must differ from the learned Chief Justice. I do not think that out of a power of fixing the rates at which, and the manner in which, the tax must be paid you can get a power to regulate the refund of that tax. But Mr. Mockett has urged before us, what does not appear from the record or from the learned Chief Justice's judgment to have been urged before him, that this bye-law could have been made by the Corporation under S. 349(29) of the Act. That runs :

"The council may make bye-laws, not inconsistent with this Act or with any other law, to provide in general for securing cleanliness, safety and order and the good government and well being of the city and for carrying out all the purposes of this Act."

Mr. Mockett contends that these words "for carrying out all the purposes of this Act" are wide enough to give the Corporation power to make this bye-law. On the other hand it is contended for the plaintiffs that we must regard the words :

"for carrying out all the purposes of this Act"

as controlled by the earlier words in that subsection :

"securing of cleanliness, safety and order and the good government and well being of the city,"

and it is contended that making refunds of tax would not come within those expressions. Here again I agree with Mr. Mockett's contention. I do not think this is a case in which we can apply the rule in regard to the interpretation of generic words following specific words. The words here are not "and other" or "the other" purposes of the Act. They are much wider than that. They are "for carrying out all the purposes of this Act." That appears to me to be a general and residual provision to cover all the purposes of the Act which have not been specifically mentioned in the earlier paragraphs of the section. The making of refunds of timber tax may be legitimately said, I think, to be one of the purposes embraced in the Act.

But does it follow that the Corporation can make such a bye-law as they have made in this case regarding refunds of timber tax ? I agree with Mr. Mockett's contention that, even if there is and I think there clearly is, a duty, imposed by S. 129 on the Corporation to make these refunds, we need not read the Act in so unreasonable a way as to suppose that it is the duty of the Corporation officials to run round the town to find exporters of timber and thrust refund upon them. The reasonable way of interpreting the provision regarding refunds is that the Corporation must pay refunds when properly applied for by those who are entitled to them. I think we may go further and agree with Mr. Mockett that the Corporation may reasonably require exporters who claim refunds to show to their satisfaction that refunds are due to them. Indeed I did not understand that this was seriously contested by the other side. It would be perfectly reasonable in my opinion for the Corporation to issue a notification inviting exporters who claim refunds to apply at a certain office or in a certain form or at a certain time, provided the invitation and its details were

(1) [1895] 18 Mad. 236=5 M. L. J. 114 (F.B.).
(2) A. I. R. 1924 Mad. 92.

reasonable. If an exporter claiming refund did not comply with these details, I think the Corporation might well do nothing in the matter and leave it to the exporter to sue them if he thought fit; and in such a case it is probable that, if the exporter's conduct had been unreasonable in not applying in the way he was invited to do or giving proper information to the Corporation officials, he would lose his costs and he might perhaps have to pay the Corporation's costs, even if he succeeded in getting his refund decreed. But all that is a very different thing from making a bye-law such as has been made in this case. A bye-law, as Lord Russell said in *Kruse* v. *Johnson* (3), is:

'an ordinance * * * * imposed by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance."

Now here we have a duty imposed by the Act on the Corporation to make refunds of nine-tenths of the tax paid on timber if it is exported from the city. Can the Corporation make a bye-law, enforced by a penalty, compelling the person who has the corresponding right of demanding the performance of that duty to apply for it in a particular way or at a particular time? If we look at the penalty ostensibly imposed in this group of bye-laws, we find that under bye-law 14 any person offending against any of these bye-laws shall be punishable with a fine which may extend to Rs. 50. To apply that to bye-law 8 appears to me on the face of it absurd, and Mr. Mockett has agreed that that penalty cannot really be applicable to bye-law 8. Here we have an exporter, who has a right to claim a refund under the Act, and this bye-law 14 imposes upon him a penalty up to Rs. 50 if he does not apply at a particular time. Supposing he does not think it worth while to apply at all, how can the Corporation have the power to impose a penalty in that way? Realizing that that would be absurd, the Corporation have not attempted to impose that penalty on the breach of this bye-law 8. What they claim to do is to enforce another penalty, namely, if the application is not made 48 hours before the time of export, to penalize the exporter by not giving him the refund at all. It is worth noticing that the power to impose penalties for infringing bye-laws is given under S. 351 of the Act, and that only provides for penalties of fine. Then where does the Corporation get this power to impose an entirely different penalty, the loss of the refund? To my mind, if the Corporation could make a bye-law ordering the applicant for a refund to make his application in a certain way or at a certain time, they could not impose this particular penalty, that if he did not comply with that bye-law, he should lose his right to the refund altogether. And I may go further and say that in my opinion the Corporation has no power in this matter, in which they have a duty to perform and the exporter has a right to claim, to promulgate any bye-law, enforceable by a penalty, compelling an exporter to do some particular thing.

That would I think be enough for the disposal of this appeal. But several other matters have been discussed at length before us, and I shall just say a few words about them. The learned Chief Justice was of opinion that at any rate this bye-law 8 was a reasonable bye-law, that there was nothing unreasonable in requiring an exporter to give 48 hours' notice of his export, if he wanted to get a refund. With that view I am unable to agree. I think it can easily be shown that quite apart from any question of the power of the Corporation to make this bye-law, as it stands, without qualification, without provision for exceptional circumstances, it would be an unreasonable bye-law. Suppose that a Government Engineer or a private person sends an order to Madras today from some place a few miles outside the city for the urgent supply of some timber required to prevent the collapse of a bridge or a factory. If this bye-law stands good, no one from Madras could send out timber either today or tomorrow, however urgently it might be required (other than timber grown in Madras, of which we all know there is comparatively little) except on pain of losing all right to the refund of nine-tenths of the tax, to which he is entitled under the Act. That appears to me to show that we cannot say that this bye-law, as it stands, without qualification

(3) [1898] 2 Q.B.D. 91=67 L.J. Q.B. 782=62 J.P. 469=78 L.T. 647=14 T.L.R. 416=19 Cox. C.C. 103=46 W.R. 630.

and without provision for exceptional circumstances, is even a reasonable bye-law.

But reasonable or not in itself, if it is enforced, does it not obviously curtail the right of the exporter to get his refund? In effect the Corporation say by this bye-law :

"Though we are bound to give the refund of this tax by the Act, we will not do so in certain circumstances, that is unless you give us 48 hours notice before export."

Mr. Mockett has contended that the bye-law in that sense can be regarded as carrying out the purposes of the Act. To my mind, it could more properly be described as defeating, or at any rate restricting, the purposes of the Act in respect of refunds.

A large number of cases have been quoted before us ; but I do not think it necessary now to refer to more than one or two of them. In *Queen* v. *Pawlett* (4), there was a right of appeal to the Quarter Sessions, given by the statute. The Court of Quarter Sessions added by rule of practice an additional condition that such an appeal must be entered so many days before the Sessions began. That additional condition, though regarded by the Divisional Court as very convenient, was held to be invalid. A still more instructive case is that of *Queen* v. *Bird* (5). Mr. Mockett suggested that that case was not applicable here. To my mind it is both very instructive and applicable. By the Licensing Act of 1872 a provisional license granted by the Licensing Justices had to be confirmed by the County Licensing Committee, before whom a person who had opposed the license before the Licensing Justices might appear and oppose its confirmation ; and under the Act the Justices in Quarter Sessions had to make regulations for the meetings of the Committee and the transaction of its business and proceedings. The Justices in Quarter Sessions for the County of London made rules that anyone intending to oppose the confirmation of a provisional license must give notice within seven days after the grant of the provisional license and must enter into recognizances in the sum of £20. The Divisional Court held that, though the rule about notice was reasonable and proper in itself, the rules were ultra vires because they imposed fresh conditions on the objector's right to oppose the confirmation, which had been given to him by the Act. Wills, J. declared it :

"a principle too clear to need the support of authority that, when a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself."

Is not that what the Corporation have attempted to do in this case ? The exporter has a right to claim this refund, if he exports timber. The Corporation have in effect attempted to abridge that right by saying that it shall not have effect unless a further condition is fulfilled, unless the application is made 48 hours before the export. The learned Chief Justice at the close of his judgment said that in his opinion the effect of this bye-law is only this :

"Prove to our satisfaction that it is the same timber and you will get a refund."

With respect, in my opinion, that is a serious under-statement of the effect of this bye-law, as the defendants contend they are entitled to enforce it. Surely it would be more correct to say that what the defendants maintain is the effect of this bye-law is :

"Prove to us by giving us notice 48 hours before you export the timber that it is the same timber on which you have paid tax, otherwise we will not make the refund."

In my opinion this bye-law in the sense in which the defendants maintain they have a right to enforce it is entirely beyond the power of the Corporation to make.

There was another aspect of the case which was put before us, namely, that the Act gives the exporter a certain right to nine-tenths of the tax which he has paid and that, if the Corporation take away that right to the nine-tenths, as they claim they may do in certain circumstances, they are working a forfeiture of the exporter's right. On that point *Kirk* v. *Nowill* (6) was quoted before us, in which Lord Mansfield said that a bye-law cannot impose a penalty of forfeiture unless the power to make it is expressly given, and Buller, J., said that the invalidity of a bye-law to that effect was made more clear by the fact that the power to impose a penalty by fine was expressly given in that case. That case also is interesting in connexion with the present case and shows

(4) [1903] 8 Q.B. 491=42 L.J.M.C. 157=29 L. T. 390.

(5) [1893] 2 Q.B. 340.

(6) 1 T. R. 118=1 R. R. 160.

that there is another defect in this bye-law. But I do not think in the circumstances it is necessary to discuss that any further.

I may add that the defendants raised a plea of limitation; but, so far as the record goes, nothing appears to have been said about that at the trial, and nothing has been said about it before us.

In my opinion this appeal must be allowed. The result of that is that the plaintiff's claim to these refunds has still to be disposed of. The learned Chief Justice said that, if he had agreed with the plaintiffs that this bye-law was beyond the power of the Corporation to make, he would have referred the case to the Official Referee in order that he might report on which of these lots of timber import tax had been paid, as that is disputed by the defendants and has not yet been made out by the plaintiffs. Mr. Mockett suggested that the proper course would be rather to send the case back to the Corporation in order that they might now satisfy themselves whether the tax had been paid on these lots of timber. Now that the case has come before the Court, I think that cannot be done. The question what is due to the plaintiffs must be decided by the Court. And, if the case is not to go back to the Corporation, the defendants, I understand, do not object to its being referred to the Official Referee, to which the plaintiffs also agree. But, before that is done, it has been suggested before us that the parties should be given an opportunity to see whether they cannot agree that import tax was paid on all or any of these lots of timber. It appears to me very reasonable that they should be given an opportunity to do that, and in my opinion the most convenient course will be to make an order that this matter should be referred to the Official Referee, as the learned Chief Justice suggested for a report by him which of these lots of timber have been actually exported and on which of them import tax was paid, but with the qualification that the matter will be adjourned for a month in order that the parties may have an opportunity of seeing whether they cannot agree in respect to all or some of the items on this part of the case. For the purpose of the proposed settlement, documents produced by either party may be delivered to them out of Court on application.

In regard to costs the proper order in my opinion will be that the defendants shall pay the plaintiffs the costs of this appeal. Costs in the suit will remain to be dealt with when the final hearing of the suit is completed. The case should now go back to the original side for further proceedings.

Cornish, J.—I agree. In my opinion the Corporation bye-laws, even assuming they are intra vires, do not justify what the Corporation has done. There is no rule in the bye-laws which in terms empowers the Corporation to penalise an applicant by refusing a refund of tax because he has not complied with the bye-laws. R. 8 on which the Corporation relies simply says this:

"Such application (that is, an application for refund) shall be made at least 48 hours before the date of the intended export beyond the limits of the city, and shall be accompanied by the original receipt granted on import thereof."

Neither this rule nor any other rule says that on non-compliance with these requirements the applicant is liable to forfeit the refund. The only penalty fixed by the bye-laws for a breach of them is that contained in R. 14, namely, liability to a fine of Rs. 50 on conviction. If, therefore, it is an offence against the bye-laws not to give the Corporation at least 48 hours' notice of an intended export of timber as a condition to an application for refund, the utmost penalty to which the offender is exposed by the bye-law is a fine of Rs. 50. The bye-laws do not .empower the Corporation tc penalize him further by forfeiting his right to get a refund; and the Act confers no such power.

But apparently R. 8 is intended to mean a good deal more than what it says, and the Corporation claims that it is entitled by this rule to refuse a refund of the tax if the application for refund is not made within the prescribed time. That is the claim asserted in para. 5 of the written statement. Whether this is a valid claim depends upon whether the bye-law is valid. I do not think that the bye-law in question has any relation to S. 129 (3) which confers the power to make bye-laws for the seizure and sale of timber which has been imported without paying the tax. Nor do I think it necessary to decide

whether the power given by S. 349 (2) to make bye-laws "for regulating the time and mode of collecting the taxes" is wide enough to include a power to make bye-laws for regulating the time and mode of refund. In my view, S. 349 (29), with its power to make bye-laws "in general for carrying out all the purposes of the Act," is comprehensive enough to include the power to make regulations governing the refund of tax. But all bye-laws made under S. 349, are subject to the restriction imposed by the section itself that "the council may make bye-laws not inconsistent with the Act or with any other law."

Now S. 129 (1), Proviso 2, definitely enacts that when any timber in respect of which tax has been paid is exported beyond the city, nine-tenths of the tax shall be refunded. An unqualified right to a refund is given by the Act. But no one could suppose that a refund of the tax is to be had from the Corporation simply for the asking. The Corporation has obviously the right to require that it shall be satisfied by proper evidence that a refund can be claimed. It is only right and reasonable, therefore, that the Corporation should have the power to make bye-laws for regulating the procedure to be followed in applications for a refund of tax; and, as I have said, I think S. 349 (29) gives the Corporation power to make bye-laws for this purpose. But a bye-law which professes to take away or abridge the right to a refund given by S. 129 would be clearly inconsistent with the Act; and if it is inconsistent, it is ultra vires. The authorities which have been referred to by my learned brother leave no doubt on that point. I will only supplement those authorities with a reference to a passage from the judgment of Shepherd, J., in *Rajam Chetti* v. *Seshayya* (1) at p. 245:

"Now it is a recognized principle of law that the rules made in pursuance of a delegated authority to that effect must be consistent with the statute under which they came to be made. The authority is given to the end that the provisions of the statute may be the better carried into effect and not with the view of neutralising or contradicting the provisions."

Rule 8 of the Corporation bye-laws undoubtedly does neutralise and contradict the right to refund given by S. 129 (1), because, as interpreted by the Corporation, it means that the Corporation can refuse to allow an applicant to prove his right to a refund unless he has given with his application 48 hours' notice of the intended export of timber; and for that reason, in my opinion, this rule is ultra vires.

I agree with my learned brother in the proposal to refer the matter to the Official Referee.

P.R.S./J.M. *Appeal allowed.*

A. I. R. 1930 Madras 654

RAMESAM AND CORNISH, JJ.

Sree Minakshi Mills Ltd., Madura—Defendants—Appellants.

v.

T. C. Anantarama Ayyar—Plaintiff—Respondent.

Original Suit Appeal No. 43 of 1927, Decided on 7th October 1929, from judgment of Waller, J., D/- 28th March 1927.

(a) Contract Act, S. 7—Offer of service accepted by wire containing words "awaiting detailed letter"—Acceptance held to be final and was not subject to reservation — Contract—Construction.

A, the managing agent of a limited company had an interview with *B*, a qualified engineer, in connexion with employing him as engineer for constructing mill buildings. *B* was offered Rs. 350 a month, but to this he replied that he could not accept any salary less than Rs. 400 per mensem. In reply to this proposal *A* sent a telegram running thus: "Agree 400 without conveyance to act Engineer and Manager. Please join duty immediately." To this *B* replied: "Shall arrive Madura Friday 1st February awaiting detailed letter."

Held: that the last telegram was itself a complete acceptance, and though it is true that ordinarily a phrase like "awaiting detailed letter" might mean that acceptance was not intended to be final until the details were known, yet as the correspondence of each case must be construed with reference to the surrounding circumstances, in the present case the phrase "awaiting detailed letter" did not mean any reservation." [P 655 C 2, P 656 C 1]

(b) Contract Act, S. 73—Contract of service — Measure of damages for breach of promise is obtained by considering usual rate of wages and loss of time before similar employment could be obtained — Servant must use diligence to find another employment.

The measure of damages for the breach of promise is obtained by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for con-

tinuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment. The Court should see in each particular case what time may reasonably be expected to elapse before a person wrongfully dismissed can secure a similar employment. [P 657 C 2]

Srinivasa Raghavan and *Avagarajan* —for Appellant.

T. M. Krishnaswami Iyer and *T. A. Ananta Iyer*—for Respondent.

Ramesam, J. — This is an appeal against the judgment and decree of our brother Waller, J., decreeing the plaintiff's suit with costs. The suit is by the plaintiff for damages for wrongful dismissal by the Sri Meenakshi Mills, Limited, of Madura. The plaintiff is a Graduate in Arts and in Engineering, of the Madras University. He was employed in the Public Works Department for some time, but lost his employment on account of retrenchment in that department and, at the time the events which are the subject of this suit took place, was out of employ. In about October 1921 a limited company was formed, called the Sri Minakshi Mills Ltd., and Messrs. Theagaraja Chetti & Co. were its Managing Agents. In October 1923 Mr. Theagaraja Chetti had an interview with the plaintiff in connexion with employing him as engineer for constructing mill buildings. But at that time Mr. Theagaraja Chetti was attempting to get the services of Mr. V. T, Srinivasa Ayyangar who was still in Government service. Until that matter was settled, he was not willing to employ the plaintiff. In November 1923 the plaintiff wrote to Mr. Theagaraja Chetti requesting him to inform his final decision (Ex. 1). On 8th December Mr. Chetti addressed a letter to the plaintiff informing him that Mr. Srinivasa Ayyangar was not available and that he was going to send an advertisement to the papers for an engineer under instruction of the directors (Ex. A). The advertisement in the "Hindu" is Ex. K and the plaintiff's application is Ex. B. The qualifications stated in his application, which are admitted to be correct, show that, until the contrary is proved, we must take it, that the plaintiff is a qualified engineer competent to undertake the construction of the buildings of the Sri Meenakshi Mills, Ltd.

Mr. Theagaraja Chetti himself had something to do with such matters and though he is not qualified in the sense that he did not receive education in a technical college, he is certainly competent to judge of the fitness of an engineer and we have no doubt that he thought that the plaintiff was a competent engineer. In Ex. C the plaintiff was offered Rs. 350 a month. But he replied by Ex. D that he cannot accept any salary less than Rs. 400 per mensem. He adds that he had previously agreed to accept Rs. 400 and he was willing to adhere to it. The reference is obviously to the conversation in October 1923. Ex. E is a telegram in reply to Ex. D. It runs thus :

"Agree 400 without quarter conveyance to act Engineer and Manager. Please join duty immediately."

Obviously the word 'manager' in this telegram was intended to mean not the Managing Agent of the company but merely manager of the construction works of the mills, and, everybody understood it to be so. In the plaintiff's application he mentions the fact that he had at one time 500 men working directly under him and with reference to this, the word 'manager' was apparently used. I mention this merely to show that there is no difficulty about the meaning of the term and there is no question of any variation of the offer so far as this word is concerned. The plaintiff replied, Ex. F, thus :

"Shall arrive Madura Friday 1st February awaiting detailed letter."

It is contended for the defendants that this letter is not an unconditional letter of acceptance and that the phrase "awaiting detailed letter" shows that there is some reservation intended by the plaintiff and not until there is acceptance after the letter was received, could it be said that there is a completed contract. Even on this contention we have no doubt that the parties acted on the footing that there was a completed contract after the receipt of the detailed letter. But it is contended for the appellants that as this is a contract completed by correspondence, the later conduct will not do. We do not agree with this contention. But apart from this, we think that Ex. F is itself a complete acceptance. It is true that ordinarily a phrase like "awaiting detailed letter" may mean that acceptance

was not intended to be final until the details are known. But each case must depend upon its own facts, the correspondence of each case being construed with reference to the surrounding circumstances. In the present case, we do not think that the phrase "awaiting detailed letter" meant any reservation. The detailed letter which was written on the invitation of the plaintiff is Ex. G and this shows that the defendants gave certain instructions to the plaintiff to be followed before the plaintiff left Madras. The evidence shows that even in October it was intended that the plaintiff should do something at Madras before going to Madura. It is with reference to this understanding that the plaintiff wanted detailed instructions in Ex. F and these instructions were given in Ex. G. It also appears that the defendants addressed a letter to the Metropolitan Vickers Electrical Co., Ltd. at Madras asking them to get into touch with the plaintiff in connexion with 1000 B. H. P. turbine for the mills. It is in pursuance of such a letter from the defendants that the Metropolitan Vickers Electrical Co. addressed Ex. H to the plaintiff. The plaintiff left Madras on 27th, went to Tinnevelly on some business of his own and finally arrived at Madura on 31st when he received Ex. G.

On the evidence we have no doubt that he entered upon his duties immediately and was doing such work as he was asked to do from that date up to 10th February. By that time some misunderstandings had arisen between the parties. It is difficult to say exactly what they are. Perhaps the defendants began to entertain some suspicions about the competency of the plaintiff. But if this was the only misunderstanding, we cannot see that there was any basis for it so far. Ex. J was then issued by the defendants to the plaintiff. The plaintiff was not willing to accept Rs. 450 renumeration and was apparently inclined to 'take the matter to a Court of law. Common friends, among whom we may mention Mr. K.V. Ramaswami Ayyar, a High Court vakil at Madura and also a director of the mills, intervened and attempts were made to settle the matter in such a way as to obviate the necessity of going to a Court of law. The results of these efforts is Ex. L. This embodies a design made by the plaintiff for building the mill and the idea was to submit this to two competent engineers, namely Mr. Sadasiva Ayyar, Assistant Engineer Madura District Board, and Mr. V. T. Srinivasa Ayyangar already mentioned, or failing them to any two engineers, agreed upon by both sides. If the plaintiff's design was approved the defendants were to take him back. The use of the phrase "will take back" also shows that at that time it was understood that there was a completed contract between the plaintiff and the defendants. But if the plaintiff's design was not certified, he was to accept the termination of his services. This phrase also shows that there was a complete contract of employment and an attempt to terminate it by Ex. J. We therefore, agree with Waller, J., in holding that there was a completed contract.

The next question that was argued related to the effect of Ex. L. According to the understanding in Ex. L the plaintiff's design was submitted to Mr. Sadasiva Ayyar and his opinion was against the plaintiff it is now contended that this is enough to put an end to the plaintiff's case on a proper construction of Ex. L. The words in Ex. L are "if the possibility is not so certified" and it is contended for the defendants that these words mean that, even if one of the two engineers to whom the matter is submitted is against the plaintiff, it is a case of the possibility not being so certified. We admit that the language is susceptible of this construction. But we also think that the phrase is somewhat ambiguous. It is possible that what the parties meant was that if both the engineers were against the plaintiff, he was then bound to accept the termination of his services. The subsequent conduct of the parties shows that this was the view on which they acted. For, immediately after Mr. Sadasiva Ayyar's opinion they, having found that V. T. Srinivasa Ayyangar was not available, referred the matter to another gentleman Mr. Annadurai Ayyangar. But both parties were not satisfied with his opinion. They then referred the matter to Mr. Baskara Ayyar whose opinion was in favour of the plaintiff. By this time they were able to have

consultation with Mr. Srinivasa Ayyangar. Both parties were introduced to him at the club and apparently he promised to give his opinion. If the result of Mr. Sadasiva Ayyar's opinion was that the whole matter went against the plaintiff, it is inconceivable why the defendant company went on seeking the opinion of another competent engineer, first Mr. Annadurai Ayyangar, then Mr. Baskara Ayyar and then Mr. Srinivasa Ayyangar. It is said this was merely because they wanted to be fair to the plaintiff and they were anxious to leave no blot on his reputation and they were even willing to take him back if really two engineers certified his design to be good. Some such notices might also have been there, but at the same time the parties already choosing to stand on their rights it is impossible to attribute the conduct of the parties to anything else but the idea that unless two engineers decided against the plaintiff, the matter could be taken to be a decision in his favour. Even if we are not correct in thinking that the phrase was ambiguous and the defendants' construction was the only possible construction of Ex. L, even then we must take it that the defendants have waived their rights on such a strict construction and entered into a fresh arrangement by which they were willing to abide by the opinion of Mr. Srinivasa Ayyangar. Ex. Q is a letter addressed by the plaintiff to Mr. Srinivasa Ayyangar enclosing a sketch showing the details of the design for a spinning mill and a description giving particulars of the specifications. It also contains Mr. Srinivasa Ayyangar's reply which says that the design is safe and can be accepted. This reply was on 2nd April 1924. Meanwhile, on 2nd April 1924, a letter was drafted from the defendant company seeking the opinion of Mr. Srinivasa Ayyangar. This was signed by Mr. A. Venkataraman, Assistant Engineer, on 3rd April. But Mr. Srinivasa Ayyangar returned it with the following endorsement:

"I herewith return the enclosures. On the points mentioned by you, Mr. Anantarama Ayyar requested my opinion as a brother engineer and I have replied him."

It is now argued before us that this reply of Mr. Srinivasa Ayyangar shows that he refused to give an opinion to the parties. It is possible to read the letter in that light. But seeing that both the parties were previously introduced to him and that he promised in the conversation of that occasion that he would give his opinion, the conversation referred to in Ex. 3, we think that it is not the proper construction of this endorsement. What he meant to say was that he already gave his opinion to a brother engineer and that opinion might be taken as the opinion sought for in Ex. 3 with reference to the conversation at the club. It is a compliance with the request of Venkatarama Ayyar and not a refusal. This is also the view of our brother Waller, J., and we agree with his view. We, therefore, think that Mr. Srinivasa Ayyangar's opinion was in favour of the plaintiff with reference to Ex. L. There being two opinions in favour of the plaintiff, he thought that he might be reinstated He accordingly wrote Ex. R. It is significant that Mr. Theagaraja Chetti instead of repudiating this mode of construing Ex. L immediately began to require what actually Mr. Srinivasa Ayyangar's opinion was. So he seems to have referred the matter to Mr. K. V. Ramaswami Ayyar, who then wrote Ex. S to the plaintiff. The correspondence may be taken to have terminated about this time and the suit was filed on 5th August 1924. We think that after the opinion of Mr. Srinivasa Ayyangar the defendants were bound to reinstate the plaintiff or to pay him damages.

The only question that now remains to be decided is what is the proper amount of damages to be awarded to the plaintiff Mr. Krishnaswami Ayyar for the respondent relied on a judgment of the House of Lords in *Beckham* v. *Drake* (1) as laying down the principles to be followed in such a case. It is there laid down thus:

"The measure of damages for the breach of promise now in question is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find

(1) [1848] 2 H. L. C. 579=13 Jur. 921=11 M. & W. 315=12 L. J. Ex. 486.

another employment. Upon these principles, in the present case, if the place of foreman in a type-foundry could not probably be again obtained without delay, and if the wages in the contract broken were higher than usual, the damages should be such as to indemnify for the loss of wages during that delay, and for the loss of the excess of the wages contracted for above the usual rate."

This principle has been recognized in all the text books and in later cases. But it is contended for the defendants-appellants that this principle applies only to a case where the contract is for a term, and that the time for which the plaintiff is entitled to reasonable notice should be taken to be the period in estimating the damages. But when we remember that the doctrine of reasonable notice itself is based upon the consideration that that is the time during which a fresh employment may reasonably be obtained, both principles come to the same thing. After all, we have got to see in each particular case what time may reasonably be expected to elapse before a person wrongfully dismissed can secure a similar employment. In the present case, the plaintiff has given evidence that he sought employment throughout India, Burma and Ceylon and in the Federated Malay States, and he actually secured one in the South Indian Railway only in May 1925. Under these circumstances, we cannot say that the period adopted by our learned brother, namely one year, is unreasonable. Even if we feel some hesitation as to whether we would have fixed the same period if any one of us were sitting as a trial Judge, still that doubt is not enough to induce us to differ from our brother Waller, J. The result is that the appeal fails and is dismissed with costs.

P.R S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 658

JACKSON, J.

Ethiyappa Gramany and *others*— Petitioners.

v.

Angappa Maistry— Respondent.

Civil Revn. Petn. No. 1865 of 1929, Decided on 17th December 1929, from order of Dist. Munsiff, Madurantakam, D/- 17th October 1929, in Civil Misc. Petn. No. 246 of 1929.

. Provincial Small Cause Courts Act, S. 17 (a)—Setting aside ex parte decree — Whether to ask to deposit or to furnish security is within Court's discretion—Order for deposit in absence of time for testing security is correct.

Upon an application for setting aside an ex parte decree the Small Cause Court has discretion either to ask for a deposit of the decretal amount or a security for that amount and where the time for testing a security is not sufficient, the Court exercises its discretion properly in ordering deposit instead of security and in dismissing the application for failure to make the deposit as ordered : *A. I. R.* 1929 *All.* 840 and *A. I. R.* 1926 *Mad.* 647, *Ref.* 43 *Mad.* 579, *Rel. on.* [P 658 C 2]

R. Somasundaram Iyer — for Petitioners.

Judgment.—The petitioner seeks to revise the order of the District Munsiff of Madurantakam at Chingleput dismissing an application to set aside an ex parte decree under S. 17, Provincial Small Cause Courts Act.

The petitioner alleging that he had come to know of the decree only twelve days back applied on 27th September to have it set aside. The District Munsiff on 1st October ordered the petitioner to deposit the amount, as there was not time to test the draft security tendered. It was a suit disposed of in March and the records had to be got from the District Court. It has been held in *Assam Mahomed Sahib* v. *Rahim Sahib* (1) that security need not be given along with the application, provided that it is all complete and in order within the month prescribed by Art. 164, Lim. Act. If the District Munsiff thinks it improbable that he will get the testing done within the period it is certainly within his discretion to say so and ask for a deposit, and he exercises that discretion entirely in the petitioner's favour. To set about testing the security and then to announce that the time had expired would work great hardship. And assuming that the petitioner has adequate security it is difficult to see how the demand for a deposit can unsuit him; for it is only a direction that he raise money in the open market upon security which he avers to be amply sufficient. It practically amounts to telling him to test the security for himself, and if he cannot raise the money it seems almost proof positive that the security is not sufficient. I do not find therefore that the learned District Munsiff did not exercise his discretion under S. 17 according to law.

(1) [1920] 43 Mad. 579=39 M. L. J. 539=55 I. C. 977=(1920) M. W. N. 376.

The petitioner, however, would have it that the Court has no discretion at all and whether he furnishes security or deposit is entirely within his own option. It is difficult to see how such a plea can be advanced in face of the perfectly plain language of the section; nor could such an option ever prevail in practice. Suppose that the petitioner elects to furnish a draft security, and before it is tested the time expires, what good then is his option? The fact is, that circumstances necessitate the direction of the Court and that is precisely why the statute provides for such direction. In *Jhaboo Misir* v. *Havaldar Tewary*, *A. I. R.* 1929 *All.* 840 it is held that the proviso to S. 17 is ambiguous and obscure, and the words "as the Court may direct," have no grammatical relation to the alternatives of deposit and security. The direction contemplated does not relate to the security being to the satisfaction of the Court and to say: "to give security to the satisfaction of the Court as the Court may direct" would be very clumsy and a construction never intended by the framers of the proviso. The proviso therefore must be taken to mean that the nature and kind of the security must be according to the direction of the Court which should also be satisfied as regards its sufficiency.

With all respect I see no distinction between the rejected interpretation, to give security to the satisfaction of the Court as the Court may direct, and the accepted interpretation, to give security to the satisfaction of the Court of a nature and kind as the Court may direct.

Nor do I see the practical difficulty which has led to this endeavour to read additional words into the plain and grammatical sense of the statute. It is suggested that a petition accompanied with a cash deposit need no direction of the Court, and therefore "as the Court may direct" can have no application to deposits. But this case affords an example where the direction of the Court might have been required. Suppose the petitioner had replied to the Courts' order. "I will make the deposit but please direct that I may substitute security when it is proved sufficient." The Court, under the proviso. could give this direction, which would be a very just conclusion of the matter. *Kaliaperumal Naidu* v. *Ponnusami Chettiar* (2) merely follows the general principle that the Court in the exercise of a discretion must act judicially and not arbitrarily. I have shown above that the Court had sound reason in the present case for demanding a deposit, and cannot be said not to have acted judicially.

For the above reasons. I decline to interfere. The petition is dismissed.

P.R.S./J.M. *Petition dismissed.*

(2) A. I. R. 1926 Mad. 647.

A. I. R. 1930 Madras 659

WALLACE, J.

Mothey Krishnayya — Defendant—Appellant.

v.

Mohamad Galeb Sahib—Plaintiff—Respondent.

Second Appeal No. 726 of 1926, Decided on 28th November 1929, from decree of Dist. Judge, West Godaveri, in Appeal No. 111 of 1926,

Evidence Act, S. 92, proviso 2—Want of consideration or failure of consideration may be proved—But party cannot prove that amount of consideration agreed upon was more or less than that stated in document.

It is open to a party to prove want of consideration or failure of consideration or a difference in kind of consideration, but it is not open to him to prove a variation in the amount of consideration. The difference in kind, that is the consideration mentioned, must be wholly absolute; a mere omission to mention some portion of the consideration will not come within the proviso, since such an omission is clearly a variation in the terms of the contract. Recitals then as to the kind of consideration or as to the actual payment of consideration may be shown to be false. Recitals as to the amount of consideration cannot be shown to be false, since the amount of consideration is clearly a term of the contract. It is therefore not open to parties to the document to give evidence that the amount of consideration agreed upon was more or less than what is stated in the document: 22 *All.* 370 (*P. C.*); 33 *All.* 340; *A. I. R.* 1926 *Mad.* 35 and 10 *L. N.* 1, *Rel. on*: 38 *Mad.* 514, *Held not affected by* 33 *All.* 340. [P 660 C 2, P 661 C 1]

P. Somasunadram—for Appellant.

G. Lakshmanna—for Respondent.

Judgment.—The facts necessary for disposal of this appeal are: the plaintiff had to pay off the mortgage amount due on a mortgage over property sold to him by the defendant under a document of sale Ex. B dated 19th June 1918. That contains a statement that "if in respect of this any dispute arise from any quarter, I shall, at my own expense set the

the same at rest and see that the sale is given effect to without any obstruction whatever, In respect of the said property I have not created as yet any right or interest in favour of any."

The defendant himself had obtained the property in a Court sale in execution of a money decree against a judgment-debtor Ibrahim Sahib who had previously mortgaged the property. It was this mortgage that the plaintiff had to pay off when it had ripened into a decree and the decree had been followed by execution proceedings. In order to preserve the property for himself the plaintiff discharged it. He has sued to recover from the defendant the amount of the loss and damage sustained by him in consequence. The defence was that the plaintiff was at the time of the sale fully aware of the mortgage and had himself orally agreed to pay it off and that he obtained the property cheaply in consequence. The defendant sought to give evidence of that oral agreement, but both the lower Courts have held that in view of the wording in Ex. A such evidence would be in contravention of S. 92, Evidence Act. They refused to admit it and decreed the plaintiff's suit. The defendant appeals and the point argued is this question of admissibility of the evidence of the case put forward by the defence.

The consideration named in Ex. A is Rs. 280. "I have sold" the document says "to you for Rs. 280 the immovable property etc." The defendant urges in effect that the consideration was something more than Rs. 280, that it was Rs. 280 plus an undertaking to discharge the existing mortgage on the property. S. 92 forbids the admission of evidence for the purpose of contradicting, varying, adding to, or subtracting from, the terms of the document as expressed by the written disposition of the property, except as allowed under various provisos, only one of which is relevant in this case, proviso 2:

"The existence of any separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms may be proved."

The interpretation which this section has received at the hands of various Courts is varied, and it is well to see how it has been interpreted, especially by the Privy Council. In *Sah Lal Chand* v. *Indarjit* (1) the Privy Council laid down that S. 92 is no bar to evidence showing that a recital in a sale deed that the consideration had been paid was false. That ruling, it must be clearly pointed out, does not touch on the question of the amount of consideration, but only on the question whether the consideration, whatever its amount, had or had not been paid. It was held that the recital of payment was not a term of the contract, so that S. 92 did not apply to that recital. It appears to me also that the Judicial Committee took for granted here that the amount of consideration is a term of the contract. They say:

"the contract was to sell for Rs. 30,000 which was erroneously stated to have been paid."

The other Privy Council case cited is *Hanifunnissa* v. *Faizunnissa* (2), a very short judgment differing from the High Court of Allahabad in its judgment reported in *Faizunnissa* v. *Hanifunnissa* (3) itself relying on the Privy Council case in *Balakishen Das* v. *W. F. Legge* (4). In *Hanifunnissa* v. *Faizunnissa* (2) it was held that it is open to a party to what was nominally a sale deed for consideration to show that no consideration did pass, and that what was a nominal sale was a real gift. The scope of that Privy Council judgment has been considered by this Court in several later cases, as the judgment therein is so short that it may be imperfectly understood and even misused: see *Nara Reddiar* v. *Doraiswami Reddi* (5), *Ramaswami Chettiar* v. *Govinddoss Krishnadoss* (6), and *Putti Sesha Aiyar* v. *Kuppachar* (7). [In the last case the head note about consideration not being a term of the contract is a misquotation of what the learned Judge has said in his judgment.] The net result of that discussion of the Privy Council case is that it is open to a party to prove want of consideration or

(1) [1900] 22 All. 370=27 I. A. 93=7 Sar 702 (P. C.).
(2) [1911] 33 All. 340=11 I. C. 308=8 A. L. J. 373 (P. C.).
(3) [1905] 27 All. 612=2 A.L.J. 360=(1905) A. W. N. 129.
(4) [1900] 22 All. 149=27 I. A. 58=7 Sar. 601 (P. C.).
(5) [1916] 31 M. L. J. 96=3 M. L. W. 589=35 I. C. 301=(1916) M.W.N.474.
(6) A. I. R. 1926 Mad. 35
(7) [1919] 10 M. L. W. 1=49 I. C. 699=(1919) M. W. N. 87.

failure of consideration or a difference in kind of consideration, but it is not open to him to prove a variation in the amount of consideration. As to evidence being admissible to show a difference in kind of consideration I own to some doubt, as such evidence appears to me to be an attempt to vary the term in the document as to consideration. The difference in kind, I take it, must be absolute; that is, the consideration mentioned must be wholly false; a mere omission to mention some portion of the consideration will not come within the proviso, since such an omission is clearly a variation in the terms of the contract. Recitals then as to the kind of consideration or as to the actual payment of consideration may be shown to be false. Recitals as to the amount of consideration cannot so be shown to be false, since the amount of consideration is clearly a term of the contract. It is therefore not open to parties to the document to give evidence that the amount of consideration agreed upon was more or was less than what is stated in the document. For this proposition the case in *Adityam Iyer* v. *Ramakrishna Iyer* (8), and *Anandacharan Sil* v. *Hargobinda Sil* (9) are authorities. The appellant points out in connexion with *Adityam Iyer* v. *Ramakrishna Iyer* (8), that it has been doubted by a Bench of this Court in *Ambiya Ammal* v. *Appadurai Mudali* (6), which takes the Privy Council case in *Hanifunnissa* v. *Faizunnissa* (2), as more or less dissenting from *Adityam Iyer* v. *Ramakrishna Iyer* (8). But with respect I do not think that the correctness of *Adityam Iyer* v. *Ramakrishna Iyer* (8) is affected by *Hanifunnissa* v. *Faizunnissa* (2), since the latter is not a case relating to a variation of the amount of consideration. In the *Ambiya Ammal* v. *Appadorai Mudali* (6) case, on which appellant relies, there was a recital in the document that Rs. 89,000 out of a total consideration of Rs. 2,89,000 had been paid in advance. The plaintiff averred, and was allowed to adduce evidence to prove, that only Rs. 60,000 was paid, that is, to show that the recital as to payment was incorrect. The defendant was also allowed to give evidence to show that it was agreed that Rs. 89,000 should be the figure shown as paid although only Rs. 60,000 was in fact paid, it being agreed at the time of sale that the total figure of consideration should be shown as Rs. 2,89,000 instead of the true figure of Rs. 2,60,000. That, I admit, seems to go very near to ruling that the defendant could adduce evidence that the total amount of consideration was not the figure given in the contract.

But the judgment states very clearly that he was allowed to adduce this evidence only for the purpose of rebutting plaintiff's case that the recital as to payment of consideration in the document was not correct, and not for the purpose of enabling the Court to decide what was the actual amount of consideration. That is, the learned Judges really laid down that the defendant could show that the figure of Rs. 2,89,000 was really the figure contracted for, so that the defendant was not really attempting to give evidence in variation of the contract but was really maintaining the correctness of the terms of the contract. The ruling in *Kailash Chandra* v. *Harish Chandra* (10) is on the same lines and goes no further. In *Ramasubba Iyer* v. *Muthiah Kone* (11), Devadoss, J., decided that the recital in a sale-deed that there is no incumbrance on the property is not a term of the contract and, therefore, evidence can be given to show that the vendee knew of such incumbrance. The appellant relies on this case but it does not really help. It is not evidence of incumbrance which is here shut out, but evidence that the consideration included the discharge of the incumbrance.

Although I am constrained to the view that some of the cases quoted above enlarge too much the opportunities of avoiding S. 92, I think it is clear on the authorities that a party to a document of sale of immovable property admitted to be a sale, that is, a transfer of immovable property for a stated consideration cannot be permitted to adduce evidence to plead that the consideration was more in amount than is stated in the document. That proposition may be reinforced by emphasising what has been pointed out in *Anandacharan Sil* v. *Hargobinda Sil* (9) that, if it were not obliga-

(8) [1913] 38 Mad. 514=25 M. L. J. 602=21 I. C. 458=(1913) M. W. N. 847.
(9) A. I. R. 1923 Cal. 570.
(10) [1901] 5 C. W. N. 158.
(11) A. I. R. 1925 Mad. 968.

tory on parties to state the full amount of the consideration in their deeds of sale, a door would be opened for fraud upon the stamp revenue. In my view, therefore, it was not open to the defendant to plead that the consideration for the sale was more than Rs. 280 recited in the sale deed, and in that view the lower appellate Court's decision appears to me correct.

There was some discussion as to whether the defendant could prove that the agreement to discharge the mortgage was prior to the contract of sale and was, therefore, an independent transaction, but I do not think the point can really be taken. It is not asserted that there was any consideration for the plaintiff discharging the mortgage debt except his purchase under the sale deed, so that the separation of the two transactions is not a separation in fact. The written statement clearly implies, as the lower Courts have held, that the discharge of the mortgage was regarded as part consideration for the sale.

No other points have been argued before me. I find, therefore, there is no error of law in the lower appellate Court's decision and I dismiss the appeal with costs.

P.R.S./V.S. *Appeal dismissed.*

A. I. R. 1930 Madras 662

ANANTAKRISHNA AYYAR, J.

C. Sankaranarayana Mudaliar — Plaintiff—Appellant.

v.

Tangaratna Mudaliar and *others*— Defendants—Respondents.

Second Appeal No. 540 of 1926, Decided on 21st October 1929, against decree of Sub-Judge, Tinnevelly, in A. S. Nos. 138 and 139 of 1923.

(a) Hindu Law — Joint family — Family property—Onus of proof discussed.

While there is a presumption that a Hindu family is joint until the contrary is proved, there is no presumption that a Hindu family is possessed of property. The party alleging that the property held by an individual member of a joint family is family property, must show that the family was possessed of some property with the aid of which the property in question could have been acquired. If this is shown, and only then, the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate : *A. I. R.* 1927 *Mad.* 38, *Foll.*; 33 *All.* 677; *A. I. R.* 1923 *Mad* 262; *A. I. R.* 1929 *P. C.* 1; 32 *I. C.* 12; *A. I. R.* 1923 *Mad.* 262 and 35 *Cal.* 1035, *Rel. on*; 3 *Cal* 315 (*P.C.*), *Disc.* and *Dist*, [P 664 C 1]

(b) Hindu Law—Joint family—If nature of income from admitted joint family property is such as would not possibly have helped in or led to the acquirement of subsequent property there is no presumption that subsequent property was joint family property.

The proposition that mere possession of joint family property by a joint Hindu family would raise a presumption of law that all the property in the possession of a coparcener is joint family property would be strictly correct only if the joint family property possessed by the joint Hindu family was such as would have enabled and led to the acquisition of the other property. If having regard to the nature of the income from the admitted joint family property or otherwise, the same could not have possibly helped in or led to the acquisition of the subsequent property, then there is no presumption that the subsequent property is joint family property. [P 665 C 1]

K. Rajah Ayyar—for Appellant.

S. Srinivasa Ayyar—for Respondent.

Judgment.—Plaintiff's claim for partition of some items of property which he alleged to be joint family property, though allowed by the first Court, was disallowed by the lower appellate Court. He has accordingly preferred this second appeal claiming a share in those properties.

The plaintiff and defendant 3 are the sons of defendant 1 by his wife, who died in 1894. Defendant 2 is the son of defendant 1 by his second wife, who has been made defendant 6 in the case after the death of defendant 1 during the pendency of the suit.

The plaintiff claims a share in the properties on the ground that (a) the presumption of Hindu Law is that all properties standing in the name of any member of the joint family is joint family property, and the onus of proving the same to be the self-acquired and separate property of any member is upon him, (b) the properties in dispute were acquired by defendant 1 with the aid of the sale proceeds of the ornaments of the plaintiff's mother (worth about Rs. 600) and also out of the moneys which belonged to one Thangathanni, it being alleged that Thangathanni was the deceased paternal aunt of defendant 1, and that she orally bequeathed Rs. 6,000 to defendant 1 and his sons.

The first Court upheld the contentions of the plaintiff with reference to ground 2 (b) put forward by him as it was satisfied from the evidence that defendant 1

could not have made these acquisitions from his earnings as a clerk or manager of an estate under the Court of Wards; and on the evidence it found that the acquisitions were made out of the moneys mentioned by the plaintiff. As regards ground 1 (a) put forward by the plaintiff the trial Court observed as follows:

"The case in *Muthan* v. *Puniakoti Mudaliar* (1) is authority for the proposition that, where one member of a joint Hindu family acquires property without the aid of ancestral or joint family funds, the property acquired will, in the absence of any indication of intention to the contrary, be owned by him as joint family property. It has been held in *Krishnaji* v. *Paramanand* (2) that the presumption of jointness in respect of property subsequently acquired by each member of a joint Hindu family is not rebutted by the fact that the ancestral assets were small in proportion to the value of the subsequent acquisitions."

The trial Court accordingly held that the plaintiff was entitled to a share in the disputed items of properties also. On appeal by defendant 1's legal representatives (defendants 2 and 6), the lower appellate Court held that the plaintiff was not entitled to a share in the items in dispute; and hence the second appeal by the plaintiff.

The learned advocate for the appellant contended that both the grounds on which the District Munsiff decreed the claim of the plaintiff with reference to these items were tenable, that the presumption of Hindu Law was as held by the District Munsiff, and that the onus was on defendant 1 to prove his plea of self-acquisition. He also argued that there was no legal evidence to support the finding of the lower appellate Court that the properties were the self-acquisitions of defendant 1. He further urged that the lower appellate Court was wrong in holding that the plaintiff's case about Thangathanni having gifted Rs. 6,000 to defendant 1 and his sons was not proved.

I think that the findings of the lower appellate Court that Thangathanni was not shown to have possessed Rs. 6,000 and that it was also not proved that she gifted the same to defendant 1 and his sons as alleged by the plaintiff, are findings of fact binding on me in second appeal. No doubt there is the evidence of P. W. 1, among others, to support the plaintiff's allegation, as also some other oral and documentary evidence. But the question turned on appreciation of evidence, and I am not in a position to say that the findings of fact arrived at by the lower appellate Court are not binding on me in second appeal. The lower appellate Court has considered this question elaborately in several paragraphs of its judgment (paras 18 to 38). The lower appellate Court also held against the plaintiff's plea that defendant 1 utilized the sale proceeds of his first wife's jewels worth about Rs. 500 for purchasing the items in dispute. I have to accept the said findings of the lower appellate Court. (Here the judgment discussed evidence and then proceeded.) It is not the case of the parties that defendant 1 threw his acquisitions into common stock or converted the separate property into joint family property. I proceed to consider the next contention raised by the learned advocate for the appellant about the correct presumption of Hindu Law to be made with reference to the ownership of property standing in the names of a coparcener of a joint Hindu family. He cited the cases reported in *Dhurm Das Panday* v. *Shamsoondari Debiah* (3) at p. 240, *Banoo* v. *Kashee Ram* (4) at p. 317, and *Kunda Lal* v. *Shanker Lal* (5).

On the side of the respondents my attention was drawn to the cases reported in *A. Narayan Rao* v. *A. Seshamma* (6), *Ethirajula Naidu* v. *Govindarajula Naidu* (7) *Periakaruppan Chetty* v. *Arunachalam Chetty* (8) and *Kannammal* v. *Ramathilakkammal*, *A.I. R.* 1927 *Mad* 38. The decisions of the Privy Council in the case reported in *Rajangam Iyer* v. *Rajangam Iyer* (9) and *Annamalai Chetty* v. *Subramaniam Chetty* (10) were also relied upon.

I do not think it is necessary for me to discuss in detail the decisions quoted before me. The matter was considered in a recent case by Krishnan and Venkatasubba Rao, JJ. in the case reported

(1) [1915] 31 I. C. 18.
(2) [1919] 49 I. C. 240.
(3) [1841-46] 3 M. I. A. 229=6 N. R. 43=1 Suther 147=1 Sar. 271 (P. C.)
(4) [1877] 3 Cal, 315=3 Sar 781 (P. C.).
(5) [1913] 35 All. 564=21 I. C. 13=11 A.L.J, 910
(6) [1915] 27 M. L. J. 677=26 I. C. 33
(7) [1916]32 I. C. 12
(8) A. I. R. 1927 Mad. 676=50 Mad. 582
(9) A. I. R. 1922 P. C. 266=46 Mad. 373=50 I. A. 134 (P. C.)
(10) A. I. R. 1923 P. C. 1

in *A. I. R.* 1927 *Mad.* 38. Venkata subba Rao,J. observed as follows at p. 40 and 41 of the report:

"While there is a presumption that a Hindu family is joint until the contrary is proved, there is no presumption that a Hindu family is possessed of property. The party alleging that the property held by an individual member of a joint family is family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. If this is shown, and only then, the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate."

The two propositions laid down by Chamier,J, in *Ram Kishan* v. *Tunda Mal* (11) were followed, with approval, by the learned Judge. At p. 41, the learned Judge made the following further observation:

"In *Narayan Rao* v. *Seshamma* (6) Sir John Wallis, C,J., and Seshagiri Iyer, J., quoted with approval the observations of Chamier J, and accepted that learned Judge's view. In a recent case of this Court, *A.I. R.* 1923 *Mad.* 262, *Vadamallai Pillai* v *Subramania Chettiar* (12) the same view was again taken. It is unnecessary to cite further cases. The law on the point may now be taken as being settled."

The said observations of the learned Judge are supported by prior decisions. In *Annamalai Chetti* v. *Subarmaniam* (10), the Privy Council observed at p. 440, (of 56 *M. L. J.*) that:

"the burden of proving in an action for partition of joint family property that any particular item of property is joint, primarily rests upon the plaintiff. The circumstances may readily cause the onus to be discharged."

In *Ethirajulu Naidu* v. *Govindrajulu* (7) a Full Bench of this Court consisting of Sir John Wallis, C. J., Seshagiri Iyer and Phillips, JJ., held that

"property acquired by a member of a Hindu family when there is no nucleus of joint property, is presumed to be his separate property and the burden of proving that he threw it into the common stock is upon those who assert it."

The same view was held in the case reported in *Vadamallai Pillai* v. *Subramania Chettiar* (12), by Spencer and Devadoss, JJ.: see p. 66, etc., where the question is discussed by Devadoss, J., at p. 67. The learned Judge remarked:

"Where it is proved that there is no family nucleus which might in the ordinary course of things have helped him substantially in acquiring it, there is no warrant in any of the cases for the position that where the family nucleus is so small that it could not by any stretch of imagination have been the means of acquiring any portion of the property standing in the name of a member, such property should be held to be joint family property."

In *Atar Singh* v. *Thakar Singh* (13) at p. 1045, the Privy Council observed:

It is not disputed that the "onus on this issue is on the plaintiff"

i e., the onus is on those who allege any property to be joint family property in which he is entitled to a share, to prove the same. This is also in accordance with the latest pronouncement of the Privy Council in the case reported in *Annamalai Chetty* v. *Subramania*H (10). The learned advocate for the appellant, however contended that the decisions of the Privy Council in *Dhurm Das* v. *Mt. Shamsoondari* (3) and *Banoo* v. *Kashee Ram* (4) were not referred to in the later cases. As a matter of fact, I find that in the case reported in *Narayana Rao* v. *Seshamma* (6), Sir John Wallis Offg. C. J. and Seshagiri Ayyar J. referred to the decision of the Privy Council in *Dhurm Das* v. *Mt. Shamsoondari* (3). At p. 680, the Court observed:

"Under Hindu Law, mere living together of the members of a family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property, which was utilised for the purpose of making the subsequent acquisition, or the members must have thrown their joint earnings into the hotchpot with the intention of giving up all their individual rights in them."

After remarking that Chamier, J. had examined all the previous rulings in the case reported in *Ram Kishan* v. *Tunga Mal* (11) and that the learned Judges agreed with Chamier, J., in the propositions enunciated by him, they noticed the decision of the Privy Council in *Dhurm Das* v. *Mt. Shamsoondari* (3) and they added at p. 240:

"Lord Campbell states distinctly it is allowed that this was a family, who lived in commensality, eating together and possessing joint property."

The Privy Council accordingly had a case where there was joint family property.

In *Banoo* v. *Kashee Ram* (4) the Privy Council decided that when there has been a division of the family property, and the separation in the family, and the members were living separately, there was no presumption that the property in the possession of the defendant was joint family property, and that

(11) [1911] 33 All. 677=10 I. C. 543=9 A. L. J. 723.

(2) A. I. R 1923 Mad. 262.

(13) [1909] 35 Cal. 1039=6 I. C. 721=35 I. A. 206 (P. C.).

the onus lay on the plaintiff to prove that the property in respect of which he claimed relief was joint family property. In fact, the Privy Council dismissed the plaintiff's suit for partition of the property in the hands of the defendant. The observation of the Privy Council at p. 317 should be taken along with the facts of the case. This was so understood by the learned Judges of the Bombay High Court in the case reported in *Murari Vithoji* v. *Mukund Shivaji Naick* (14). This is also evidently how that case was understood in para. 291 of Mayne's Hindu Law. The earlier decision in *Dhurm Das* v. *Mt. Shamsoondari* (3) was not referred to in *Banoo* v. *Kashee Ram* (4); obviously the Privy Council had to consider in *Banoo* v. *Kashee Ram* (4) quite a different principle. In any event, having regard to the other decisions of the Privy Council, and also to the decision of the Full Bench of this Court, and the other decisions mentioned above, I do not think that the appellant's contention is sustainable.

In some cases, it is mentioned that mere possession of joint family property by a joint Hindu family would raise a presumption of law that all the property in the possession of a coparcener is joint family property. I should like to observe that the above position would be strictly correct only if the joint family property possessed by the joint Hindu family was such as would have enabled and led to the acquisition of the other property. If having regard to the nature of the income from the admitted joint family property or otherwise, the same could not have possibly helped in or led to the acquisition of subsequent property, then there is no presumption that the subsequent property is joint family property. Either the presumption should be raised only when the property possessed by the joint family was yielding such income as could have enabled the acquisitions of the subsequently acquired property, or the presumption if raised from the mere position of joint family property should be taken to have been counterbalanced by proof that such property yielded no income and could not have otherwise helped in or led to the acquisition of other property.

Having regard to the decisions mentioned by me above, I agree with respect, with the remarks of the learned Judge Venkatasubba Rao, J., at p. 41 of *A. I. R.* 1927 *Mad.* 38 that

"the law on the point may now be taken as being clearly settled."

All the contentions raised by the appellant accordingly fail and the second appeal is dismissed with costs.

P.R.S./S.N. *Appeal dismissed.*

(14) [1891] I5 Bom. 2(1.

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* A. I. R. 1930 Madras 665

ANANTAKRISHNA AYYAR, J.

(*Pakkiri*) *Mohideen Tharagan* and *another*—Plaintiffs—Appellants.

v.

Muhammad Mustappah Rowther and *others* — Defendants — Respondents.

Second Appeals Nos. 1034 and 1035 of 1926, Decided on 22nd November 1929, from decrees of Sub-Judge, Tinnevelly, in Appeal Suits No. 211 and 220 of 1924.

(a) Transfer of Property Act, S. 53—Onus of proof lies on plaintiff—Transfer for valuable consideration and with full intention of passing title to transferee and no benefit retained by transferrer is valid against attaching creditor even when intention is to defeat impending execution.

The onus of proof in a suit under S. 53 to avoid a transfer is on the plaintiffs who wish to avoid the transfer. If the transfer is for valuable consideration and is made with the full intention that the title in the property should pass to the transferee, and if no benefit be intended to be retained to the grantor, then the transfer will be valid as against an attaching creditor even though the object of the transfer might have been to defeat an impending execution. The general creditors of the transferrer are not defeated in such a case since instead of the property of the debtor which has been transferred there remains the money representing the price paid for the property in the hands of the debtor, and the creditors could proceed against the same.

[P667 C 2, P 668 C 1]

*** (b) Transfer of Property Act, S. 53—Intention to defeat creditor's "expected execution" does not invalidate transfer—But kuowledge of transferrer's intention to convert immovable property into money and to defeat creditors of transferrer invalidates transfer.**

The intention of the debtor to defeat executing decree-holder creditor's expected execution does not invalidate the transfer even though the transferee had also knowledge of the same. But if the transfer be for cash and be made to a stranger who had knowledge of the intention of the transfer to convert the immovable property (which cannot be secreted) into money (which could easily be secreted) and to defeat

the creditors of the transferor, then the transfer would be invalid. [P 663 C 1]

* (c) **Transfer of Property Act, S. 53—Transfer to existing creditor--Transferee having notice of intention to defeat other creditors—Nevertheless transfer is valid.**

If the transfer be to an existing criditor to whom the transferrer already owed money then even though the transferee had notice that the effect of the transfer would be to remove that property not only from the reach of the executing decree-holder's expected execution, but also from the reach of other creditors the transfer would nevertheless be valid and not open to objection under S. 53. It is open to every creditor to try his best to realise his debt from the common debtor and ordinarily in the race between the creditors he who lags behind could not complain of him who proceeded fast and succeded in getting at the property of the debtor : *A. I. R.* 1915 *P. C.* 115, *Foll.* [P 668 C 1]

* (d) **Transfer of Property Act, S. 53—Only one creditor existing—Transfer to stranger to defeat such creditor—Transfer is fraudulent and voidable.**

If there be only one creditor, then the act of the debtor in transferring all his property to a stranger with a view to secrete the same and defeat the creditor would be fraudulent and the transfer could be set aside if the transferee had notice of the circumstances, and of the debtor's evil design. [P 668 C 1]

(e) **Evidence Act, S. 103—Question whether or not transfer is fraudulent—Vendee should personally be examined — Transfer of Property Act, S. 53.**

The true object to be achieved by a Court of justice in finding out whether or not a transfer ie fraudulent can only be furthered with propriety by the testimony of the vendee who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination. It is an error to rely on the abstract doctrine of burden of proof : *A. I. R.* 1917 *P. C.* 6 and *A. I. R.* 1929 *P. C.* 95, *Rel. on.* [P 669 C 2]

B. Sitarama Rao and *T. A. Ananta Iyer*—for Appellants.

M. S. Venkatarama Iyer and *R. Srinivasa Iyer*—for Respondents.

Judgment.—These second appeals preferred by the plaintiffs arise out of two suits instituted by the same plaintiffs against defendants 1 and 2 who are the same in both the suits, and against defendant 3 who is the purchaser from one or other of the other defendants of the properties mentioned in the plaint. The prayer in the suits was for a declaration that the plaint properties belong to defendants 1 and 2 and that the sale deeds executed in favour of defendant 3 are not binding on the creditors of defendants 1 and 2. The purchaser is different in the two suits ; he is defendant 3 in each case. The purchasers will be referred as defendant 3 in the judgment for the sake of convenience. Defendant 3 in O. S. No. 236 of 1921 purchased from defendants 1, and defendant 3 in O. S. No. 237 of 1921 from defendant 2.

The plaintiffs alleged that they obtained a money decree in O. S. No. 517 of 1916 and attached the plaint properties before judgment in the said suit ; when final orders had to be passed in respect of the said attachment defendants 1 and 2 undertook not to alienate the properties pending disposal of the suit. After obtaining decree the plaintiffs had the properties sold in execution and themselves purchased the same on 14th June 1918. Defendants 1 and 2 applied to have the sale set aside. That application was dismissed on 5th September 1918. Discovering that there was a misdescription in relation to one of the properties in the attachment warrant (in as much as survey No. 468-B was by mistake mentioned in the attachment proceedings, instead of the correct survey No. 568-B which is the chief property included in the sale deeds in favour of defendant 3 in each of the suits), the defendants with a view to defeat the plaintiff's claims hit upon the idea of selling the properties (along with some other comparatively minor items) to defendant 3 in December 1918. The appeal preferred by the defendants was dismissed on 17th March 1919. The plaintiffs alleged that the sales in favour of defendant 3 in such suit were brought about with the intention of defeating the plaintiffs' decree debt. They alleged that the sale deeds were not supported by consideration and were also not real transactions, and that in any event the same contravened the provisions of S. 53, T. P. Act. The plea of defendnat 3 in each of these suits was that the sale in his favour was a bona fide transaction supported by consideration, that defendant 3 was a bona fide purchaser for value without notice and that the plaintiffs were not entitled to any relief. Both the lower Courts dismissed the plaintiff's suits and hence these second appeals have been preferred by the plaintiffs in the two suits.

The learned advocate for the appellants contended that the lower appel-

late Court's findings are unsatisfactory based on a mistake of law and in any event insufficient to warrant the dismissal of the suits. The lower appellate Court found in para. 15 of its judgment as follows :

"The plaintiffs have not discharged the onus of showing that the transfers evidenced by Exs. 1 and 2 were made with intent to defraud or delay the creditors. That being so the question whether the vendees are transferees in good faith and for valuable consideration requires no proof and no point can be made therefore of the fact that the vendees let in no evidence whatever on the said question".

In para. 22 the lower appellate Court remarked as follows :

"The fact that the assignment of the whole or the bulk of his property by the debtor was made to defeat the claim of a particular creditor is of no moment if the consideration be adequate. Even if the purchaser had asked the seller why he wanted to sell and the latter had told him that it was to defeat an execution, that would have been no ground for impeaching a transaction. But the case would be different if the transfer is made in fraud of the general body of creditors."

In para. 23 the learned Subordinate Judge further observed that :

"the evidence of plaintiff 1 led to the only conclusion that the purchase evidenced by the said documents were real and for valuable consideration but were made to defeat the decree debt of plaintiffs."

It may be mentioned that the defendants filed only their sale deeds Exs. 1 and 2 and let in no evidence oral or documentary. None of the defendants went into the box nor anybody connected with the sale deeds. The defendants seemed to have relied upon the abstract theory of the burden of proof though one would have expected that defendant 3 the purchaser in each of these suits, would have gone into the box and given evidence about his being a bona fide purchaser for value. It was contended that the lower appellate Court was not right in holding that the sale "made to defeat the decree debt of the plaintiffs" would still be good. While admitting that a real and a bona fide sale deed executed by the judgment-debtor for valuable consideration would be valid though the object might be to defeat an expected execution (since the effect of the sale would be to leave with the judgment-debtor moneys representing the value of the properties sold, which moneys could be utilized for paying, and would be available to the general creditors of the debtor), it was argued that when the sale is effected not to defeat an expected execution only but "to defeat the decree debt of the plaintiffs," that the same would be invalid. It was also argued that there was no evidence that there were other creditors. The respondents' learned advocate argued, on the other hand, that a sale to defeat an expected execution is not invalid, nor a sale to defeat an individual creditor. These are only circumstances from which in conjunction with the other evidence in the case the jury or the Court would have to find whether the object was to defeat or delay creditors. He argued that the findings in this case concluded the appeal against the plaintiffs-appellants.

There was also discussion before me that though as a matter of fact the Courts find that the plaintiffs did not prove that the property was attached, yet the decree passed in the suits specifically recited that the properties were attached, and it directed the sale of the attached properties. It was said that this circumstance had not been noticed by the Courts. Cases reported in *Sankarappa* v. *Kanayya* (1); *Hakim Lal* v. *Mooshahur Sahu* (2); *Aftabuddin Chowdhury* v. *Kumar Mukhapadhyaya* (3); *Musahar Sahu* v. *Hakim Lal* (4); *Fakira Singh* v. *Magho Singh* (5); *Loorthiya Odayar* v. *Gopalasami Aiyar* (6); *Ishan Chunder Das* v. *Bishu Sirdar* (7) bearing on the application of S. 53. T. P. Act, were cited before me, and extracts from the judgment of the Full Bench in the Irish case *In re, Moroney* (8) were also read to me.

The onus of proof in a suit under S. 53, to avoid a transfer, is on the plaintiffs who wish to avoid the transfer. If the transfer is for valuable consideration and is made with the full intention that the title to the property should pass to the transferee, and if no benefit be intended to be retained to the grantor, then the transfer will be valid as against an attaching creditor even

(1) 3 M. H. C. R. 231.
(2) [1907] 34 Cal. 999=6 C. L. J. 410=11 C. W. N. 889.
(3) [1918] 22 C. W. N. 427=45 I. C. 441.
(4) A. I. R. 1915 P. C. 115=43 Cal. 521=43 I. A. 104 (P.C.).
(5) [1917] 2 Pat. L. J. 516=40 I. C. 685.
(6) A. I. R. 1924 Mad. 450.
(7) [1897] 24 Cal. 825=1 C. W. N. 665.
(8) [1887] 21 Ir. R. 27.

though the object of the transfer might have been to defeat an impending execution. The general creditors of the transferrer are not defeated in such a case since, instead of the property of the debtor which has been transferred, there remains the money representing the price paid for the property in the hands of the debtor, and the creditors could proceed against the same: the debtor might as well have intended to have his property distributed among his creditors instead of allowing it to be taken in execution by one decree-holder creditor only. In such cases the intention of the debtor to defeat the executing decree-holder creditor's "expected execution" does nc invalidate the transfer even though the transferree had also knowledge of the same. If the transfer be for cash and be made to a stranger who had knowledge of the intention of the transferrer to convert the immovable property (which cannot be secreted) into money (which could easily be secreted) and to defeat the creditors of the transferrer, then the transfer would be invalid. If the transfer be to an existing creditor to whom the transferrer already owed money, then, even though the transferee had notice that the effect of the transfer would be to remove that property, not only from the reach of the executing decree-holder's expected execution, but also from the reach of other creditors, the transfer would nevertheless be valid and not open to objection under S. 53, since it is open to every creditor to try his best to realize his debt from the common debtor; and ordinarily in the race between the creditors he who lags behind could not complain of him who proceeded fast and succeeded in getting at the property of the debtor. (I am not now considering the effect of the insolvency law in this connexion.) A debtor is entitled to leave alone one creditor and satisfy the other creditors in cases not falling under Insolvency Acts (provisions relating to fraudulent preference, &c.). If there be only one creditor, then the act of the debtor in transferring all his property to a stranger with a view to secrete the same and defeat the creditor would be fraudulent and the transfer would be set aside if the transferee had notice of the circumstances and of the debtor's evil design.

Thus, in cases where no consideration of the law of bankruptcy comes in, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid, though the result might be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts: see *Musahar Sahu* v. *Hakim Lal* (4) at p. 524. But as observed by Sir Francis Maclean and Banerjee, JJ., in *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (7):

"Reading this section as a whole, then what it means, so far as it is applicable to a case like the present, is this: that where a transfer of immovable property is made with intent to defeat or delay any creditor of the transferrer it is voidable at his option."

In this connexion some passages from the judgment of Porter, M. R., in the Irish case *In re, Moroney* (8) at p. 55 may be quoted:

"Next Mr. Carton contended, in reference to the Statute of Charles, that the transaction before us was not intended to defeat creditors in the plural, but only one creditor; and *Wood* v. *Dixie* was relied upon on this point. It is important in this connexion to again consider what are the words of the Statute of Charles. Its intent is stated in the recital or preamble which I have already read, and which no doubt speaks of creditors. It was necessary to use the plural and not the singular number. But when we come to the operative part of the section, the words used are not in the plural only; for we have "that person or persons, his or their heirs (&c)"; and, therefore, no argument in favour of exempting the case of a single creditor can be deduced from the language of the Act. It would be the summit of absurdity to suppose that a mischief of this kind was to be struck at if two or more persons were affected, but that a single creditor was to be without protection. We were also pressed with the other consideration that the policy of the Act of Charles was quite different from that of the Bankruptcy Act. So it is. I admit that. The early Act only intended to protect the rights of a special class of creditors, and not all creditors, as the Bankruptcy Act does. If the inference suggested could be drawn from the Act of Parliament, it is very strange that neither the Judges who decided *Twyne's* case, nor Lord Coke, who took as much trouble to report and comment upon it, ever noticed the point, though the whole discussion there was as to one creditor, there having, in fact, been but a single creditor in *Twyne's* case. The statement of that case sets out: "*C* brought an action of debt against Pierce." There would have been the same answer to that action as is relied on here if the appellant's contention before us was right."

No doubt the intention to defraud must be proved; the Court which has to find on facts will have to take into consideration all the circumstances of the case, the existence of other creditors

whom the debtor paid out of the sale proceeds would be conclusive against the inference of fraud. But when the Court is able to come to the conclusion that it was to defeat a creditor, and not simply to defeat his "expected execution," then the transfer would be voidable at the instance of the creditor when the transferee was aware of that intention, and when the intention was not to use the money for payment of other creditors but to help the transferrer to convert immovable property into money and thus to enable the debtor to secrete the said money. The question will be essentially one of fact, and all that I am anxious to make clear is that it could not be laid down as a general proposition of law that intention on the part of both the transferrer and the transferee to defeat one creditor of the transferrer, could under no circumstance enable that creditor to avoid the transfer. The above propositions seem to be deducible from the cases decided under S. 53, T. P. Act, and from the authorities mentioned already.

In the present case, I think that the relevant questions that arise in these cases have not been properly tried, nor properly considered, by the Courts. Further, the only evidence is that given by the two plaintiffs in the case. The purchaser in each of these cases, whom I have called defendant 3, has not gone into the box, nor anybody connected with the sales. The abstract doctrine of burden of proof seems to have been too much pressed into service by the defendants (purchasers) in these cases. But, as remarked by the Privy Council, it is an error to rely on the abstract doctrine of burden of proof in all cases: see *Murugesam Pillai* v. *Gnana Sambanda Pandara Sannadhi* (10) and *Rameshwar Singh* v. *Bajit Lal Pathak* (11). At p. 408 (*of* 40 *Mad.*) the Privy Council observed as follows:

"A practice has grown up in Indian Courts of those in possession of important documents or information, lying by, trusting to the abstract doctrine of the onus of proof and failing to furnish to the Courts the best materials for its decision."

In the case reported in *Gurbaksh Singh* v. *Gurdial Singh* (12), the Privy Council decided that it is the bounden duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. They observed at p. 399 as follows:

"The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination. . . . . Their Lordships cannot doubt that if this part of the case had been treated from the point of view consistent with sound practice, as just stated, the High Court could never have reached the conclusion come to."

The learned Subordinate Judge admits in para. 19 that "in the stated circumstances, the said transfers may seem open to suspicion. No doubt, "suspicion, though a ground for scrutiny could not be made the foundation of a decision." *Muhammad Mehdi Hasan Khan* v. *Mandir Das* (13). But as observed by the Privy Council in the passage in *Gurbaksh Singh* v. *Gurdial Singh* (12), quoted above, the purchasers ought to have by their personal testimony helped the Court in dispelling the suspicion attaching to the transfers.

No explanation has been given why defendant 3 did not go into the box. The learned advocate only suggested that it was evidently by some mistake that the same was not done. Again it is not clear whether there were other creditors of defendants 1 and 2 at the time of the sales, though the lower Court's judgment makes general reference to "creditors," and whether there were other properties belonging to defendants 1 and 2, and if so particulars related to the same could be useful. If the plaintiffs had been the only creditors, then if the present finding of the lower appellate Court be accepted that the sales were made to defeat the decree debt of the plaintiffs, it is a question for consideration, in the light of the above remarks, whether the sales could be upheld, if the question had to be decided on the present scarty materials on record. I think that for a satisfactory disposal of these appeals, it is necessary that the lower appellate Court

(10) A. I. R. 1917 P.C. 6=40 Mad. 402=44 I.A. 98 (P.C.).
(11) A. I. R. 1929 P. C. 95.
(12) A. I. R. 1927 P. C. 230.
(13) [1912] 34 All. 511=17 I. C. 396=39 I. A. 68 (P.C.).

should be asked to rehear these appeals, after allowing the parties further opportunity to adduce evidence on the question whether defendants 1 and 2 owned other properties at the time of the sale, and if so details regarding the same. I think it is also necessary that the mistake committed on the part of defendant in each case in not giving evidence should be condoned in the circumstances, and the purchasers should be given a fresh opportunity to adduce evidence in the case relating to the sale deeds, Exs. 1 and 2. As regards one of the sale deeds there is the recital that there were prior debts which were paid from the sale price. Except the recital, there is no other evidence in the case and it is necessary that the lacune and the defect should be removed. On the whole, I think it necessary, in the interests of justice, that these second appeals should be allowed, and the appeals remanded to the lower appellate Court for disposal in accordance with law, and having regard to the observations contained in this judgment.

It is open to the lower appellate Court either to record additional evidence itself, or have the same recorded and certified to it by the first Court if it should think it necessary to do so. Costs of the second appeals will be provided for in the revised judgment to be passed by the lower appellate Court. Court-fee on second appeal memoranda will be refunded to the appellants. I am anxious that nothing that I have said above should be taken as deciding any part of the controversy between the parties on the merits, and it would be open to the lower appellate Court to deal with the whole controversy between the parties and decide the same in any way it should think fit.

P.R.S/V.S. *Case remanded.*

A. I. R. 1930 Madras 670

PANDALAI, J.

Pinnamraju Rajamraju — Complainant—Petitioner.

v.

Potturi Tirupatiraju and *others*—Accused—Respondents.

Criminal Revn. No. 789 of 1929 and Crim. Revn. Petn. No. 710 of 1929, Decided on 20th January 1930.

(a) Penal Code, S. 424—Concealment by debtors or removal by others of property to avoid attachment with dishonest intention is offence.

Concealment of property by debtors or taking away of property by others to avoid its attachment if done with a dishonest intention is an offence under S. 424. [P 671 C 1]

(b) Civil P. C., O. 21, R. 43 — Attachment of cattle securely tied — Actual contact is not necessary—Mere declaration by Court officer of intention to attach is enough.

Actual seizure of moveables to be attached does not always require physical contact but this depends upon the particular fact.

Where the goods to be seized were cattle securely tied by ropes so that they could not run away of their own accord.

Held: that it was sufficient for the officer of the Court to go sufficiently near the cattle and declare to others his intention to attach the cattle: 27 *Mad.* 346, *Appr.* [P 671 C 2]

C. Rama Rao—for Petitioner.

K. S. Vasudevan—for Respondents.

Order.—Four persons were accused before the Stationary Sub-Magistrate of Amalapur for offences under Ss. 424 and 379, I. P. C. The facts alleged against them were that in execution of a decree obtained by P. W. 2 against one P. Subbaraju, since deceased, the decree-holder accompanied by an amin of the Munsiff's Court P. W. 1 went to attach cattle belonging to the estate of the deceased, and that after the amin had attached one cow, a calf and a she-buffalo, the accused drove them away. The Stationary Sub-Magistrate examined witnesses including P. W. 1 the Court amin, P. W. 2 the decree-holder and P. W's. 3, 4 and 5 attestors to the attachment list. The Stationary Sub-Magistrate discharged the accused under S. 253 (1) on the ground that the proceedings conducted by the amin P. W. 1 did not in law amount to actual attachment. He says:

"He (the amin) did not know what he had to do when he attached the property and so in the cross-examination he merely stated

that he did nothing beyond notifying the distraint and writing up the attachment list. The omission was noticed by the counsel for the complainant and all the P. W's. 2 to 4 that came afterwards on subsequent dates were prepared with an answer on this point. In the circumstances, I consider that there was no valid attachment at all and that any obstruction to such an illegal attachment was not certainly punishable by law."

The complainant applied to the District Magistrate of East Godaveri to revise the above order of discharge but that application was dismissed, the District Magistrate making the following observation:

"It is quite clear from the evidence of P. W. 1, the amin, that he simply went to the place where the cattle were tied and proceeded to write up the distraint list and that the accused came up and removed the cattle from the place where they had been tied all the time. The amin did not take actual possession of the cattle at any time. The lower Court rightly in my opinion held that there had been no legal distraint of the cattle and that the accused committed no offence in removing the cattle."

On this ground the District Magistrate dismissed the revision petition. The complainant has applied to this Court to set aside the discharge and order a fresh enquiry.

It is clear that the view of the lower Courts is wrong in two particulars. In the first place assuming that their view as to completed attachment was right, as to which I will speak presently, still there was the charge under S. 424 made in the complaint about which the Courts have said nothing. The offence under S. 424 is dishonestly removing any property and the dishonesty in such a case consists of the intention to avoid attachment for a debt. Therefore concealment by debtors themselves is an offence. Similarly taking away property by others with a view that it may not be attached, if done with a dishonest intention would fall under S. 424. The act of the accused would amount to an offence under that section and this matter has been ignored.

The more important point, however, is that the view of the lower Courts as to what constitutes a valid attachment is erroneous. They seem to have been of the opinion that in order to constitute a valid attachment of cattle, it is necessary actually to seize them or do something which would bring them into physical contact with the person attaching. Actual seizure of moveable property to be attached does not always require physical contact. Whether it is so required in any particular case, must be decided upon the particular facts. For instance, property in a locked room may be attached without even seeing the goods, by putting a lock upon the outer door: see *Multan Chand Kanyalal* v. *Bank of Madras* (1). In England it has been held that

"for an act of the Sheriff or his bailiff to constitute a seizure of goods, it is not necessary that there should be any physical contact with the goods seized, nor does such contact necessarily amount to seizure. An entry upon the premises on which the goods are situate together with an intimation of an intention to seize the goods, will amount to a valid seizure even where the premises are extensive and the property seized widely scattered. But some act must be done sufficient to intimate to the judgment-debtor or his servants that seizure has been made : see Halsbury's Laws of England, Vol. 14, p. 54."

In this case, the goods to be seized were cattle. It was not necessary to attach them that they should have been seized by their horns or even by their ropes. From the evidence it appears that they were already tied and secured so that they themselves could not run away of their own accord. All that was necessary to constitute the attachment was that the officer of the Court should go sufficiently near to them to explain to others that he has come to attach the property and to intimate his intention to do so. This the officer did do. What more in the circumstances he could have done or should have done to get possession of these cattle which were already tied up, it is difficult to see. The view of the lower Courts as to the ingredients of a valid attachment is erroneous. The discharge must be set aside and further enquiry into the charges ordered. The case will be sent back to the Stationary Sub-Magistrate, Amalapur, for disposal according to law.

P.R.S./J.M. *Discharge set aside.*

(1) [1904] 27 Mad. 346.

* A. I. R. 1930 Madras 671

PANDALAI, J.

Burham Sahib—Accused—Petitioner.

v.

Emperor

Criminal Revn. No. 670 of 1929 and Criminal Revn. Petn. No. 606 of 1929, Decided on 22nd January 1930 from decision of Sess. Judge, Madura, in Criminal Appeal No. 65 of 1928.

* Penal Code, Ss. 161 and 116—Patient ordered to be discharged but still in hospital—Bribe offered to doctor in charge but not accepted — Doctor is not "functus officii" and offence falls under Ss. 161 and 116.

Where the doctor in charge of a Government hospital has already decided to discharge a patient but that patient is still in the hospital he cannot be regarded to be functus officii as his duties and responsibilities to the patient still remain and an offer of a bribe to him to retain the patient for a longer period is an offence under S. 161 and the refusal of the bribe brings the case under illustration (a), S. 116: *A. I. R.* 1929 *Mad.* 756, *Dist.*

[P 672 C 2]

V. L. Ethiraj and *S. K. Ahmed Meeran*—for Petitioner.

K. S. Vasudevan—for the Crown.

Order.—The petitioner was convicted under Ss. 161 and 116, I. P. C. of abetment of bribery by the Sub-Divisional Magistrate of Madura and sentenced to pay a fine of Rs. 300 and this conviction and sentence were confirmed on appeal by the learned Sessions Judge of Madura. The present petition is by the accused to have the conviction and sentence set aside.

The learned advocate for the petitioner argued in the first instance that of the witnesses who spoke to the petitioner's act only one had actually seen the offer of the money and the others had only seen him in Col. Harley's bungalow, that Col. Harley himself was unable to identify the petitioner and that his description of the petitioner as a revenue inspector was belated and that the whole case was due to the influence of the petitioner's enemies who were friends of Col. Harley. This is an argument purely upon the evidence in the case and all these aspects of the evidence have been considered by both the Courts below. They have accepted the evidence and I am not in a position to say that their conclusion is incorrect, that the petitioner went to the house of Col. Harley, P. W. 1 and there offered him money to induce him to retain in hospital as an inpatient a brother of the petitioner who had been injured in a fracas with the object, no doubt, of making out that the injury caused was grievous hurt and not simple hurt. With these conclusions, I agree.

The learned advocate then raised the point that the facts established do not amount to an offence under S. 161 read with S. 116; and for this he relied upon the decision in *In re., Venkatarama Naidu* (1). In that case a Police Inspector had passed orders rejecting the application of Venkatarama Naidu to be enlisted as a police-man. After he had rejected this application, Venkatarama Naidu offered Rs. 5 to the Inspector of Police to take him. The Bench held the Inspector had become functus officii, in other words, his official duties had become spent so far as accepting Venkatarama Naidu as a police-man was concerned and that therefore according to decisions of Indian Courts there could no longer be in that matter any bribery of a public servant or abetment of such bribery. In my opinion that decision does not apply to the facts of this case. If I held that the facts were very similar, I should, as at present inclined, have thought it my duty to refer the question to a Bench because in my opinion the point requires reconsideration. But the facts of the two cases are entirely dissimilar. In this case Col. Harley was not functus officii as his duties and responsibilities to the patient still in the hospital were by no means over It is true, that he had decided or proposed to discharge him the next day but the man was not discharged and if Col. Harley could have been illegally influenced it would still have been possible for him by reason of that influence to detain the patient further in the hospital than he was bound to do according to his official duties. That fact distinguishes this case from the facts of the decision relied upon. In my opinion the facts proved clearly come within S. 161 as they amount to an offer of illegal gratification to a public s vant as a motive or reward for show- g favour to a patient in the discharge of that public servant's official duties. As the offence was not completed by reason of the refusal of the offered bribe, the case comes strictly within Illus. (a), S. 116, I. P. C. and is covered by it.

The petition must be dismissed.

P.R.S /J.M. *Petition dismissed.*

(1) A. I. R. 1929 Mad. 756.

* A. I. R. 1930 Madras 673

JACKSON, J.

Gopala Krishna Iyer and *another*—Plaintiffs—Appellants.

v.

Sankara Iyer—Defendant — Respondent.

Appeal No. 117 of 1928, Decided on 28th November 1929, from appellate order of Sub-Judge, Tuticorin, D/- 28th July 1928 in Appeal Suit No. 43 of 1928.

(a) Evidence Act, S. 92—Oral agreement though prior to decree cannot be proved.

Oral evidence is not admissible to prove an agreement prior or subsequent to a decree contradicting or varying the terms of the decree: *A. I. R.* 1927 *Mad.* 911 and 35 *All.* 48, *Rel. on.* [P 673 C 1, 2]

*** (b) Civil Procedure Code, O. 21, R. 2—Both pre-decree or post-decree adjustment must be certified** (*Obiter.*)

Under O. 21, R. 2, any adjustment whether it be to a pre-decree or post-decree agreement must be certified, otherwise the clear provision of the statute would be evaded: 31 *Cal.* 179, 29 *Cal.* 810, *Appr.* 40 *Mad.* 233 (*F.B.*) *not Appr*: *A. I. R.* 1926 *Mad.* 582, per *Wallace, J.*, *Ref.* [P 674 C 2]

A. Swaminatha Iyer—for Appellants.

T. M. Ramaswami Iyer—for Respondent.

Judgment.—Appellants are decree-holders in O. S. No. 158 of 1922 District Munsif's Court, Srivaikuntam, and hold a decree for ejectment and mesne profits. The respondent has pleaded a prior oral agreement whereby appellants can only eject him on payment of Rs. 175 in discharge of an othi. The learned Subordinate Judge has ordered evidence to be taken on this plea. The appellants claim that it is unsustainable in law.

The District Munsif rejected the plea in limine because, as laid down in S. 92, Evidence Act; an oral agreement contradicting or varying the terms of a disposition of property reduced to the form of a document cannot be proved. He cited *Rajah of Kalahasti* v. *Venkatadri Rao* (1) to show that a decree is a disposition of property, and *Abdullah Khan* v. *Basharat Husani* (2) as authority that it is immaterial whether the oral agreement sought to be proved is prior or subsequent to the disposition. The learned Subordinate Judge merely records his ipse dixit that the Munsif is wrong, without reference to these or any other authorities. That is not the way in which an appeal should be decided. In this Court the respondent had nothing to cite against the clear authority of these two rulings, and confined his argument to a repetition of the plea that the language of S. 92 precludes the idea of a prior agreement. The language of S. 92, on the contrary, makes it clear that no agreement, whether prior or subsequent, can be proved. It would indeed be a curious state of the law if, for instance, a mortgagor though precluded from going behind the plain terms of a registered document by a plea of subsequent agreement, could nevertheless lead evidence to prove a prior agreement. On this short ground the appeal must succeed and the judgment and order of the learned District Munsif must be restored.

In the course of the argument *Chidambaram Chettiar* v. *Krishna Vathiyar* (3) and kindred rulings have been discussed, and I would venture to observe that these cases seem to proceed on a misunderstanding of what the word "adjustment" means. Seshagiri Aiyar, J. (pp. 239) says:

> "The agreement in question is not an "adjustment within the meaning of O. 21, R. 2,"

evidently implying that the agreement is an adjustment outside the meaning of R. 2. The sense of the Full Bench case has, with all respect, been correctly given by my brother Wallace, J., in *Venkatasubba Mudali* v. *Manickammal* (4):

> "The question was whether a pre-decree arrangement can be pleaded."

Now this arrangement or agreement is not an adjustment at all, and to talk of a pre-decree adjustment would be a meaningless phrase.

"Adjust" is a word that has come into English from French and Mediaeval Latin, and simply means to join, with possibly an added sense of join harmoniously, because the original adjuxtare having become adjustare, some idea of justice has intruded, though it is quite foreign to the original derivation. So, when the judgment-debtor informs the Court of an adjustment of the decree he informs the Court that he has joined it to something else, quite possibly so as

(1) A. I. R. 1927 Mad. 911=50 Mad. 897.
(2) [1913] 35 All. 48=17 I. C. 737=40 A. 31 (P.C.).
(3) [1917] 40 Mad. 23[illegible]=32 M. L. J. 13=5 M.L.W. 132=37 I.C. 836=(1917) M.W.N. 44 (F.B.).
(4) A. I. R. 1926 Mad. 582=49 Mad. 513.

to give him a sence of harmony and justice, though the principal point is that he has joined it. When he seeks to certify under O. 21, R. 2, the judgment-debtor does not plead a previous agreement or arrangement; he pleads that he has joined the decree to something and unless he acts under O. 21, R. 2 he must allow the decree to be executed simply as it stands without any adjunct.

Abdur Rahim, J., in *Chidambaram Chettiar* v. *Krishna Vathiyar* (3), observes that O. 21, R. 2, which speaks of a decree being adjusted assumes the existence of the decree at the time of the adjustment. This is perfectly true, just as when we speak of joining hands, we assume the existence of a hand. But when the learned Judge proceeds to say that O. 21, R. 2, has no application to cases in which the alleged adjustment was by virtue of a pre-decree agreement, the ground seems hardly so firm. I do not think .the word alleged assists the argument. The decree has been joined for better or worse with the agreement, and whether the Court's certificate is or is not necessary, it is none the less an adjustment. For the proposition that O. 21, R. 2, will not apply to such an adjustment of a decree with a pre-decree agreement we are referred to *Rama Ayyan* v. *Sreenivasa Pattar* (5), which contains this passage:

"Presumably the section (now O. 21, R. 2) has no application to this case because on the date of the transaction, which if proved, would prevent the appellant from executing the decree, he was not himself the decree-holder. As I understand the said provision of the law it is only when the parties to a transaction entered into for the purpose of satisfying or adjusting a decree stand at the date of such transaction in the relation of judgment-debtor and judgment-creditor to each other, that a Court executing a decree is prohibited from recognizing such transaction unless duly certified."

Here there is the same confusion between the agreement and the adjustment which joins the agreement to the decree. It is assumed that what the Court is asked to recognize is the agreement and that agreement need not be certified because when the parties entered into the agreement there was no decree and no judgment-debtor or creditor. But the Court is not asked to certify the agreement, but to certify the joining of the agreement with the decree. Assume that they are literally pinned together and the judgment-debtor says, "in executing this decree you must read it along with this agreement." The Court may then certify, and unless there is such certificate the Court will pay no attention to what is pinned to the decree. That is perfectly plain, and the object is perfectly plain. A judgment-debtor must not be allowed to reopen the argument when execution is reached. But in this Presidency at the stage of execution a judgment-debtor can produce a decree with an agreement joined or pinned to it. If that agreement is post-decree, the Court executes the decree as it stands, but if that agreement is pre-decree it reopens the argument, which, with the profoundest respect to authority I feel constrained to observe, is a distinction without a difference. I should hold that under O. 21, R. 2, any adjustment whether it be to a pre-decree or to a post-decree agreement, must be certified, otherwise the clear provision of the statute is evaded. This is the view in *Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (6), and *Hassan Ali* v. *Gauzi Ali Mir* (7) to which I would defer. Happily, as this case is decided by the provision of S. 92, Evidence Act, I have not to decide what a Court should do when it is confronted by a clear provision in a statute and a contrary ruling of a Full Bench. In *Chidambaram* v. *Krishna Vathiyar* (3) Seshagiri Ayyar, J., was evidently impressed by the uniform and consistent view of the Calcutta High Court, but preferred to adopt the principle of stare decisis. But I should confess to difficulty in standing by the Madras decision which I feel convinced is wrong. Costs to the appellant in this and lower appellate Court.

P.R.S./J.M. *Appeal allowed.*

(5) [1896] 19 Mad. 230=5 M. L. J. 213.

(6) [1902] 29 Cal. 810=6 C. W. N. 838.

(7) [1904] 31 Cal. 179.

A. I. R. 1930 Madras 674

BEASLEY, C. J. AND PANDALAI, J.

Vasteva Holla and *another*—Defendants—Appellants.

v.

P. Mahabala Rao — Plaintiff—Respondent.

Letters Patent Appeal No. 25 of 1926, Decided on 18th December 1929.

Malabar Law—Mortgage — South Kanara —Improvements on "kumki" land put in possession by mortgagor along with "warg" land—Express agreement silent about improvements on kumki land — Mortgagor entitled to compensation.

In South Kanara, a usufructuary mortgagee when put in possession by the mortgagor of kumki lands along with warg lands, the latter alone being specified in the mortgage deed, is entitled to the value of improvements effected by him not only in respect of warg land, but also in respect of kumki land, even though the express agreement for compensation refers to warg lands only : 24 *M. L. J.* 397 and 15 *I. C.* 278, *Ref.* [P 675 C 2]

Pandalai, J.—The point for decision in this appeal is whether in a case of a usufructuary mortgage of warg lands in South Kanara to which the right of holding kumki lands is attached, when the warg lands and kumki lands are both put in possession of the mortgagee and he effects improvements on both, he can on redemption claim the value of improvements on the kumki lands as well as those on the warg lands. The Courts below have held that he is entitled only to the second but not to the first. Hence this appeal.

The facts are as follows :

In 1868 some warg land was usufructuarily mortgaged by the plaintiff's predecessor-in-title to the defendants' predecessor-in-title. Possession was given to the mortgagee not only of this warg property which belonged to the mortgagor but also of an adjacent area of kumki land (which belonged to the Government) the possession of which is, according to the rules made for that purpose by Government and which are found in Board's Standing Orders, Vol. 2, pp. 61 and 62, given to the owner or occupant for the time being of the warg land for the more advantageous cultivation and enjoyment of the warg land. The mortgagee has been for more than 50 years in possession and enjoyment under the mortgage of both the warg and the kumki lands. The suit was for redemption and the plaintiff sued for the possession of both the properties on the footing that the mortgagee was put in possession of both under the mortgage and was bound to restore both to the mortgagor. The mortgagee (defendant) did not, as indeed he could not, question the right of the plaintiff to recover along with the warg property the kumki property attached to it and a decree has been passed accordingly. But while the Courts have awarded the mortgagee the value of the improvements on the warg property, they have held that he is not entitled to the value of improvements, such as trees planted etc., on the kumki.

The right of mortgagees and other subordinate holders of property to the value of improvements effected by them on their holding in the course of prudent husbandry is a customary right in South Kanara, as indeed it is throughout the west coast of this Presidency, including the States of Travancore and Cochin: *Dharamma* v. *Mariamma* (1). In the District of Malabar the matter is now governed by the Malabar Tenants Improvements Act and forms an important aspect of the tenancy legislation now pending. Besides, in this particular case the mortgage deed, Ex. 5, contains a specific clause whereby the mortgagor agrees to pay the mortgagee on redemption the value of the improvements effected by him on the mortgaged property as fixed by the grihaster (panchayatdars). It was argued for the respondent that we should read this specific agreement as confined to the warg property which alone according to him is the mortgaged property and as implying a contract that no compensation was payable for the improvements on the kumki. We cannot accede to either of the two propositions, either that the kumki is not to be deemed part of the mortgaged property or that the agreement even if it were confined to the warg property implies a contract to the contrary in respect of the kumki. As to the former it was undoubtedly the case that possession of the kumki was handed over to the mortgagee as part of his security and the mortgagor has got a decree for redelivery to him of both on the footing of the mortgage. It has been held that the right of a wargdar over the attached kumki is in the nature of an easement and the two cannot be separated or separately alienated : *Matilda Fernandes* v. *Allen Pinto* (2). We need not now decide whether the right of the wargdar which entitles him to be in possession of the kumki, to plant trees etc., on it, and cut and remove them subject to Government regulations, is not something higher than an easement. But it is clear that, as between the mort-

(1) [1913] 24 M. L. J. 397=19 I. C. 371.
(2) [1912] 15 I. C. 278.

gagor and mortgagee of the warg, possession and enjoyment of the kumki is a valuable adjunct of the security and therefore a part of it, that the two cannot be separated and that the mortgagor having given possession of the kumki to the mortgagee has now got a decree for its recovery. In these circumstances, the argument, that the kumki was not part of the mortgaged property which found favour in the second appellate Court and which is correct only to the extent that the mortgage deed did not contain a description of the kumki for the reason that being Government land the mortgagor was not entitled to create a valid charge on it so as to bind the Government, cannot be of any avail to the mortgagor as between him and the mortgagee. The kumki is for the purposes of redemption and the rights of the parties on redemption to be regarded as part of the security. If so, the defendants are entitled to compensation for improvements on the kumki as well as on the warg.

Secondly, we are quite unable to imply from an express agreement as to the warg a contract to the contrary in respect of the kumki. There is nothing to show that the defendant who had been let into possession of the kumki under the mortgage agreed to give up his right to the value of improvements to which under the customary law he was entitled.

A short consideration will show the unfairness of a contrary opinion. According to Government rules, the pattadar of the warg has a preferential right, which in practice is never denied, of getting the attached kumki registered in his own name and thereby becoming its owner, and also to be exempted from payment of the value of the trees which would be charged to a stranger. The plaintiff therefore on redemption gets the valuable right of having the kumki registered as his property and the result of depriving the defendant of compensation for trees or other improvements on the land is simply to compel him to make a present of that amount to the plaintiff. We see no ground for enforcing this unfair arrangement.

In the result, we vary the decree of the lower Court by declaring that the defendant is entitled to the value of improvements made by him or his predecessors-in-title after the mortgage on the kumki property Survey No. 111-B. The case will be remitted to the Court of the Subordinate Judge of South Kanara for fixing the additional amount that may be due to the defendant after obtaining, if necessary, a finding on the point from the District Munsif and for making a decree accordingly.

The appellants will have proportionate costs of this appeal and of the second appeal. In other respects this appeal is dismissed.

P.R.S./J.M. *Decree varied.*

A. I. R. 1930 Madras 676

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Sinnana Gownden and *others*—Plaintiffs—Appellants.

v.

Veerappa Gownden and *others*—Defendants—Respondents.

Letters Patent Appeal No. 115 of 1925, Decided on 1st November 1929.

(a) Easements Act, S. 7—Contiguous fields—Tenement on higher level has right to let rain-water collecting on it to flow out on lower tenement.

Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property : *A. I. R.* 1926 *Mad.* 449 (*F.B.*), *Rel. on.* ; *A. I. R.* 1929 *Mad.* 337 and *Gibbens* v. *Lengesty*, (1916) 113 *L. T.* 55, *Ref.* [P 678 C 2]

(b) Easements Act, S. 13—Two adjacent plots one on higher level—Subsequent to partition joint wall with aperture built—Water from well existing before partition and used for washing can be allowed to flow from higher plot to lower through aperture as easement under S. 13.

Two plots of land with two houses one in each plot belonging to a common proprietor were partitioned, one plot being on the higher level. Subsequent to the partition a wall was built between the two plots jointly by the two owners. In that wall an aperture was left for carrying away water from the plot and house on the higher level.

Held : that the upper plot owner had a natural right under the Easements Act to allow rain water on his land to flow out on the adjacent land through the opening. Further if there is a well which was in existence before

partition discharge of well water used for washing purposes cannot be a natural right and is a quasi-easement under S. 13 as such easement is both apparent and continuous the owner of plot on upper higher level has right to allow the water-accumulating on his tenement to flow over land of the plot on lower level though this is a foreign water brought to the land of owner of higher level plot by artificial means. [P 679 C 1]

V. N. Shama Rao and *A. Venkata Subba Mudaliar*—for Appellant.

K. S. Krishnaswami Iyengar, *T. M. Krishnaswami Iyer*, *N. Sivaramakrishna Iyer* and *G. Ramakrishna Iyer*—for Respondents.

Venkatasubba Rao, J.—This case, we trust, has now reached its final stage. The late Chief Justice and Mackay, J., who heard the Letters Patent appeal from the Judgment of Phillips, J., called for findings in a short order which runs thus:

"We direct that findings be recorded by the District Munsif on the following points:

(1) Has the plaintiff recently raised the level of his land so as to cast an additional burden on the defendant's land ?

(2) Is the plaintiff entitled to discharge through the point R

(a) drainage water from the house; and

(b) water drawn from the well for washing purposes and thereafter thrown on the defendant's land?"

This order does not bring out, we understand, that the dispute relates also to rain-water which collects on the plaintiff's land. Before the partition, the two plots of land were owned by a common proprietor. The land on which the plaintiff's house stands is on a higher level. The defendant owns the adjacent house on the lower land. Subsequent to the partition, a wall was built between the houses jointly by the two owners. It was in that wall that an opening was made at the point R referred to in the order of the Bench.

I may mention that this opening was made at the time when the wall itself was constructed.

The right which the upper owner has to allow rain-water on his land to flow out to the adjacent tenement must be taken to be a natural right under the Easements Act: see S. 7, Illus. (i). But then comes the question, is the right limited to allowing the water to flow out naturally and spread itself on the land of the lower owner, or, can the upper owner send it out through an opening provided for that purpose? It is the former view that found favour with Phillips, J., who heard the second appeal. His judgment was delivered on 19th January 1925. This is not consistent with the view of the Full Bench in *Sheik Hussain Sahib* v. *Subbayya* (1), decided subsequently. That case decides that the law on this species of right is settled by the Judicial Committee in *Gibbons* v. *Lengesty* (2). The Privy Council had to consider the question in an appeal from the Royal Court of Guernsey, but the Full Bench, though it does not deal with this specific matter, regards the decision as of binding authority. On this point with which we are concerned the law is thus stated in the judgment of the Judicial Committee in a passage cited by the Full Bench:

"Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property."

I may also refer in this connexion to *Kasia Pillai* v. *Kumaraswami Pillai* (3) to which my learned brother was a party. I must therefore hold that the plaintiff can send out the rain-water on his land through the opening R. It is urged for the defence that the plaintiff in thus sending the water cannot impose an additional burden upon the adjacent land. On the point of law raised, I express no opinion, for the defendant has not shown that any additional burden is involved, though it was open to him to make that out, as a question of fact.

I shall now proceed to deal with the well water referred to in question (2) (b) formulated by the Bench. Under the Act, this cannot be deemed a natural right, but as the District Munsif in his latest order points out, it is a quasi easement under S. 13. The plaintiff claimed it as an easement of necessity, but his claim cannot be supported on that ground. The right view is that taken by the District Munsif, for all the requirements of S. 13(f) are found fulfilled.

(1) A.I.R. 1926 Mad. 449=49 Mad. 441 (F.B.)
(2) [1916] 113 L. T. 55.
(3) A. I. R. 1929 Mad. 337=52 Mad. 426.

The well in question was in existence before the partition and the plaintiff has a right to enjoy his share of the property under that section in the same manner as he enjoyed it when the partition took effect. Moreover, it is conceded that the easement was both apparent and continuous. From the foregoing, it will be seen that the plaintiff has a right to allow the well water referred to above accumulating on his tenement to flow over to the defendant's land.

The last question then remains: Does the right of the plaintiff to discharge the water through the opening R extend to this water also? This is foreign water brought to the plaintiff's land by artificial means and it is unnecessary to decide in this case whether the right claimed exists as a matter of law or not. But I must take it that the effect of the finding is, that both the parties concurred in building the wall and making the opening. From this, what is the natural and proper inference? It may be implied that the parties themselves by consent provided by making the vent in question for the mode of enjoying the right. In this view the plaintiff can discharge any water drawn from the well and used for washing and domestic purposes through the vent R in the wall in question.

Question 2 (a) relates to drainage water from the house and the plaintiff's learned counsel has not pressed his case in regard to this.

In the result we issue an injunction restraining the defendant from interfering with the plaintiff's enjoyment of the right as found in this judgment.

Having regard to the course that this case has taken, we make no order as to costs.

Madhavan Nair, J.—I agree. On the first point, following the decisions in *Ramakrishna* v. *Venkata*, *A. I. R.* 1928 *Mad.* 52 and *Kasia Pillai* v. *Kumaraswami Pillai* (3) it must be held that the plaintiff in this case who owns the land standing on a higher level has a natural right to drain off the rainwater falling on his land into the adjoining lower land of the defendant through the opening R, in the boundary wall. The decision in (1915) in *Gibbons* v. *Lengesty* (2), and the other decisions bearing on the point are referred to in *Kasia Pillai* v. *Kumaraswami Pillai* (3), to which I was a party. The question whether the right claimed by the plaintiff can be exercised only if no damage is caused to the defendant, the owner of the lower land, does not arise for consideration in this case as that question was not raised in the Courts below.

P.R.S./V.B. *Order accordingly.*

A. I. R. 1930 Madras 678

BEASLEY, C. J. AND PANDALAI, J.

Polaki Chidambaram—Accused.

v.

Emperor

Criminal Revn. No. 779 of 1929 (Case referred No. 44 of 1929), Decided on 13th November 1929.

Explosives Rules (1914), R. 35 — Person accused of having taken delivery of consignments described as fireworks in contravention of R. 35—Burden of proving that they were explosives such as are covered by Explosive Rules is on prosecution—His having signed those consignments does not amount to admission that they were such explosives.

Where a person is accused of having taken delivery of consignments described as "fireworks" in contravention of R. 35, the burden of proving that these were explosives such as are covered by the Explosives Rules is upon the prosecution and the mere fact that the accused took possession of and signed for a consignment which was described as fireworks does not amount to an admission by him that these were explosives such as are within the purview of these rules. [P 679 C 2]

C. Sambasiva Rao—for the Accused.

K. N. Ganpati—for the Crown.

Order.—This case comes to us on a reference by the learned Sessions Judge of Ganjam in which reference he recommends that the conviction of a man named Chidamabaram for an act in contravention of R. 35, Explosives Rules, 1914 and the fine of Rs. 50 imposed upon him should be set aside. The facts of the case are that a certain firm had consigned some packages described as "fireworks" weighing 52 maunds 36 seers to one Indupuri Narasimham and that he having no license for explosives did not take delivery of them but Chidambaram did so paying the money into a Bank. He got the railway receipt and received the goods on 8th August 1927. He was thereafter charged with an act in contravention of R. 35, namely, being in possession of explosives not in accordance with the conditions of the license granted under

the rules for possession. He had a license entitling him to have explosives weighing up to 200 lbs. The origin of the complaint seems to be that some rival trader in the place complained to the police that the consignment was to be taken possession of by the accused. Certain facts appear and one fact is that at the hearing of the complaint the actual consignment or parts of it were not produced in Court but certain material objects were and the witnesses stated that the crackers taken delivery of by the accused were similar to those material objects. If that is true, then it is obvious that the conviction in this case was wrong because they are clearly toy fireworks and the rules do not apply to the manufacture, possession etc. of those fireworks. But it is said that those material objects are not samples of what the consignment contained; but all we can say with regard to that is that the police had ample opportunities of satisfying themselves when the consignment was at the railway station as to its nature. Certain cases, we are informed, were opened and on examination were seen to contain very small fireworks; and it was sought to collect the amount of gun-powder that these articles contained and after a most diligent attempt the quantity of gun-powder obtained was simply infinitesimal.

The Joint Magistrate seems to have thought that the onus of showing that an offence under the Explosives Rules had not been committed lay upon the accused, namely, that it was for him to produce the fireworks in Court and satisfy the Court that they were only toy fireworks and seems to have proceeded on the assumption that, as the consignment was labelled fireworks and as delivery on the railway receipt was taken of these articles as fireworks by the accused, it was tantamount to an admission that the articles in the consignment were articles coming within the Explosives Rules. The learned Sessions Judge has taken the view that the prosecution had not proved the case that there had been any contravention of R. 35 by the accused and furthermore that the accused was in possession of explosives and of a greater quantity than 200 lbs. With that view of the learnad Sessions Judge we entirely agree. We think that the burden of proving that these were explosives such as are covered by the Explosives Rules is clearly upon the prosecution and that the mere fact that the accused took possession of and signed for a consignment which was described as fireworks does not amount to an admission by him that these were explosives such as are within the purview of these rules. Under these circumstances we set aside the conviction and order the fine, if paid, to be refunded.

P.R.S./S.N. *Conviction set aside.*

A. I. R. 1930 Madras 679

SUNDARAM CHETTY, J.

Secy. of State—Plaintiff—Appellant.

v.

Dist. Board of Tanjore—Defendant—Respondent.

Second Appeal No. 26 of 1926, Decided on 19th September 1929.

(a) Limitation Act, Art. 144 — Exclusive right of fishery is interest in immovable property and not merely "profit a prendri" —Adverse possession for 12 years against lawful owner creates such interest. — Easements Act, S. 15.

An exclusive right of fishery in a locality in the sense that even the lawful owner is excluded from its enjoyment is not a mere "profit a prendri" but is a heritable and transferable interest in immovable property which can be acquired by 12 years' adverse possession as against the lawful owner, Art. 144, Lim. Act, being applicable to such a case : 1 *Pat.* 674 and 14 *C. L. J.* 572, *Foll.* [P 680 C 2]

(b) Madras Local Boards Act (5 of 1884), S. 51—President is not agent of the Board —Management of chhatram proprietor vesting with Board of which Collector is President—No fiduciary position exists and Collector can acquire title to the properties for Government by adverse possession — Adverse possession.

The President of a District Local Board is not its agent and the Collector as its ex officio President cannot be said to have held any fiduciary position with respect to chhatram properties where management vested in the District Board and the mere circumstances that the Collector had two capacities is not an impediment to an acquisition of a prescriptive right by Government by adverse possession over those properties: 22 *Mad.* 342; 11 *C. L. J.* 373, *Foll.*: *Williams* v. *Pott*, 12 *Eq.* 149, *Appr.*: 22 *Mad.* 342 and 31 *Mad.* 111, *Rel. on.*; 21 *Mad.* 153; 53 *I. C.* 625; 38 *Mad.* 903; 27 *Bom.* 43; 37 *Bom.* 84; *A.I.R.* 1922 *Mad.* 369; 31 *M. L. J.* 344 and *A. I. R.* 1926 *Mad.* 769, *Dist.* [P 682 C 1]

(c) Adverse Possession — Enjoyment of exclusive right of fishery —Mistaken notion of right — Possession is adverse to real owner.

Enjoyment of an exclusive right of fishery, even though it proceeded for some time under

the mistaken notion of right would still be adverse to the real owner of the property.

[P 682 C 1]

Govt. Pleader—for Appellant.

P. Chenatuah and *P. V. Rangaram*—for Respondent.

Judgment.— The plaintiff-appellant is the Secretary of State for India in Council. The suit is against the District Board of Tanjore in whom the right of management of the properties belonging to the plaint-mentioned chhatram is vested. The dispute in this case is in respect of the right of fishing in the river Korayar which is a non-tidal and non-navigable river within the limits of the inam village of Turakkadu which belonged to the chhatram. The village on either side of Turakkadu belong to the plaintiff. It is alleged in the plaint that the exclusive right of fishing in aforesaid river within the limits of the said village has been in the enjoyment of the Government peaceably and openly from Faslis 1302 to 1329 inclusive as of right and without interruption. The title to the said right of fishing is claimed as an easement under S. 15, Easements Act, and if for any reason that Act is held to be inapplicable, the plaintiff states that he is entitled to the exclusive right of fishery within the aforesaid limits of the river by reason of adverse possession of such interest in immovable property for over 12 years. The suit is for declaration, injunction and damages. The defendant denies that the plaintiff enjoyed the fishery peaceably and openly and by assertion of right on his own behalf. It is alleged that the Collector of Tanjore, as agent of the Board of Revenue, managed the chhatram properties till 1872 and, then, as agent of the District Board, Tanjore from 1872 to 1920 when a non-official President was appointed, that during the time the Collector managed either as the Revenue Board's agent or as the District Board's agent, his subordinates in the Revenue Department were looking after the chhatram properties, that it was in this capacity that the leasing of the suit fishery must have been made and that, in such circumstances, there could not be any adverse possession of the fishery right.

As regards issuel in the case, namely, whetherthe fishery right in dispute was enjoyed by the plaintiff openly, peaceably and as of right for over 20 years, there is the concurrent finding of both the lower Courts in the affirmative. This finding has been arrived at after a due consideration of the documentary and oral evidence. The documents unmistakably show that all the leases of the fishery right were granted by the Government and the muchlikas taken in favour of His Majesty's Government. The notifications regarding auction sales were issued by the Tahsildars on behalf of the Government and the sales held by the Tahsildar were confirmed by Deputy Collectors. The rents collected in respect of the leases so granted have all been credited to the revenue of Government. There is ample proof that the Government has been exclusively enjoying the plaint-mentioned right of fishery from 1894 onwards till 1920 openly without interruption and as of right. This being a concurrent finding of fact by both the lower Courts is not open to question in this second appeal and I accept it as a proper finding.

There is no doubt that an exclusive right of fishery is an interest in immovable property. Such a right may be acquired by 12 years' adverse possession. It is not the plaintiff's case nor is it indicated by the evidence that what was enjoyed by the Government is a mere right to fish in the locality in question which does not exclude the acquisition of similar rights by others or by the lawful owner of the land but, on the other hand, it is an exclusive right of fishery in that locality, in the sense that even the lawful owner of the land has been excluded from the enjoyment of such fishery right therein. That being so, the right established by the plaintiff is not a mere profit a prendri, but is an interest in immovable property which can be acquired by 12 years' adverse possession as against the lawful owner. Such an interest is transferable and heritable : vide *Hill & Co.* v. *Sheoraj Raj* (1). But the controversy in this case is centred mainly on the question whether possession of the fishery right set up by the plaintiff can be really deemed to be adverse to the defendant or the chhatram. It is contended on the respondent's side in ac-

(1) A. I. R. 1923 Pat. 58=1 Pat. 674.

cordance with the view taken by the lower Courts that the Collector must be deemed to have filled a dual capacity as the ex-officio President of the District Board and also as the agent of the Government and that the possession and enjoyment of the fishery right by the Government through the acts of the Collector who filled such dual capacity could not be constituted as adverse possession as against the District Board in which the management of the chhatram was vested. The lower appellate Court, in coming to its conclusion, has observed that this question does not seem to be one free from doubt. In my opinion, the correct position of those to whom the acts of enjoyment are attributed and the nature of the enjoyment should be clearly ascertained before the application of the legal principles. Till 1872 the Board of Revenue was exercising the powers of supervision and control over the chhatram endowments under the provisions of Regn. 7 of 1817. After the passing of the Local Boards Act 4 of 1871, the management of the chhatram properties became vested in the District Board.

Section 51, Cls. 1 and 2, Madras Local Boards Act 5 of 1884 are exactly similar in wording to S. 26, Cls. 1 and 2, Madras District Municipalities Act 4 of 1884. In dealing with S. 26 of the latter Act, it has been held in *Chairman, Municipal Council, Rajahmundry* v. *Venkateswarlu* (2), that, prior to the transfer to the municipality, the Board of Revenue had only powers of supervision and control; but what was made over to the municipality under S. 26 was not only the superintendence of the choultry but also the actual management. These observations seem to be applicable to the present case also which is governed by S. 51, Madras Local Boards Act 5 of 1884. It is not correct to say that prior to 1872 the Revenue Board was in actual management of the chhatram properties beyond exercising the general powers of supervision and control. The contention of the respondent, that the Collector, as a subordinate of the Board of Revenne must be deemed to have been in possession and management of the chhatram properties prior to 1872, is unsustainable. After 1872 the actual management did pass to the District Board. The District Board is a corporate body capable of owning property, having perpetual succession and a common seal of its own and is also capable of suing and being sued on its corporate name. As such a corporate body, it is distinct from its President or the individual members thereof : vide S. 27 of the Act. Under S. 33 (1), Madras Local Boards Act 5 of 1884, the resolutions of the Local Board shall be carried into effect by the President in whom the entire executive powers of the Board shall be vested and who shall be directly responsible for the due fulfilment of the purposes of this Act. The section exactly corresponding to this in the District Municipalities Act referred to above is S. 32 (1). It has, however, been held by this High Court that the relation of principal and agent does not exist between the Municipal Council and the Chairman : *Srinivasa Ayyangar* v. *Municipal Council, Karur* (3).

The powers of the President of the District Board, being the same as the powers of the Chairman of a Municipality as set forth in the two sections above referred to, it must be taken on the authority of the decision in *Srinivasa Ayyangar* v. *Municipal Council Karur* (3), that the President of the District Board is not really the agent of the Board. Moreover, Cl. 2, S. 33, Madras Local Boards Act, states that it shall not be lawful for the President to exercise any power which, by this Act, it is expressly declared, shall be exercised by the Local Board. Though the executive power is vested in the Collector as the ex-officio President of the Board, still the Board, in its corporate capacity is capable of taking any action in the management of its properties by means of resolutions passed at meetings and the President has to carry out such resolutions and act in conformity with them. It cannot be said that the District Board is incapable of suing in its own name and under its own initiative apart from the President. A suit may be laid by the District Board in its own name and any Secretary may sign the plaint on its behalf. It is not, therefore, correct to say that the Collector, as ex-officio President of the District Board, was the person in possession and management of the chhatram properties.

(2) [1908] 31 Mad. 111=3 M. L. T. 241.

(3) [1899] 22 Mad. 342.

As he is not strictly an agent of the District Board, it cannot be said that he held any fiduciary position with respect to the chhatram properties whose management vested in the District Board. There is no doubt that the enjoyment of the fishery right in question was by the Government through its subordinate officers, namely, the Collector, the Revenue Divisional Officer, the Tahsildar and so on. All the leases were granted distinctly by the Government and the rents went into the coffers of the Government. During the period of such enjoyment it was perfectly open to the District Board to set up its right on behalf of the chhatram and sue the Government for any remedy open to it by reason of the wrongful enjoyment by the Government. It seems to me that, prior to the decision of the Privy Council in *Bala Surya Prasad Row* v. *Secy. of State* (4), the Government was treating the bed of a river even within the limits of a zamindari or inam as its own property and exercising acts of ownership over it accordingly. In all probability, the right of fishery in question was enjoyed by Government on that basis. Such an enjoyment, though under a mistaken notion of right, would still be adverse to the real owner of the property. The District Board, in its corporate capacity, had no incapacity to sue during the period of adverse enjoyment and the mere fact that the Collector happened to be its ex-officio President does not affect the adverse nature of the Government's enjoyment. It is clear that the Government never purported to enjoy the fishery right on behalf of the chhatram or the District Board. In view of these facts, the mere circumstance that the Collector had two capacities combined in him does not, in my opinion, change the character of the Government's enjoyment, nor was there a suspense of the right of action which the District Board had. There was thus no impediment to the acquisition of a prescriptive right by adverse possession on the part of the Government.

The decision in *Guru Das Kundu* v. *Basanta Kumar Roy* (5) seems to my mind to be almost exactly in point. In that case, the question was whether the enjoyment of immovable property by the Government could be deemed to be adverse to the Court of Wards who were managing the plaintiffs' properties. It was contended that the possession of the Government from 1888 to 1894 must be deemed to be the possession of the Court of Wards, namely, the Board of Revenue. In negativing this contention, it is observed thus on p. 377 :

> "But that is not enough to make the possession of the Government the possession of the plaintiffs by the Court of Wards. The distinction between the Collector in his official capacity and in the capacity of a manager under the Court of Wards was pointed out in the case of *Chowdhree Sheoraj Singh* v. *Collector of Moradabad* (6). That was a suit to recover money deposited by the Collector as an officer of the Court of Wards in the Government Treasury. It was held that the Government was not liable as a trustee by reason of the money having been deposited in the Treasury by an officer of the Court of Wards, though that officer was, in fact, the Collector."

That principle well-nigh applies to the present case, in distinguishing the capacity of the Collector as President of the District Board and his ordinary official capacity as a Government servant. It cannot be seriously contended that, by reason of this dual capacity, the possession of the Government of the fishery right in question is either the possession of the District Board or is not adverse to it. Stress has been laid by the learned advocate for the respondent on the following passage at p. 377 of the said ruling :

> "In this case the wards were represented by non-official managers and there was nothing to prevent a suit being instituted in their name against the Government, provided that the sanction of the Court of Wards was first obtained."

It seems to me that the real decision did not turn upon this fact, though it was stated as a ground for meeting the argument that the Court of Wards could not have sued the Government. Be this as it may, according to the provisions of the Local Boards Act, there is really nothing to prevent a suit being instituted by the District Board on behalf of the chhatram in respect of the fishery right against the Government, though the Collector happened to be the ex-officio President of the Board. In the appeal preferred against the decision in *Guru Das* v. *Basanta Kumar* (5),

(4) A. I. R. 1917 P. C. 42=40 Mad. 886=44 I. A. 166 (P.C.).

(5) [1910] 11 C. L. J. 373=3 I. C. 15=14 C. W. N. 317.

(6) 2 N. W. P. 379.

two points were urged, the second of them being that the possession of the revenue authorities could not be availed of against the plaintiffs by reason of their being at the time minors under the guardianship of the Court of Wards. Their Lordships of the Privy Council, though they allowed the appeal, have, however, expressed no dissent from the view of the High Court on the question of adverse possession as would appear from the following passage on p. 875, namely :

"In differing from the High Court upon the determination of the appeal, their Lordships do not wish to be taken as expressing any opinion adverse to the view on the second point."

In support of the plaintiff's contention reliance is placed upon the decision in *William* v. *Pott* (7). In that case it has been held that :

"the principal may acquire a possessory title to real estate by receiving the rents for 20 years through an agent, although that agent is the person really entitled to the estate."

The possession of the agent was held to be possession of the principal. Though the agent was enjoying the property by receipt of rents on behalf of his principal alone, without knowing that the property belonged to himself, such enjoyment was held to be adverse with the result that the ownership of the agent in the property was extinguished by reason of such adverse possession of the principal through him. If such possession could be deemed to be adverse, possession of the Government in the present case must a fortiori be deemed to be adverse to the defendant.

A number of decisions were quoted on behalf of the respondent, in which possession was not held to be adverse under special circumstances none of which exists in the present case. They relate to the case of co-owners in which possession would become adverse only after one co-owner sets up a hostile title to the knowledge of the others, to the case of a third party trespassing on the property while it was in the possession of a usufructuary mortgagee and continuing in possession for over the statutory period, where there was a doubt as to whether his possession according to animus was adverse to the mortgagee alone or to the mortgagor also and consequently the knowledge of the mortgagor as to such possession had to be shown, to a case of principal and agent and to the cases of alienations by the trustee or shebait of an idol *Ittappan* v. *Manavikrama* (8), *Harikanta Das* v. *Bibi Nurunnissa* (9), *Periya Aiya Ambalam* v. *Shunmugasundaram* (10), *Taru Bai* v. *Venkatrao* (11), *Malkappa* v. *Mudkuppa* (12), *Linga Munisami Reddi* v. *Govindaswami Naicken* (13), *S. Somayajipad* v. *Kunhu Kutti Korilamma* (14) and *Rama Reddy* v. *Rangadasan* (15). As none of those cases can be applied to the facts of the present case as stated above, I am of opinion that they have no bearing and, therefore, it is unnecessary to consider them in detail.

I am therefore, clear that the plaintiff has acquired by adverse possession for over the statutory period the right of fishery in question which is doubtless an interest in immovable property capable of being acquired by adverse possession. A suit for possession of such a fishery right is governed by Art. 144, Lim. Act : vide *Lokanath Bidyadhar* v. *Jahania Bibi* (16). The plaintiff, having acquired such an indefeasible title, is entitled to the declaration and injunction prayed for as also to the past damages claimed as to the correctness of which there is no dispute.

In the result, the decree of the lower appellate Court is reversed and a decree is passed in plaintiff's favour as prayed for with costs in all the Courts against the defendant.

P.R.S./J.M. *Decree reversed.*

(7) [1871] 12 Eq. 149=40 L. J. Ch. 775.
(8) [1898] 21 Mad. 153=8 M. L. J. 92.
(9) [1919] 53 I. C. 625.
(10) [1915] 38 Mad. 903=26 M. L. J. 140=1 M.L.W. 119=22 I. C. 615=(1914) M.W.N. 417 (F.B.).
(11) [1903] 27 Bom. 43=4 Bom. L. R. 721.
(12) [1913] 37 Bom. 84=17 I. C. 657=14 Bom. L. R. 931.
(13) A. I. R. 1922 Mad. 369.
(14) [1918] 34 M. L. J. 344=7 M. L. W. 490=41 I. C. 630=(1918) M.W.N. 179.
(15) A. I. R. 1926 Mad. 769=49 Mad. 543.
(16) [1911] 14 C. L. J. 572=12 I. C. 305.

* A. I. R. 1930 Madras 683

ANANTAKRISHNA AYYAR, J.

(*Madiraju*) *Jagannadha Rao* — Defendant—Appellant.

v.

Somu Lakshminarayana and *another*—Plaintiffs—Respondents.

Second Appeal No. 1261 of 1926, Decided on 18th December 1929.

(a) Specific Relief Act, S. 27—Father of joint Hindu family executing agreement to sell—Suit for specific performance—Son made party—Son not objecting to his being joined in lower Courts — He cannot do so in second appeal.

Although in a suit for specific performance brought on the basis of an agreement to sell executed by the father of a joint Hindu family the son is not a necessary or proper party, still if once made a party there is nothing in S. 27 to prevent him from having the whole matter agitated and adjudicated on, if he chose to do so in that suit. Hence if the son failed to raise the objection that he was not a necessary party in the lower Courts he cannot do so for the first time in second appeal. [P 685 C 1, 2]

* (b) Registration Act, S. 17 — Agreement to sell immovable property does not necessarily create interest in that property —Where no interest is created agreement to sell is admissible though unregistered— —Transfer of Property Act, S. 54.

Agreement to sell immovable property is inadmissible if unregistered, only if it creates an interest in the property agreed to be sold. Every agreement to sell does not necessarily create such an interest. Where therefore an agreement to sell does not create any interest in the property, it is admissible in evidence though unregistered : *A. I. R.* 1929 *P. C.* 269. *Expl.*; *A. I. R.* 1922 *Cal.* 486; *A. I. R.* 1926 *Bom.* 375 and *A. I. R.* 1926 *Mad.* 530, *Cons.* [P. 688 C 2]

P. Satyanarayana Rao — for Appellant.

A. Venkatachalam—for Respondents.

Judgment.—Defendant 2 is the appellant in this second appeal. He is the adopted son of defendant 1, his adoption having taken place in 1917. Defendant 1, the adoptive father executed an agreement in favour of the plaintiff to sell some immovable property belonging to the joint Hindu family composed of defendants 1 and 2. In Ex. A which is the agreement defendant 1 undertook as follows :

" I shall include my adopted son Jagannath Rao also as a party to the sale deed and execute the document of sale in your favour. "

Defendant 1 having defaulted to carry out his part of the contract, the plaintiff filed the original suit of which this second appeal has arisen for specific performance of this agreement to sell, making the father as defendant 1 and the adopted son as defendant 2 to the suit. Defendant 1 set up a plea that the plaintiff himself agreed to secure the conjunction of defendant 2 and the plaintiff not having done so, the suit for specific performance should fail for that reason. Defendant 2 pleaded that the agreement was not entered into for necessary purposes and that under the adoption deed, Ex. 2, dated 12th February 1917 the adoptive father, defendant 1, undertook not to alienate any of the family properties without the conjunction of defendant 2 also in the same. The trial Court framed six issues of which the 4th was " Whether specific performance can be granted " and the 5th " whether defendant 2 is bound by the contract entered into by defendant 1 " Another issue was raised whether the plaintiff undertook to procure the conjunction of defendant 2 also in the same. Both the lower Courts found against defendant 1's plea that the plaintiff undertook to get the defendant 2 also to join in the sale deed. The first Court granted a decree for specific performance in so far as defendant 1 was concerned. One reason why the suit against defendant 2 was dismissed is stated in para. 14 of the first Court's judgment :

" Under Ex. 2, the adoption deed, defendant 1 undertook not to alienate any family property. Defendant 2 is a major and it has not been satisfactorily proved that defendant 1 is the family manager. Under these circumstances I find that defendant 2 is not bound by the contract. "

I must say at this stage that I am not able to follow the learned Munsif in the observation that, simply because defendant 2 the adopted son is a major, there must be some satisfactory proof that defendant 1, the adoptive father, is the manager. The learned District Munsif observes: " It has not been satisfactorily proved that defendant 1 is the family manager." I cannot understand what sort of proof is necessary to constitute the adoptive father and the only other member of the joint Hindu family besides the adopted son, a joint family manager. Under Hindu law defendant 1 is the joint family manager and unless any other member proves that owing to specific agreement or for some other reasons defendant 1 has ceased to be manager, it is not necessary to prove that defendant 1 is the joint family manager. The learned District Munsif passed a decree against defendant 1 only, and dismissed the suit against the second. On plaintiff's appeal, the learned Subordinate Judge went into the question whether the agreement entered into by defendant 1 to sell the properties to the plaintiff

Ex. A, was binding upon the joint family. He found that as early as 1912 there was a mortgage debt incurred by defendant long before the adoption of defendant 2. He also found that the mortgagee filed a suit and obtained a decree (Ex. C) for Rs. 2,000 and odd on the footing of his mortgage. After a portion of the decree amount had been given up by the mortgagee decree-holder, there was a large amount of about Rs. 2,000 due under the decree of 1921. It was to pay off that decree debt and for a fresh consideration of Rs. 200 that defendant 1 executed this agreement to sell the properties to the plaintiff, and he took an advance of Rs. 100 out of the Rs. 200 at the time of the agreement of sale. Of course the lower appellate Court held that defendant 1 was the manager. On these findings the lower appellate Court modified the decree of the first Court and granted a decree for specific performance against defendant 2 also. This second appeal has accordingly been preferred by defendant 2. Two main points have been raised by the learned advocate for the appellant. One was that in a suit for specific performance proper, in pursuance of an agreement entered into by defendant 1 (in whatever capacity he might have entered into that agreement), strangers ought not to have been made parties to the suit. The other was that, having regard to the recent Privy Council case reported in *Skinner* v. *Skinner* (1), the agreement in question, Ex. A, is inadmissible in evidence and consequently the suit must fail for want of legal evidence to prove the agreement.

I will take up the first question first. No doubt under S. 27, Specific Relief Act, suits for specific performance of agreement to sell immovable property would ordinarily be maintainable only against parties to such agreement, and against certain other persons who are specifically mentioned in the several clauses of that section. It would no doubt have been open to defendant 2, the adopted son, when he was made a party to the suit, to plead that he is not a necessary or proper party to such a suit and to have his name removed from the suit, and even allow the plaintiff to obtain whatever decree he can, against defendant 1 either personally or in the capacity as manager, the Court might grant a decree against defendant 1, in which case it would have been open to defendant 2, if necessary, in a fresh litigation to have the questions decided as between the plaintiff on the one hand and defendant 2 on the other. But reading defendant 2's written statement, it is clear that that was not the line of defence he purported to take. There he sets out various pleas on the merits which, if proved, would have had the result of having the suit dismissed as against defendant 2. For example, he pleaded that there was no necessity to sell and that there was no mortgage binding upon him and put forward other similar pleas. No doubt there is the general statement that the suit against defendant 2 should be dismissed with costs. Under these circumstances one would like to know how the trial Court understood the pleadings in the case. No issue raised the question whether defendant 2 was a proper party to the suit or not.

I am not able to see anything in S. 27, Specific Relief Act, which would prevent a person in the position of defendant 2, when made a party to a suit from having the whole matter agitated and adjudicated on finally in this very same suit, if he chose to do so. Having therefore joined issue on the merits of the controversy and having failed, I do not think it is open to defendant 2 in these circumstances to raise for the first time in second appeal the point that the frame of the suit according to S. 27, Specific Relief Act, ought to have been against defendant 1 only. The learned advocate also argued that at one stage of the trial of the suit, the plaintiff would appear to have been content with taking a decree against defendant 1. The learned District Munsif makes an observation to that effect in the course of his judgment. That was evidently at the time when plaintiff's second witness, the plaintiff, was being examined. That offer was not accepted either by defendant 1 or defendant 2 with the result that the plaintiff's examination had to be completed and two other witnesses had also to be examined on the side of the plaintiff. P. W. 4 proves

(1) A.I.R. 1929 P.C. 269=51 All. 771=56 I.A. 363 (P.C.).

the binding nature of the debts which were purported to be discharged by means of the sale to be brought about by the agreement Ex. A. There would have been absolutely no relevancy in letting in evidence of P. W. 4 if the parties agreed that the case should take that course at that stage as suggested here.

I am therefore of opinion that, whatever might have been the proposal made on the side of the plaintiff at one stage of the trial, the same was not accepted by the defendants, and consequently this second appeal must be disposed of on the footing that there was no such proposal at all. Defendant 2 having pleaded on the merits and having let in evidence on the merits in support of his pleas and having failed with findings against him on all questions that could possibly have arisen between the plaintiff on the one hand and defendant 2 on the other, I do not think it is open to defendant 2 at this stage to ask me to set at large all these findings and to dismiss defendant 2 from the suit at this stage of the litigation. I feel therefore compelled to overrule this contention of the appellant in the circumstances.

The second contention raised by the learned advocate for the appellant is based upon the recent decision of the Privy Council reported in *Skinner* v. *Skinner* (1). As the date of this judgment is 16th July 1929 and as this second appoal was filed in 1926, the learned advocate, as is usual in such cases, took the precaution to file an additional ground of second appeal raising a new point. The purport of the argument raised by the learned advocate on this point is this: The Privy Council has decided, according to his contention, that in the case of an agreement to sell immovable property, an interest in such property is created by such agreement. Having regard to Ss. 17 and 49, Registration Act, such agreement requires registration and Ex. A, not being registered, is not admissible in evidence. When the original evidence is not available for want of registration, secondary evidence could not be let in and therefore the plaintiff's suit must have been dismissed in limine for want of legal evidence to prove the agreement.

To this it was replied by the learned advocate for the respondents that the observations of the Privy Council should be limited to the document they had to consider in that particular case. My attention was drawn to the terms of the document which the Privy Council had to consider. The document is set out in extenso in, pp. 766 and 576 (*of* 57 *M. L. J.*), of the judgment. The one party is called the vendor and the other party is called the vendee, the words "vendor" and "vendee" occurring in several places in the document. In para. 9 these words occur:

"In virtue of this sale and agreement, if the vendee considers necessary, the vendor will always be ready to execute and register a power-of-attorney &c. &c."

Again in para. 11:

"Should the vendee not be able to get mutation of names done in his name and get full and complete possession, the vendor in such a case directs the vendee to pay the balance, &c. &c."

Then there is the undertaking in para. 9 to give the vendee any other document or help the vendee may demand. Para. 12 is also important, "Schedule of properties sold is hereto annexed." Now when construing the words used by their Lordships in the course of their judgment it is proper that we should have regard to the document which was the subject of dispute before them. Having set out the important words occurring in the document, I proceed to notice the several passages occurring in the Judgment of the Privy Council to which my attention was drawn by the learned advocates on the one side or the other. At p. 769 (*of* 57 *M. L. J.*) this is what the Privy Council says:

"On the first question the Subordinate Judge by whom the suit was tried was of opinion that the document was a sale deed. The High Court differed from this conclusion. The learned Judges held that the document ought to be treated as being an agreement for sale rather than a sale deed."

The Privy Council observes:

"Their Lordships have no doubt that the view taken of it by the Subordinate Judge was right."

That being so, it is absolutely clear that the Privy Council construed the document before them as a "sale deed." The further discussion in my view, is relevant only for the purpose of considering whether a provision in a sale deed by which the vendor undertakes to execute any further document that the vendee may ask him to execute

would enable the vendee to put in evidence the sale deed. In my view that is the purport of the whole of the subsequent discussion in the other portions of the judgment of the Privy Council. Their Lordships observe at p. 770 (*of* 57 *M. L. J.*)

"If an instrument which comes under S. 17 as purporting to create or transfer an interest in immovable property is not registered, it cannot be used in any legal proceeding to bring about indirectly the effect it would have if registered."

This observation in my view, confirms the suggestion that the document in that particular case did create an interest in immovable property in the transferee and it is with reference to that document that those observations were made by the Privy Council. The learned advocate for the appellant, however, drew my attention to two passages which, he submitted, were inconsistent with the view that I have set forth above. The passages are :

"They think that an agreement for the sale of immovable property is a transaction affecting property within the meaning of the section inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provisions of S. 17 (2) (b) which exempts from registration and therefore frees from the restriction of S. 49 a document which does not itself create an interest in immovable property but merely creates a right to obtain any document which will do so. In the face of this provision to allow a document which does itself create such an interest to be used as a foundation for a suit for specific performance appears to their Lordships to be little more than an evasion of the Act."

Reading the sentences as a whole, I think that what their Lordships meant there was that the document before them was a document which created an interest in immovable property ; in fact the whole interest in the property was transferred by that document of sale ; and their Lordships observe that simply because there was an agreement to execute a further document if called upon, the same should not be utilized as evidencing an agreement in a suit for specific performance. I do not think that the learned advocate for the appellant is right in his contention that every agreement for the sale of immovable property should be treated after the decision of the Privy Council, to be an agreement affecting immovable property within the meaning of the section. I am not able to understand the observations of their Lordships in that way. On the other hand, we have got S. 54, T. P. Act, which specifically declares that :

"A contract for the sale of immovable property does not of itself create an interest in, or charge upon, such property."

It may not be irrelevant at this stage to call attention to the fact that in cases where an agreement to sell immovable property contained a recital of part payment of the price, the Privy Council had to consider the question whether in respect of the said advance a charge was created on the property. The Privy Council held that a charge was created and that such documents require registration. The practice in India was that even in cases where there was an advance, such documents were treated as mere agreement to sell and as not creating any sort of interest in immovable property. Having regard to the decision of the Privy Council, the Indian legislature had to intervene and Act 2 of 1927 was passed to the following effect :

"In sub-S. (2), S. 17, Registration Act, the following explanation shall be added, namely :

Explanation.—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money."

If I understand the argument of the learned advocate for the appellant rightly, he suggests that the Privy Council decision referred only to cases where there was payment of earnest money, in which case the Privy Council held that the document came under the heading of compulsorily registrable documents, and should be registered before the same could be admitted in evidence, that the Indian legislature restored the law as it was understood in India by Act 2 of 1927, but in cases where there is no earnest money or part payment made, an agreement to sell immovable property should be taken to create not "a charge" (a word which would directly come under Act 2 of 1927) but, "an interest" in immovable property which, having regard to Ss. 17 and 49, Registration Act, would require to be compulsorily registered before the same could be received in evidence. I do not think that the Privy Council case lays down any such propositions as the learned advocate for the appellant asks me to as-

sume. If that be so, the provisions of S. 54, T. P. Act, and also of Act 2 of 1927 would surely have been considered by their Lordships. Further, in the last portion of the judgment of the Privy Council their Lordships make the following observations :

"Their Lordships think that no good purpose would be served by a detailed explanation of the decisions of the Indian Courts. They have the satisfaction of knowing that the principle which has been enunciated above is in accordance with the recent decisions in most of the High Courts."

Their Lordships refer to three cases, one from each of the High Courts of Calcutta, Bombay and Madras. The *Calcutta* case quoted is *Sanjib Chandra* v. *Santosh Kumar* (2), the *Bombay* case is *Ramling Parwatayya* v. *Bhagawant Sambhuappa* (3) and the *Madras* case *Satyanarayana* v. *Chinna Venkata Rao* (4). Referring to these cases one is strengthened in the view set forth above. In the case in *Sanjib Chandra Sanyal* v. *Santosh Kumar* (2), Rankin, J., as he then was, made the following observations :

"From the terms and from the admitted circumstances I think it clear that it (the suit document) was intended to operate as a present demise to the plaintiff for five years."

That was a case where there was not merely an agreement to lease but an actual lease which operated or was construed to operate as a present demise. The case in *Ramling Parwatayya* v. *Bhagwant Sambhuappa* (3) made the distinction between an agreement to sell which does not convey any immediate interest in immovable property and a document which purports to create an interest in praesenti in the property that was the subject of the agreement. The last of the cases in the case reported is *Satyanarayana* v. *Chinna Venkata Rao* (4), a judgment of the late learned Chief Justice of this Court and of Reilly, J. That was a case where the Court had to consider whether a suit for specific performance would lie at the instance of a vendee when, owing to any default on the part of the vendor, the deed of sale in the possession of the vendee was not presented for registration in due course. The Court held that such a deed of sale was inadmissible in evidence unless it was registered according to the provisions of the registration law. That was a case where an actual deed of sale, and not an agreement to sell, was under consideration and the Court held that such a document was inadmissible in evidence.

I have therefore come to the conclusion that the Privy Council only confirmed the principle that was discussed in the Indian Courts in the cases referred to by them ; and that the observations should be taken to refer only to documents which effect a transfer in praesenti of an interest in immovable property. In the view I take, the document, Ex. A, was properly admissible in evidence, and I also overrule this second contention raised by the learned advocate for the appellant. Both the contentions failing, the second appeal is dismissed with costs.

P.R.S./S.N. *Appeal dismissed.*

(2) A.I.R. 1927 Cal. 436=49 Cal. 507.
(3) A.I.R. 1926 Bom. 375=50 Bom. 334.
(4 A.I.R. 1926 Mad. 530=49 Mad. 302.

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* A. I. R. 1930 Madras 688

REILLY AND CORNISH, JJ.

C. Meenambal Ammal—Appellant.

v.

Aburubammal — Plaintiff — Respondent.

Original Side Appeal No. 57 of 1929, Decided on 3rd December 1929, from judgment of Beasley, J. (Now C. J.) D/- 28th March 1929, in E. P. No. 148 of 1928.

(a) Hindu law — Widow — Surrender does not defeat charge created on property —Transfer of Property Act, S. 100 (obiter).

Per Reilly, J.—By surrendering her widow's interest to her husband's reversioner a widow cannot defeat the charge created by the consent decree, on the house in her possession.

[P 690 C 1, 2]

*** (b) Hindu law—Widow—Surrender—Charge created on widow's estate does not persist beyond her death.**

If a widow had only a widow's estate, the charge created by a decree on the property in her possession would not persist beyond her death unless it was made for legal necessity.

[P 690 C 1, 2]

(c) Civil P. C., S. 47—Decree creating charge — Executing Court can construe decree—Decree.

If a decree is the instrument which created the charge, though no doubt the charge can be enforced in execution, yet an executing Court, though it cannot question the validity of a decree, is bound to construe the decree, if necessary: 30 *Mad.* 26 ; 32 *Mad.* 429 and 19 *All.* 480, *Dist.* [P 690 C 2]

(d) Hindu law — Alienation — Widow— Burden of proof lies on alienee to prove that alienation was made for necessity.

The burden of proof lies on the decree-holder as alienee from a widow, who had only a widow's interest in the property to prove that the alienation, viz.,the charge made in the decree, was made for any necessity which could legally extend its validity beyond the widow's life, or that the decree-holder took this alienation in good faith after making the necessary inquiries. [P 690 C 2]

(e) Civil P. C., S. 47—Alienee of land from widow can demand proof of his being her legal representative from decree-holder in execution of money decree against widow.

Where a decree is not a decree for sale of property but is only a money decree it is perfectly open to the transferee of the land from a widow to object that the decree against the widow cannot be executed against the transferee unless it is shown that the transferee is widow's legal representative either by being in possession of the property, which was the widow's property, or, at least, by being in possession of property over which the widow had created an encumbrance which continued to be binding on the property after her death: 32 *Mad.* 429, *Ref.* [P 692 C 2]

K. S. Krishnaswami Iyengar and *N. C. Vijiaraghavachariar*—for Appellant.

K. Ramanatha Shenai—for Respondent.

Reilly, J.—This appeal is against an order made by the learned Chief Justice as Beasley, J. in execution proceedings. In November 1921 one Thayammal, who was the widow of Munuswami Mudali, with her brother Kanniappa Mudali jointly executed two promissory notes in favour of Aburubammal, who is the respondent before us. Kanniappa Mudali became an insolvent, and Aburubammal brought a suit against Thayyammal on the notes. That suit was compromised in April 1925; and on the basis of the compromise a consent decree was made, under which Thayammal had to pay Rs. 1,750 in instalments and the whole amount was made a charge upon a house in Madras called Ganesa Vilas. In December 1925 Thayammal surrendered her interest in that property and in her husband's estate to his reversioners; and they a month or so later sold the house to Meenambal, who is the appellant before us. In June 1926 Thayammal died; and the execution petition with which we are concerned was put in on 30th March 1928. At one stage it was asserted by Aburubammal that this house, Ganesa-Vilas, was the absolute property of Thayammal; but it has been admitted before us that Thayammal got it from her husband, whose property it was. How after being her husband's property it became her absolute property there is no evidence, and it has not been explained to us. Before Beasley, J., the whole case proceeded on the assumption that Thayammal had only a widow's interest in this house; and in the circumstances we also must proceed on that assumption. Beasley, J., eventually made an order that Aburubammal was permitted to execute the decree against the assets of Thayammal in Meenambal's hands and that the house should be sold in execution of the decree. It is against that order that Meenambal appeals.

It has been admitted before us that Meenambal has had nothing to do with any assets of Thayammal other than this house; and it is clear that Meenambal cannot be the legal representative of Thayammal except as the person owning or possessing the house. A large part of the judgment of Beasley, J., is taken up with the consideration of the question whether by surrendering her widow's interest to her husband's reversioners. Thayammal could defeat the charge made by the consent decree on this house. I am inclined to agree with Beasley, J. that Thayammal's surrender could not have that effect, though I do not think it is necessary for the disposal of this case to express any final opinion on that.

But Mr. Ramanatha Shenai who appears for Aburubammal, has taken a new point before us. He has drawn our attention to a decision of Phillips and Odgers, JJ. in *Vijiaraghavachariar* v. *Ramanujachariar* (1), according to which, having made this alienation by way of a charge on the house, Thayammal had put it out of her power to make any surrender to the reversioners at all. In that decision the learned Judges follow the decision in *Sakharam Bala* v. *Thama* (2). If that view is correct, then, as Mr. Ramanatha Shenai contends, the surrender made by Thayammal was invalid, and on the strength of that surrender the reversioners could not convey a good

(1) A. I. R. 1929 Mad. 37.
(2) A. I. R. 1928 Bom. 26=51 Bom. 1019.

title to Meenambal. But that difficulty, I think, could be answered for Meenambal by calling in aid S. 43, T. P. Act. Mr. Ramanatha Shenai has contended that a transfer or attempted transfer of their expectancy by reversioners cannot be validated under the provisions of that section and has quoted *Ramasami Naik* v. *Ramasami Chetti* (3). But that was an entirely different case. In that case certain defendants, who were in the line of succession to a zamindari, purported to mortgage their expectancy, and the learned Judge held, no doubt rightly, that that was prohibited by S. 6 (a), T. P. Act. But here the reversioners did not purport to transfer any expectancy to Meenambal. They professed to be the owners of this house on the ground that the reversion had fallen in by the surrender and they professed to sell their present right in the house to Meenambal. If the true view is that the surrender was invalid, they had not a present right in the house. But, when Thayammal died, the reversion did fall in apart from the surrender, and Meenambal, if the conditions of S. 43 of the Act are fulfilled, could call upon them to make good the transfer which they erroneously professed they were able to make at the time of their sale.

But that is really a by-path in this case. Anyhow it is admitted that Meenambal is in possession of the house, and the real question is whether the charge, which was created by the decree, is one which persists after Thayammal's death. If Thayammal had only a widow's estate and on that assumption we must deal with the case the charge would not persist beyond her death unless it was made for legal necessity. Beasley, J. in his judgment mentions that Meenambal did raise this objection, that the charge could not extend beyond Thayammal's death; but he says the question was not argued before him. But, if that contention was raised for Meenambal, no argument, so far as I can see, at that stage would be necessary. If Thayammal had nothing more than widow's estate in this house, all that Meenambal need do was to raise that contention and then wait for the decree-holder to attack the position by showing that the charge was created for necessity legally sufficient to give it effect on the husband's estate after Thayammal's death or at least to show that she took the charge in good faith that it was of that nature after making reasonable inquiries.

The burden was obviously upon Aburubammal. Mr. Ramanatha Shenai admits that that is the well-known rule on the matter and that the burden would be upon his client if this was a suit. But he contends that the whole position is different because these are execution proceedings and that Meenambal cannot question the nature of the charge in execution proceedings. His argument is first that the Court in execution proceedings cannot question the validity of the decree. That is not a proposition which anybody has disputed before us or is likely to dispute. But he goes further and says that this is of the nature of a mortgage decree for sale, and he contends that no one can be heard to say in execution that this property is not to be sold in satisfaction of the charge. He quotes in support of that position *Kumaretta Servaigaran* v. *Sabhapathy Chettiar* (4), *Zamindar of Karvetnagar* v. *Trustee of Tirumalai Tirupati etc. Devasthanams* (5) and *Sanwal Das* v *Bismillah Begam* (6). Now it is quite true that, if there is a mortgage decree for sale in a suit in which the validity and character of the mortgage have been established or admitted, no one can come in as a claimant under R. 58, O. 21 of the Code or as an objector under S. 47 of the Code and say that the property mortgaged and ordered to be sold cannot be sold because some one has a right to it. In such a case the mortgaged property must be sold in accordance with the decree, that is the mortgagor's and mortgagee's interests in the property, whatever they may be. But here to my mind we have something different from a mortgage decree for sale. This decree is the instrument which created the charge, though no doubt the charge can be enforced in execution. An executing Court, though it cannot question the validity of a decree, is bound

(3) [1907] 30 Mad. 255=17 M.L.J. 201.

(4) [1907] 30 Mad. 26=16 M. L. J. 545.
(5) [1909] 32 Mad. 429=2 I. C. 18=19 M. L. J. 401.
(6) [1897] 19 All. 490=(1897) A. W. N. 115.

to construe the decree, if necessary. Here we have a charge on this house. What does that charge mean? Is it a charge on the house which is to subsist indefinitely until the debt is satisfied, or is it a charge on Thayammal's interest in the house as a widow subsisting only for her lifetime? That is a question of the utmost importance, and, to my mind, a question which the executing Court in such a case as this must decide, if required to do so. We must remember that this was a consent decree, made on the basis of a compromise. The charge is a charge created as part of Thayammal's contract though it is clothed in decretal language and so can be enforced in execution proceedings. But it is obvious that, although the Court was the agency through which this charge was created, Thayammal could give the Court no authority to create a charge of more extended validity than she herself could create. As the nature of the charge actually created is disputed, it must be determined before the decree can be executed.

That appears to me to be one answer to Mr. Ramanatha Shenai's contention that these matters cannot be agitated in execution. A second answer is that Aburubammal has brought Meenambal into the matter as Thayammal's legal representative. Meenambal denies that she is Thayammal's legal representative; then the question whether she is so or not has to be decided in execution proceedings. And how can it be decided without going into the question of the effect of the charge? Meenambal can only be legal representative in this case either if Thayammal had an absolute right to this property, which we must leave out of account, or if Thayammal created a charge on her husband's property validly so that it persisted beyond her death. In the latter case strictly Thayyammal would have been acting, when she created the charge, as representing her husband's estate, and Meenambal, being in possession of the property on which the charge had been created, would be the legal representative of Thayammal in that capacity. The dispute whether Meenambal was the proper legal representative first came before the Master, and he refused to go into these questions whether the property was Thayammal's absolute property, whether Thayammal had only a widow's interest in it and whether she, having a widow's interest, had created a valid charge. On his refusal the matter was taken before the Judge and came before Kumaraswami Sastri, J. He found that the Master was wrong and remarked that this was not, as the Master thought, a question of going behind the decree, saying in the course of his judgment:

> "The question for decision is the character of a party, which in turn depends on the title to the property, the possession of which will make the person liable to be proceeded against in execution."

With that view I entirely agree.

There is a third difficulty in Mr. Ramanatha Shenai's way. As I have said, Kumaraswami Sastri, J., coming to that conclusion sent the matter back to the Master for the determination of these questions. The Master found that under the rules of the Court he could not deal with it and referred it to the Judge. It then came before Beasley, J. Now there was no appeal against Kumaraswami Sastri, J's., order that these questions should be decided in execution. And, though there appears to have been an elaborate hearing before Beasley, J., there is nothing to show that any objection was taken for Aburubammal to the determination of these questions in the execution proceedings. In my opinion it is not open to Aburubammal now to say that this is a matter which cannot be dealt with in execution.

The position then appears to me to be this, that the decree-holder as alienee from Thayammal who had only a widow's interest in the property, has not proved that this alienation, the charge made in the decree, was made for any necessity which could legally extend its validity beyond Thayammal's life, or that Aburubammal took this alienation in good faith after making the necessary inquiries. On the facts before us, on the contrary it appears probable that the debts for which this charge was created were not debts which could bind the husband's estate as they were contracted by Thayammal and her own brother. However the burden is on the alienee, and the alienee has not discharged it.

There is only one other matter which I need mention. In one part of his judgment Beasley, J., has expressed the opinion that at any rate Aburubammal is entitled to recover the rents and profits of this house up to the date of Thayammal's death. In regard to that I must with respect differ from him. The charge, so long as it is valid, gives a right to recover the debt by sale of the house; but it could give no right to participate in the rents or profits. In my opinion, this appeal must be allowed and the execution petition dismissed with costs throughout.

Cornish, J.—I entirely agree.

I think that much of the argument addressed to us by the learned counsel for the respondent, the execution petitioner, was not really open to him in this appeal. When this matter came before Kumaraswami Sastri, J., the learned Judge clearly laid down that the objection raised by the appellant, who was the respondent in the execution proceedings, to the notice of execution, was not an attempt to go behind the decree against Thayammal, but was intended to show that the decree was not executable against her as Thayammal's legal representative. The appellant's objection was not an objection to the decree, which so far as she was concerned was a perfectly valid decree against Thayammal's legal representative because she happened to be in possession of the property in which Thayammal during her lifetime, had a Hindu widow's estate. I think the petitioner must have appreciated this position, because in her counter-affidavit she alleged that the property was the absolute property of Thayammal. These were the rival cases put forward by the two parties and Kumaraswami Sastri, J., in his judgment expressed the opinion that this question must be determined in execution under S. 47, Civil P. C., and that each party was entitled to prove the case which she set up in her affidavit. There was no appeal from this judgment, and when the case was referred by the Master into Court for determination by the Judge the argument appears to have proceeded on the lines indicated by Kumaraswami Sastri, J., in his judgment. Beasley, J., went very closely into the question whether the surrender of her estate, which Thayammal was alleged to have made in favour of the reversioners, from whom the appellant derived title to the property, was a valid surrender, and the learned Judge came to the conclusion that it was not. He did not, however, find that the property in respect of which the surrender is supposed to have been made was, as alleged by the petitioner, the absolute property of Thayammal. On the contrary, it is clear from the judgment that he was of opinion that it was property in which Thayammal had a Hindu widow's estate for at the conclusion of his judgment he held that the

> "defendant, having taken the property with full notice of the charge created upon it and not having proved that the debt was not for necessity, the onus of proving this being upon the defendant, cannot be heard to say that the decree is not to be executed against her."

In my view, the question whether Thayammal could or did terminate her widow's estate by a surrender is not very material. Her estate was terminated by her death a few months later, and it appears to me that, if the appellant is a legal representative within the definition of S. 2 (11), Civil P. C., it does not matter whether the title under which she purported to be in possession was a good title or a bad one. Now, the decree here is not a decree for sale of property under O. 34, Civil P. C., so as to come within the rule referred to in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupathi, etc., Devasthanams* (5) at p. 440. It was perfectly open, therefore, to the appellant to object that the decree against Thayammal could not be executed against her unless it was shown that she was Thayammal's legal representative, either by being in possession of the property, which was Thayammal's property, or at least by being in possession of property over which Thayammal had created an encumbrance which continued to be binding on the property after Thayammal's death. I think that the appellant would have been entitled to succeed on the first point because the petitioner failed to substantiate her allegation that the property in question was the absolute property of Thayammal. At the hearing, however, this point does not appear to have been argued.

It is necessary, therefore, to consider whether the appellant can be deemed

to represent the estate of the deceased Thayammal by reason of being in possession of the property which Thayammal purported to charge, and which property Beasley, J., has found was taken by the appellant with full knowledge of the charge. But there the petitioner being the alienee of Thayammal, that is, the person in whose favour the charge was created by the consent decree, is met with the obligation of discharging the onus of proof which lies on the alienee of property from a Hindu widow. It has been held by a Full Bench in *Tirupathi Raju* v. *Venkayya* (7) that the interposition of a consent decree does not make any difference to the onus of proof. The alienee must still show that the alienation upon which he relies is one that is binding on the estate. The onus, therefore, was clearly upon the petitioner to show that the charge bound the estate after Thayammal's death ; but she has not attempted to discharge the onus. On this ground I am of opinion that the execution petition should have been dismissed.

P.R.S./V.S. *Appeal allowed.*

(7) A. I. R. 1922 Mad. 131 = 45 Mad. 504 (F. B.).

A. I. R. 1930 Madras 693

REILLY AND CORNISH, JJ.

Official Assignee of Madras — Defendant—Appellant.

v.

T. Krishnaji Bhat — Plaintiff—Respondent.

Original Side Appeal No. 84 of 1926, Decided on 6th December 1929, from decree of Kumaraswami Sastri, J., D/- 18th August 1926, reported in *A. I. R.* 1927 *Mad.* 249.

(a) Trusts Act, S.6—Instrument of trust directing trustee to invest trust money either in trustee's own or some other business and providing that interest shall be paid for use of that money—Valid trust is created and not mere relation of debtor and creditor.

There is nothing illegal in a settlor authorizing by the instrument of trust, the trustee to invest the trust money in a business, whether trustee's own business or some other business, and providing that interest shall be paid for the use of the money so invested to the beneficiary and so it would be wrong to say that the relationship thus created is that of mere debtor and creditor. The arrangement creates a valid trust. [P 698 C 1]

(b) Trusts Act, S. 63—Trustees investing trust money in their own firm—Firm running insolvent—Beneficiary can trace trust money into firm's assets in Official Assignee's hands though unable to point to any particular stock as representing original investment.

Where being permitted by the instrument of trust, the trustees invest the trust money in their own firm, but afterwards the firm goes insolvent, the beneficiary can trace the trust money into the assets of the firm, notwithstanding his inability, at the time when the stock in trade of the firm became vested in the Official Assignee, to point to any particular stock as representing the original investment : *Pennel* v. *Deffell*, 43 *E. R.* 553 *In re, Hallett's estate* : *Knatchbull* v. *Hallett*, 13 *Ch. D.* 696, *Rel. on.* : *A. I. R.* 1930 *Mad.* 24, *Ref.* [P 698 C 1,2]

K. V Krishnaswamy Iyer, and *T. L. Venkatarama Iyer*—for Appellant.

V. V. Srinivasa Ayyangar and *S. Ramanatha Devay* and *C. Rangaswami Aiyangar*—for Respondent.

Reilly, J.—In this case it is admitted that in August 1919 Tawker and Sons, defendants 1 to 8, who were a firm of jewellers collected Rs. 65,000 on behalf of the plaintiff's father, who is a nephew of defendant 1. It is also admitted that in October 1919 the plaintiff's father created a trust in respect of Rs. 10,000 out of that Rs. 65,000. The trustees were Tawker and Sons, defendants 1 to 8, and the beneficiary was the plaintiff who was then a minor, aged 13. The obligations of the trust are set out in Ex. A, a letter from the plaintiff's father to defendant 1, in which he says :

"It is my request that you should invest in your firm Rs. 10,000 in the name of my minor son, T. S. Krishnajee Bhat, and pay him the interest accruing thereon:"

and after making reference to another matter he goes on :

"I shall not trouble you any more about these moneys and shall not question your investment of Rs. 10,000 either in your firm or any other as you may deem fit from time to time as you may deem proper. Until my said son becomes 21 years of age, you need not hand over the principal to him, only the interest you can be paying to my family."

A few days later Tawker and Sons gave a receipt to the plaintiffs' father for this Rs. 10,000 as fixed deposit in the name of his minor son, T. Krishnajee Bhat, in accordance with the instructions contained in Ex. A, stating that the amount was to carry interest at 9 per cent per annum.

In November 1923, that is four years later, the plaintiff instituted this suit against Tawker and Sons, alleging that

they were then involved in financial difficulties and were likely to be adjudged insolvents and also that they had committed a breach of trust by not investing the Rs. 10,000 in accordance with the trust. He claimed a preferential right over the assets of Tawker and Sons to the extent of Rs. 10,000 and any interest that might be due upon it, and he prayed for the removal of Tawker and Sons from their office of trustees, for the appointment of a new trustee and for an order that Tawker and Sons should hand over the Rs. 10,000 to the new trustees or that it should be paid into Court out of their assets in preference to the claims of any other creditors.

Tawker and Sons in their written statement admitted the trust. They denied that the plaintiff had any right to question their investment of the Rs. 10,000; they denied that they had committed any breach of trust, they alleged that there had been overpayment of interest, and they maintained that the suit was premature.

Issues in the suit were framed in July 1924. It must be noticed that at that stage the allegation of breach of trust was dropped, and there is nothing at all about it in the issues. At some time in 1925, while the suit was pending, Tawker and Sons were adjudged insolvents. The Official Assignee was then brought in as defendant 9, and in February 1926 he filed a written statement, in which he put the plaintiff to the proof of the trust and denied that the plaintiff had any preferential claim over the assets of Tawker and Sons. But he did not ask for any additional issues to be framed.

At the trial the existence of the trust was admitted, though it is not clear exactly what admission was made in regard to the subject-matter of the trust. Kumaraswami Sastri, J., who tried the case, has made a statement in his judgment in regard to the course the arguments took, which Mr. Venkatarama Ayyar, who appeared for the Official Assignee at the trial and also appears in the appeal, had told us is not exactly correct. But there is no question now that the existence of some trust was not then denied by the Official Assignee, though, as will be seen there is still some dispute as to what was the subjectmatter of the trust. The main question which was dealt with at the trial was the question whether the plaintiff had a preferential claim over the assets of Tawker and Sons. Kumaraswami Sastri, J., came to the conclusion that the plaintiff had such a claim, and he made a decree against the Official Assignee for the payment of the Rs. 10,000 and interest into Court. He did not order the removal of Tawker and Sons as trustees, nor did he say anything about the appointment of a new trustee. But that is of no importance at the present moment, as we are informed that the plaintiff is already a major, more than 21 years of age. The Official Assignee appeals against that decree.

As I have said, at the trial the allegation of breach of trust was not urged. It had been dropped, so far as we can see, at a much earlier stage. But at a very late stage in the arguments before us it has been suggested that the breach of trust may be made out in this way: Tawker and Sons as trustees were under the duty of guarding the interests of the plaintiff in the most diligent way possible: they had the option of investing this money either in their own firm or in any other firm: when they found that their own firm was in difficulties, it was their duty to exercise their option of putting the money in some safer business. But that contention was not raised at the trial; and there is no evidence on the record to show when Tawker and Sons began to be in financial difficulties, or how far those difficulties had gone at the date of the suit. In my opinion we cannot take up this question of breach of trust at this stage. We must treat the case, as it was treated at the trial, as one in which no breach of trust was seriously alleged and certainly no breach of trust was made out.

On that basis no wrongful disposal of the trust property has been shown; nor has any wrongful mixing of the trust property with other property of Tawker and Sons such as would bring the case within S. 66, Trusts Act, been suggested. That being so, can the plaintiff get a charge for this Rs. 10,000 on Tawker and Sons' assets? He can do so, if he can trace his trust property into the assets in the Official Assignee's

hands within the meaning of S. 63, Trusts Act. It is admitted that the Official Assignee got into his hands a considerable quantity of jewellery, the stock in trade of Tawker and Sons, after their adjudication and that by selling a part of that stock he has realized Rs. 22,000 much more than is necessary to satisfy the plaintiff's claim. At the trial an attempt was made to trace the Rs. 10,000 with which we are concerned definitely to the jewellery which came into the Official Assignee's hands about six years after the creation of the trust. That obviously was a very difficult thing to do. It would require a chain of definite evidence to show that the jewellery which came into the Official Assignee's hands was actually bought with this Rs. 10,000 or with the proceeds of other jewellery, which in its turn was connected directly or indirectly by some chain of happenings with the Rs. 10,000. So far as the record shows, no attempt whatever was made to show anything more than the first step in such a chain, namely, that the Rs. 10,000 was used by Tawker and Sons for the purchase of some jewellery. What became of that jewellery, except that the evidence indicated that it was probably sold and the proceeds used again, there is nothing to show. And even in regard to this first purchase with the Rs. 10,000 the evidence, which is that of the plaintiff's father appears to me vague, inadequate, flimsy and entirely insufficient to trace the Rs. 10,000 to the jewellery which actually came into the Official Assignee's hands.

But it has been urged before us by Mr. Srinivasa Iyengar, who appears for the plaintiff that it is not necessary for him to show that this Rs. 10,000 became by a succession of happenings transformed into that particular jewellery which eventually came into the Official Assignee's hands, that it is enough for him to show that the Rs. 10,000 was invested in Tawker and Sons' business, which is admitted, and that from that alone he can trace the trust property to the assets of the firm, at the time of their insolvency. Is that admitted fact, the investment of the Rs. 10,000 in Tawker & Sons' business, sufficient for this purpose of tracing within the meaning of S. 63, Trusts Act? We must remember that this investment was permitted, and indeed intended, by the plaintiff's father when he created the trust. When he directed that the Rs. 10,000 was to be invested in Tawker & Sons' business, should they wish so to invest it, what could he have meant except that it was to become a part of the working capital of Tawker & Sons' business. If that were so, into what could it become transformed when used as working capital? It would be spent, we may suppose, on the purchase of stock or the payment of establishment or other running charges of the business or perhaps in clearing off debts and overdrafts. If that was done, what would represent the trust property now? I think it would be represented, as Mr. Srinivasa Iyengar contended, by the stock in trade, the goodwill of the business and the outstanding debts due to the business, in short by the assets of the firm.

Mr. Krishnaswami Ayyar for the Official Assignee has urged strongly before us that if you are to trace and follow trust property within the meaning of S. 63, Trusts Act, you must be sure that there is a continuing identity from one transformation to another, there must be a traceable continuity. That is undoubtedly correct. You must be able to assure yourself with reasonable certainty that the trust property has been transformed by successive transactions into the substitute which the beneficiary claims or into something embracing it on which he is entitled to a charge. It does seem at first sight a rather long step to say that trust property invested in a business can by that fact be traced within the meaning of the section to the eventual assets of the business. But in *Pennell* v. *Deffell* (1) Turner, L. J., gave an instance of following trust property in this sense. His illustration was the case of an executor of a deceased partner leaving the deceased partner's capital with the surviving partners for them to trade with; and he pointed out that that would be trust money in the hands of the surviving partners and it might be followed, even though it started in the first instance when entrusted to them in the comparatively vague form of stock in trade and

(1) 43 E. R. 553,

book debts, through all the fluctuations and ramifications of the business for a long period to its ultimate fruits, to which the beneficiaries would be entitled. That carries this principle of tracing of following trust property very far. Are we asked to go any farther in this case? Mr. Krishnaswami Ayyar has suggested that the illustration put by Turner, L. J., is inapplicable to this case because the deceased partner had an interest in every item of the partnership assets, and he would distinguish the case put in the illustration from this case in that matter. But surely Turner, L. J., was not dealing with that aspect of the matter at all. If he had been, his illustration would have been entirely inapplicable to the case he was then discussing, *Pennell* v. *Deffell* (1). He was stating generally the length to which the tracing of property was carried in Courts of Equity; and in my opinion that principle as illustrated by him on that occasion is sufficient to cover the tracing of the Rs. 10,000 originally invested in Tawker & Sons' business to the assets remaining in that business when they were adjudged insolvents. It makes no difference that their assets represented not only the Rs. 10,000 but something else also. That does not affect the question, as is shown by Illus. 2, to S. 63, Trusts Act.

But Mr. Krishnaswami Ayyar has raised several interesting and ingenious objections why this principle is not applicable to the present case. He has pointed out quite rightly that when you are tracing trust property through a chain of transformations if you reach a stage where the relationship of trustee and beneficiary no longer exists and in its place you find only the relationship of debtor and creditor, the chain breaks and tracing can go no farther. That is quite true. He urges that in this case the chain broke at the very outset, his contention being that when the Rs. 10,000 was invested in Tawker & Sons' business the relationship of debtor and creditor arose and superseded that of trustee and beneficiary. But I do not think that that correctly represents the position. Can we say in the words of Thesiger, L. J., *In re, Hallett's Estate* (2) that nothing remained "beyond the ordinary duty of a man to pay his debts"? What difference, except in one respect, can we find between the relationship of Tawker & Sons to the plaintiff in regard to the Rs. 10,000 and the relationship of the surviving partners to the executor of the deceased partner in the illustration put by Turner, L. J., in *Pennell* v. *Deffell* (1). There is one distinction. I have mentioned that Tawker & Sons were to pay to the plaintiff interest at 9 per cent per annum on the Rs. 10,000. Is that a crucial distinction? We must remember that this is a very exceptional trust, in which the creator of the trust authorized the trustees to use the money, to invest the money, in their own business. If in exercising their option Tawker & Sons had invested it in some other firm and had collected 9 per cent from those people and handed it over to the plaintiff, there would have been no question that their trusteeship would have continued. Does it make any real difference that by the special authorization of the settlor they invested the money in their own business? As is well known, if the subject of a trust is a house, the trustee cannot take a lease of that house for himself. But if it were permissible for him to do so, could you say that his position as lessee would in that case entirely supersede and wipe out his position as trustee? That is what is suggested in this case: that a relationship of debtor and creditor has arisen which has superseded, overwhelmed and obliterated Tawker & Sons' trusteeship. For myself I do not see how that in the circumstances can have happened. And we must remember that it is admitted that they were trustees for the plaintiff in this matter and that their trusteeship in some sense persisted throughout.

Another objection is based upon the evidence that no money passed between the plaintiff's father and Tawker & Sons when this trust was created. D. W. 1, Tawker & Sons' clerk, says that this was a matter of book adjustment. On that remark Mr. Krishnaswami Ayyar bases the contention that tracing is in this case impossible under the decision *In re, Hallett & Co. Ex parte Blane* (2). It is quite true that in this case Tawker & Sons who held Rs. 10,000 of the plaintiff's father's money did not pay that

(2) [1894] 2 Q. B. 237.

Rs. 10,000 into his hands and he did not pay it back into their hands. But what happened in effect was that they held his Rs. 10,000 and he said: "Please keep that Rs. 10,000 on behalf of my son and invest it in your business." The result of that was that, whereas before the transaction Tawker & Sons were liable to pay Rs. 10,000 to the plaintiff's father at any moment, after the transaction they held Rs. 10,000 which could not be claimed from them for eight years until the plaintiff became 21, and that Rs. 10,000 they could use in their own business. Is it not clear from that that Tawker & Sons' resources, their assets, were by that transaction augmented by the Rs. 10,000. That alone would take this case out of the ruling *In re, Hallett & Co. Ex parte Blane* (2). I may mention here that Tawker & Sons' clerk who has been examined as D. W. 1 gave some confused evidence about the disposal of the Rs. 65,000 collected by Tawker & Sons on behalf of the plaintiff's father. From one part of his evidence it appears that so much of that Rs. 65,000 had been paid out by Tawker & Sons to different persons that less than Rs. 10,000 remained to be dealt with at the time the trust was created. But afterwards he contradicted himself. When we examine his evidence, what is it worth? He is not a man who could give any evidence about the matter of his own knowledge.

It appears from the record that when he was asked questions on this subject he looked into some book which was in Court but which was not exhibited in evidence, and gave his replies from what he found in that book. I do not understand myself how that evidence was in any way admissible. It appears to me of no value whatever.

The last contention of Mr. Krishnaswami Ayyar is that the subject matter of this trust was only a debt due from Tawker & Sons to the plaintiff's father. I have indicated already that I do not think on the facts that represents the position correctly, I may add that if the plaintiff's father had merely transferred to Tawker & Sons the legal right to a debt due to him from Tawker & Sons the debt would have been extinguished, and there would have been nothing on which the trust could operate. But obviously that is not a complete account of what happened.

In my opinion the plaintiff has sufficiently traced this trust property, the Rs. 10,000, to the assets of Tawker & Sons in the hands of the Official Assignee and he is entitled to a charge on those assets. Though with respect I do not agree with all the steps by which Kumaraswami Sastri, J., reached his decision, I agree that his decision is correct. In my opinion, therefore, this appeal should be dismissed with costs.

Cornish, J.—I am of the same opinion. I think that the arrangement evidenced by Exs. A and B was a trust. It was common ground upon the pleadings of the plaintiff and defendants 1 to 8 that a trust was created by the plaintiff's father over a sum of Rs. 10,000 in the hands of the defendants and owing to the plaintiff's father, for the benefit of the plaintiff, and that the defendants accepted the trusteeship. Defendant 9, the Official Assignee, by his written statement did not admit the fact or validity of the trust. But the only issue framed on this point was "what were the terms of the trust," which would seem to import that there was in fact a trust. No question was put to the plaintiff's witness, the plaintiff's father, contradicting or challenging either the fact or the validity of the trust. Indeed, he was only asked one question about the trust and that solitary question put to him in cross-examination was: "When was this trust created." But it has been argued that, notwithstanding the intention of the parties to stand towards one another in the relationship of trustees and beneficiary, the arrangement whereby the trustees were to have the use of the trust money for investment in their business is so incompatible with the notion of a trust, that no trust can be inferred and that the parties must be taken as standing in the relationship of debtors and creditors only in respect of the Rs. 10,000. No doubt it is a well established principle that a trustee is to make no profit out of the trust fund; the reason for the rule being as stated in Lewin on Trusts, p. 306, "to keep trustees in the straight line of their duty." It is equally a principle that, if a trustee trades with the trust money he is accountable to the beneficiary for the profits. But it is

open to a settlor when creating a trust to make it advantageous to the person appointed trustee to undertake the trusteeship, and to determine the purposes for which the trust fund shall be utilized, always provided that the purpose of the trust is not unlawful. There is nothing illegal in a settlor authorizing by the instrument of trust the trustee to invest the trust money in a business, whether the trustee's own business or some other business and providing that interest shall be paid for the use of the money so invested. The only effect of such authority is to save the trustee from what would otherwise be a breach of trust. In my view, therefore, there is no ground for holding that the arrangement made by the plaintiff's father with defendants 1 to 8 is not capable of being treated as a trust.

Now the money being trust money, and if, as stated by the plaintiff's witness at the trial (on contradiction of the plaintiff's written statement in para. 7 of the plaint) it was invested in the defendants' firm, the plaintiff, as beneficiary, has a right to follow the money, if he can trace it, into the firm's assets now in the hands of the Official Assignee. Section 63, Trusts Act, gives him this right, and in my opinion it is unnecessary to look beyond this section. The relevant portion of S. 63 provides:

"Where the trustee has disposed of trust property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust property."

The two illustrations to the section describe the rights of a beneficiary where there has been a wrongful investment of the trust money by the trustee. But the right of the beneficiary to follow the trust money does not depend upon the act of the trustee being a wrongful one. This is clear from the principles stated by Sir George Jessel, M. R. *In Re, Halletts's Estate Knatchbull* v. *Hallett* (3), and which are embodied in S. 63. At p. 708 of the judgment Sir George Jessel says:

"You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds if you can identify them. There is no distinction therefore between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds."

The judgment proceeds to show that where property has been acquired by a trustee with money partly trust money and partly the trustee's own money, the beneficiary can no longer elect to take the property for the reason that it has been purchased with a mixed fund and not with the trust money purely and simply and therefore the beneficiary is entitled to a charge upon the property for the amount of the trust money laid out in the purchase. The evidence of the plaintiff's witness who is the creator of the trust is that this sum of Rs.10,000 was in fact used by the defendants in the purchase of showroom stock. But his evidence is not very precise on this point, for in cross-examination he appears to admit that this was an assumption made by him from the fact that a few days after the receipt of this money certain show room stock was purchased by the defendants. Besides, the witness appears to be speaking of a transaction which took place some time at the end of August or the beginning of September before he left the defendant's shop, where he was employed as manager and prior to the creation of the trust in October. It is certainly difficult to reconcile this evidence with the statement in his letter, Ex. A, written on 5th October in which he speaks of a sum of about Rs. 13,000, the balance of money remaining in the defendant's hands. in respect of which he requests the investment of Rs. 10,000 in their firm for the benefit of his minor son, the plaintiff. But I do not think that the inability of the witness to identify any particular stock as purchased with the Rs. 10,000 affects the plaintiff's right to follow the trust money, if it is be established that the sum of Rs. 10,000, the subject of the trust, was as a matter of fact invested in the defendants' business. The trust money in my opinion is traceable into the defendants' firm notwithstanding the plaintiff's inability at the time when the stock in trade of the firm became vested in the Official Assignee to point to any particular stock as representing the original investment. I think this is clear from what was said by Turner, L.J., in *Pannell* v. *Deffell* (1), at p. 558:

(3) [1880] 13 Ch. D. 696=49 L. J. Ch. 415=28 W. R. 732=42 L. T. 421.

"It is, I apprehend, an undoubted principle of this Court, that as between cesti que trust and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property whether in its original or in its altered state, continues to be subject to or affected by the trust."

And after giving examples of this principle the Lord Justice added:

"But of course in those cases as in other cases the property which is the subject of the trust must in some manner be ascertained."

Reference may also be made to *Official Assignee of Madras* v. *Meenakshi Vidyasala Paripalana Sangam* (4), where this doctrine was applied. The learned trial Judge accepted the evidence of the plaintiff's witness. I have already indicated that the witness's effort to identify particular show room goods as the goods purchased with the Rs. 10,000 does not appear to me successful; but I see no reason to doubt that the transaction evidenced by Exs. A and B was a real and genuine transaction and that, as a result of that arrangement the sum of Rs. 10,000 was in fact invested in the business of the defendants and utilized for the purposes of the business. No evidence has been called to disprove the investment of this money in the business, or to show that the stock which became vested in the Official Assignee on the firm's insolvency was in no wise or could not be the produce of the original investment of the Rs. 10,000. In these circumstances, it seems to me that Kumaraswami Sastri, J., rightly held that the plaintiff was entitled to a charge on the sale proceeds of the stock realized by the Official Assignee, and I think that this appeal should be dismissed.

P.R.S /S.N. *Appeal dismissed.*

(4) A. I. R. 1930 Mad. 24=52 Mad. 919.

A. I. R. 1930 Madras 699 (1)

JACKSON, J.

Renganatha Iyengar—Plaintiff—Petitioner.

v.

Sundararaja Iyengar and *others*—Defendants—Respondents.

Civil Revn. Petns. Nos. 959 and 1288 of 1928, Decided on 7th October 1929, against order of Dist. Munsif, Devakottah D/- 28th March 1928.

Civil P. C., O. 7, R. 10—Court finding suit beyond its jurisdiction cannot do more than order plaint to be presented in proper Court—Plaint should not be rejected.

Where on revaluation, Court finds that the suit is beyond its jurisdiction it cannot do more than order the plaint to be presented in the proper Court. It has no jurisdiction to reject the plaint for failure to pay additional Court-fee: 41 *Mad.* 701, *Rel. on.* [P 699 C 2]

R. Kesava Iyengar—for Petitioner.

V. Rajagopala Ayyar and *T. V. Ramiah*—for Respondents.

Judgment.—In this case the District Munsif of Devakottah found that the petitioner's suit on revaluation was beyond his jursidiction. He ordered him to pay the deficient court-fee within 15 days and when that was not done he rejected the plaint under O. 7, R. 11, Civil P C.

There is some divergence of opinion as to what is the proper course in these circumstances, but the only case in the authorised reports is *Kannuswami Pillai* v. *Jagathambal* (1) which in my opinion accords with the plain reading of the statute. If a Court finds a suit beyond its jurisdiction it cannot do more than order it to be presented in the proper Court. The District Munsif in this case had no jurisdiction to reject the plaint, and I cancel the order. He is directed to return the plaint.

The petition is allowed with costs.

P.R.S./S.N. *Revision allowed.*

(1) [1918] 41 Mad. 701=35 M. L. J. 27=8 M. L. W. 145=46 I. C. 265=(1918) M. W. N. 497.

A. I. R. 1930 Madras 699 (2)

JACKSON, J.

Dandayutha Pani Devasthanam—Petitioner.

v.

Muthayanswami Chetti—Respondent.

Civil Revn Petn No. 1348 of 1927, Decided on 11th November. 1929, from order of Dist. Court, Madura, D/-24th January 1927.

Civil P. C., S. 73—Once inferior Court orders satisfaction or pays out amount in ignorance of decree of superior Court against same judgment-debtor, superior Court cannot order restitution or rectify error and make assets available for rateable distribution among decree-holders of superior Court.

Although a superior Court is competent to call for assets in the hands of an inferior Court in consequence of a sale in execution of the decree of the inferior Court against the

same judgment-debtor so as to render them available for rateable distribution among the decree-holders of superior Court, if the inferior Court has paid out amount or ordered satisfaction of the decree in ignorance of the decree of the superior Court, the superior Court has no jurisdiction to order restitution and rectify the error ex debito justitiae: *A. I. R.* 1927 *Mad.* 67 and 11 *Mad.* 356, *Ref.*

[P 700 C 2]

K. Rajah Iyer and *V. Ramaswami Iyer*—for Petitioner.

T. S. Swaminadhan and *R. Jayaram*—for Respondent.

Judgment.—Petitioner is a devasthanam, and respondent is a Chetti. The devasthanam attached its judgment-debtor's property in execution of a decree in the District Court, Madura, in November 1924.

The Chetti had attached the same property, and brought it to sale in execution of a decree in the Sub-Court, Dindigul. Out of the sale proceeds he satisfied his decree.

The devasthanam petitioned the District Judge to order restitution of the amount taken by the Chetti in order that there might be rateable distribution. The District Judge held that he had no jurisdiction to pass such an order and hence this petition.

Part of the argument on behalf of the petitioner has been directed towards showing that if the Sub Court held assets in consequence of the Chetti's sale, such assets would be available for rateable distribution by the District Court. So much the respondent is prepared to concede, and authority for the proposition will be found in *Periya Karupan* v. *Soma Sundaram Chetti* (1). It is not the respondent's case that the sale by the Sub-Court prevails against the attachment by the District Court. He merely contends that when the money has been paid out by the Sub-Court, it is too late for the District Court to call it back.

The petitioner relies strongly upon *Madden* v. *Chappani* (2), where apparently the same Court was executing decrees for a Mrs. Madden and for a Pillai, both of whom had taken out attachment against the same judgment-debtor. The Pillai brought property to sale and set off his decree amount against the purchase-money; Mrs. Madden claimed that the purchase-money was an asset available for rateable distribution and should not have been paid in and then paid out to the Pillai alone, which was what the process of setting off amounted to. This Court agreed that the lower Court could only have allowed the set off subject to Mrs. Madden's right to rateable distribution, and the Pillai was bound to pay in the purchase-money which was rateably due. Such refund could be enforced by an order in execution by way of restitution.

Against this ruling the respondent relies upon an unreported decision of a Bench of this Court C. R. P. No. 586 of 1926. There the attachments were in the Courts of a Sub-Judge and a Munsif. The Munsif sold the property and distributed the proceeds to two judgment-creditors. A third judgment-creditor who had an attachment in the Sub-Court demanded that these assets should be called back by the Munsifs to enable him also to share in the rateable distribution. The question before this Court was whether the Munsif had jurisdiction to do so and it was held that the Munsif had not acted illegally or without jurisdiction, because it was through no fault of his that he had never heard of the attachment in the Sub-Court, and, therefore, he had no jurisdiction to rectify his error ex debito justitiae.

The matter then resolves itself into the question, when is the conduct of the Court such, that it may itself take steps for rectification in the ends of justice? It is held in *Madden* v. *Chappani* (2) that it can take action when it has overlooked an attachment which is pending before it, and, in the unreported case, that it cannot take action when it has ignored an attachment in another Court which was never brought to its notice.

With all respect, I consider that the distinction drawn in these two cases affords a very just rule of law. The learned District Judge, in effect, followed the unreported case which is relevant to the facts before him, and I see no reason to interfere. The petition is dismissed with costs.

P.R.S./V.B. *Petition dismissed.*

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(1) A. I. R. 1927 Mad. 67.
(2) [1888] 11 Mad. 356.

* A. I R. 1930 Madras 701

WALLACE AND ANANTAKRISHNA AYYAR, JJ.

Jaffar Husain Khan and *others*—Plaintiffs—Appellants.

v.

Krishnan Servai and *others*—Defendants—Respondents.

Second Appeal No. 105 of 1926, Decided on 16th December 1929, from decree of Sub-Judge, Trichinopoly, in Appeal Suits Nos. 252 and 256 of 1923.

(a) Civil P. C., S. 11—Previous suit confined to a particular right only, general right not being in question—Plea claiming general right in subsequent suit is not barred by constructive res judicata.

Where in a suit by Hindus against a Government Order denying them the right to play music at the "medai" during the "Mari Amman" festival, the right was granted by the Court, they are not precluded by constructive res judicata from claiming, in a subsequeut suit, a general right to play music in the public street during the festival since it was not incumbent on the Hindus to claim such general right in the former suit. [P 701 C 1]

*** (b) Highway — Procession — Playing music on public streets and in Hindu temple customary — Mosque built in the locality subsequently and deliberately — Hindus' rights cannot be curtailed so long as the right of the public to ordinary use of the road is not interfered with and lawful directions of Magistrates are carried out.**

Where a Hindu temple existed in a locality for a long time and the community had exercised the right to play music in it and also on the adjacent public street for a considerable length of time and subsequently the Mahomedans deliberately built their mosque cheek by jowl with the Hindu temple and sued the Hindus for a declaration restraining them from disturbing their worship,

Held: that the Hindus had the right to conduct processions with music so long as they did not interfere with the ordinary use of the street by the public and subject to the lawful directions by the Magistrates. That the right of the Mahomedans to stop the playing of music depends on the circumstances of each case and that they cannot claim to curtail the Hindus' right of service and music which has been customary long before the mosque was built: *A.I.R.* 1925 *P. C.* 36, *Foll.*; 2 *Mad.* 140, *Expl.*; and 6 *Mad.* 203 (*F.B.*), *Ref.* [P 703 C 1]

B. Pocker—for Appellants.

M. S. Vaidyanatha Iyer—for Respondents.

Wallace, J.—The plaintiffs are representative Mahomedans of Lalgudi and neighbouring villages. They sued for a declaration that they are entitled to carry on public worship in the suit mosque, at hours stated by them, undisturbed by Hindu processions of music, or playing of music in the adjoining Pilliar Kovil, and they sued further for an injunction restraining the defendants who are representative Hindus of these villages, from so disturbing their worship. Both the lower Courts have dismissed the suit and the plaintiffs appeal.

Although the plaint prayer is indefinite as to the period of time for which the plaint relief is desired, the plaintiffs' learned advocate stated at the Bar that the plaint case relates to the period of the Mari Amman festival. The plaintiffs claim that the relief they seek for was in effect granted in a former suit filed by the Hindus against the Mahomedans to set aside the Government Order restraining the Hindus from playing music in front of the suit mosque during stated hours of the day at the time of the Mari Amman festival. The decree in that suit was in favour of the Hindus, but the plaintiffs' argument is that the point on which they now seek relief must be taken to have been decided against the Hindus in the former suit, either because it was there specifically sought for and refused, or because it ought to have been sought for and was not. They thus claim that on this point there is a matter of constructive res judicata and that the lower Courts have on this point committed an error of law.

The former suit was O. S. No. 226 of 1911, and ended in the High Court in S. A. 112 of 1914. The judgment and decree in the former suit are Exs. H and H (1). It was finally decided by the High Court that the scope of that suit was confined to music at a medai which was in the public street in close proximity to the mosque, and to the alleged interference with the mosque worship which the playing of music at that medai during the Mari Amman festival occasioned. The High Court decided that the Hindus have the right of celebrating the Mari Amman festival at the medai, "without any restriction as to the time of playing music." That would seem to be a decree entirely in favour of the Hindus, but the plaintiffs here claim that it must be taken that the Hindus have no other right of playing music during the Mari Amman festival than that which has been declared by the High Court because if any such further right existed

it was either implicit in the subject matter of the former suit or ought to have been made the subject matter of that suit. I am unable to accept that argument. As to the first contention it is not open to the plaintiffs, since they themselves in the former suit contended that that suit was confined to playing at the medai and that even the right to take the procession with music past the mosque was not included there, and on that very ground they persuaded the High Court to modify the decree of the lower appellate Court. It is not open to them now to turn round and say that any other matter was included in the former suit. As to the contention that it ought to have been made the subject matter of the suit I find no substance in this either. The cause of action in the former suit was based on a definite Government Order which infringed the present defendants' rights of playing music at the medai in the public street. On that point they succeeded. The Government Order did not not touch the general right of playing music in the public street or inside the Pillaiyar Kovil which is made the subject matter of the present case. It was not incumbent on the Hindus in the former suit to seek for a relief which had not been denied to them by the Government Order which formed their cause of action. I, therefore, cannot find that the plaintiffs' present claim can be based on any theory that the rights now claimed by the Hindus were denied to them in the former suit.

Some question was raised as to whether the Hindus have not shifted the position of the medai, but the lower Courts have found that there has been no change and that is a pure question of fact and binding on us in second appeal. The points in the present suit and decided there in favour of the Hindus are the alleged disturbances caused by the Hindus playing music, not at the medai, which is in the public street, but in the public street itself and inside the Pillaiyar Kovil which adjoins the mosque. The plaintiffs allege first that the playing is in itself a nuisance which they have a civil right to stop, and secondly, that this playing which is a part of the Mari Amman Kovil festival takes place on days outside the proper 15 days for that festival. As to the first point the plaintiffs' contention set out in para. 32 of the plaint is that any loud playing of music during their religious service is an infringement of their civil rights. No authority is advanced for that proposition. As to the right of procession in public streets with music the law on the subject has been finally laid down by the Privy Council in *Manzur Hasan* v. *Muhammad Zaman* (1). The Hindus have the right to conduct such procession so long as they do not interfere with the ordinary use of the street by the public and subject to lawful directions by the Magistrates. So far as the right of the Mahomedans to stop the playing of music inside a Hindu temple is concerned I find no direct authority in point, but it appears to me that that can only be decided not as a proposition of law but on the stated circumstances in each case. The plaintiffs rely strongly on a sentence from *Muthialu Chetty* v. *Bapun Sahib* (2):

"It is on the one hand a right recognized by law that an assembly lawfully engaged in the performance of religious worship or religious ceremonies shall not be disturbed."

That no doubt is a general right, but obviously it can be modified by circumstances so that the exercise by each party of its legal rights shall be reasonable and with due regard to the rights of the others: see *Sundaram* v. *Queen* (3). If, for example, two places of worship of different sects have been existing side by side from time immemorial then each no doubt must exercise its rights of worship with due regard to the rights of the other and submit to curtail its own rights in consideration of the other party also curtailing its rights. The modus vivendi is a compromise of competing rights and the Courts will enforce as the real civil rights of each party the mutual compromise, instead of putting both parties in an impossible position by declaring the formal civil rights of both. But where, for example, a new sect or body of worshippers invades a locality already occupied by another religious body, it is not reasonable that it should in the name of ensuring quietness for its own worship, claim to curtail the service of worship, which has been customary

(1) A. I. R. 1925 P. C. 36=47 All. 151=52 I. A. 61 (P.C.).
(2) [1879] 2 Mad. 140.
(3) [1883] 6 Mad. 203 (F.B.).

long before it invaded the locality, That is the present case. It is found as a fact by the lower Courts that the Mahomedans chose to erect their mosque close to an existing Pillaiyar temple where service with music forms part of the usual public religious worship, and they now claim that such service shall be stopped during their own service hours. The lower Courts have found that the Pillaiyar Kovil was built long before the mosque and that the mosque therefore was built with the full knowledge that it would be close to the Hindu temple.

It was urged that when the mosque was built the Pillaiyar Kovil was not actually being used, but I do not see that that makes any practical difference. The Mahomedans deliberately built their mosque cheek by jowl with the Hindu temple and in such a case the newcomer must respect the religious sentiments and services of the older inhabitants. It would be different if the service in the Pillaiyar temple amounted to a general public nuisance but no such case is put forward here. The Mahomedan sect alone cannot and does not represent the general public; it is only one section of the general public.

As to the alleged extension of the Mari Amman festival days, that is a point which seems to me irrelevant. The only ground on which the extension is attacked and can be attacked in this suit is that it is an infringement of the former decree. I cannot find that time is of the essence of the former decree, nor is the period of 15 days mentioned. In any case that decree as I have held applied only to music at the medai and has no concern with music played in the public street or inside the Pillaiyar Kovil.

The appellants, therefore, fail on the points raised by them. The lower appellate Court has committed no error of law. I would, therefore, dismiss the appeal with costs.

Anantakrishna Ayyar, J.—I agree.

P.R.S./J.M. *Appeal dismissed.*

A. I. R. 1930 Madras 703

PANDALAI, J.

(*Pulavarthi*) *Lakshmanaswami*—Petitioner.

v.

Abdul Khudavande Sahib Garu and *others*—Respondents.

Criminal Revn. No. 887 of 1929 and Criminal Revn. Petn. No. 797 of 1929, Decided on 30th January 1930.

Madras Local Boards Act, S. 221—Application under S. 221 for recovery of dues—Other remedies not exhausted as enjoined by Government Orders—Government Orders being merely advisory, Magistrate cannot decline to consider application.

The Government Orders enjoining on the Local Boards to exhaust all other remedies of realizing dues before having recourse to S. 221 before a Magistrate are only advisory and merely administrative direction and a Magistrate cannot decline to consider an application under this section where other remedies have not been exhausted. [P 703 C 2, P 704 C 1]

Ch. Raghava Rao—for Petitioner.

K. Venkatarama Raju—for Respondents.

Public Prosecutor—for the Crown.

Order.—This petition arises from an application to the Stationary Sub-Magistrate of Bhimavaram by the Union Board of Akiveedu under S. 221, Local Boards Act, to realize from the respondents the amount of a penalty which the Union Board alleged the respondents had incurred by reason of unauthorised occupation or encroachment upon the property of the Union Board. The Sub-Magistrate, instead of proceeding under the section to hear the application and the objections if any and to determine them, made an order on 27th March 1929 that in pursuance of two Government Orders respectively 4657 L & M dated 23rd November 1928 and 770 L & M dated 13th February 1929, the Union Board could not proceed before the Magistrate, before it had exhausted all other processes for the recovery of the dues. The Board has petitioned this Court to revise the said order.

I think the order of the Sub-Magistrate was wrong. The Government Orders, mentioned above are at best only advisory and amount to a caution to the Local Boards that it is proper to exhaust the other available means of realising dues before having recourse to S. 221 before a Magistrate. Government Orders as such have no force of law and were merely administrative

directions. Once the matter was placed before the Magistrate, it was his duty to enquire into it according to law, i. e., S. 221. He has practically declined to do so and therefore the order is set aside and the papers will be remitted to him for disposal according to law.

P.R.S./J.M. *Order set aside.*

A. I. R. 1930 Madras 704

BEASLEY, C. J. AND PANDALAI, J.

Public Prosecutor—Appellant.

v.

Lakshmamma—Accused.

Criminal Appeal No 420 of 1929, Decided on 27th November 1929.

Criminal P. C., S. 417 — Appeal by Government against acquittal—High Court should not interfere if trial Court's judgment is neither perverse nor such as no reasonable man shall come to even if it comes to conclusion that prosecution case upon evidence was strong enough to justify conviction.

An appeal on behalf of Government in the exercise of the powers conferred by S. 417 should not be entertained when the judgment appealed from is based upon facts and the conclusions of the Court are such as may reasonably be arrived at upon the facts found. Where, therefore, the High Court cannot say that there were not some grounds which might justify the acquittal of the respondent and that the judgment of the learned Sessions Judge is perverse or one which no reasonable man could have come to, on the facts, it should not interfere with that judgment even if it comes to the conclusion that upon the evidence the prosecution case was sufficiently strong to justify a conviction : 16 *All.* 212 and 16 *Cr. L. J.* 529, *Appl.*

[P 704 C 2, P 705 C 1]

K. S. Vasudevan—for Accused.

Beasley, C. J.—On the 9th February last the deceased a young boy had climbed a fruit tree to get some berries or some other fruits which had grown on that tree. Beneath the tree was a little girl, the daughter of the accused, the respondent here. The little boy threw the fruits down on to the ground from the tree above and the little girl picked up those fruits whereupon the little boy climbed down from the tree and beat the little girl with a cholam stick. She went off to her home and complained to her mother (the respondent) about the beating. The mother then came up and pursued the little boy. Up to this point both the prosecution case and the defence case agree. The little boy sustained very serious injuries. He had three ribs broken on the one side and four on the other penetrating the pleural cavity and causing his death some two days later. The respondent was charged at the Sessions Court with murder under S. 302, I. P. C. The defence put forward by the respondent was that it was true that she pursued the little boy and that he was running away but in the course of his flight he tripped up and fell upon a stone or a boulder well imbedded in the ground and that was how he came by his injuries.

The learned Sessions Judge after hearing the evidence agreed with the opinion of the four assessors in finding that the respondent was not guilty of the offence and she was accordingly acquitted.

This is an appeal by Government against the acquittal. The case for the prosecution was that the respondent fisted, struck and kneed the little boy and was the cause of his broken ribs. (Here the judgment considered evidence and proceeded.) The conclusion we have come to in this case is that upon the evidence the prosecution case was sufficiently strong to justify a conviction for an offence and that it establishes the fact that the injuries were caused to the little boy by this woman.

But we have got to consider what test should be applied by the High Court on an appeal by Government against an acquittal. Is the test to be that in the opinion of the appellate Bench there should have been a conviction sufficient to justify allowing the appeal or should it be something much more strong on the facts before the High Court is entitled to allow that appeal? We have not had any cases cited to us but we have discovered two cases which lay down a test which we think is the correct one to be applied in such cases as this. The first of them is *Queen Empress* v. *Robinson* (1). In that case it was held that an appeal on behalf of Government in the exercise of the powers conferred by S. 417, Criminal P. C., should not be entertained when the judgment appealed from is based upon facts and the conclusions of the Court are such as may reasonably be arrived at upon the facts found. The other case

(1) [1894] 16 All. 212=(1894) A. W. N. 49.

is a decision of a single Judge Kumaraswami Sastri, J., in *Public Prosecutor* v. *Narayana Nayudu* (2). There it was held that in appeals against acquittals the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure. That is saying the same thing which was said in the *Allahabad* case in different words. We think that those tests are the proper ones. At the trial in a Sessions Court or in any other Court in which evidence is taken, the trial Judge or Magistrate, as the case may be, has the witnesses before him and he is really in a better position to decide whether those witnesses give correct evidence and in this case the Sessions Judge has disbelieved most of the prosecution witnesses. We cannot say that there were not some grounds which might justify the acquittal of the respondent in this case. We are unable to say that the judgment of the learned Sessions Judge is perverse or one which no reasonable man could have come to on the facts. There was just a reasonable doubt and, that being so, we are unable to interfere with that judgment and this appeal by Government must be dismissed.

P.R.S./S.N. *Appeal dismissed.*

(2) [1915] 16 Cr. L. J. 529 = 29 I. C. 657.

A. I. R. 1930 Madras 705

PANDALAI, J.

Golusu Appalanarasiah—Petitioner.

v.

Emperor

Criminal Revn. No. 669 of 1929 and Criminal Revn. Petn. No. 605 of 1929, Decided on 22nd January 1930.

(a) Criminal P. C. Ss. 198 and 200—Magistrate proceeding without complaint and without examining complainant in case of defamation—Objection to procedure by accused at earliest stage—Proceedings are vitiated.

Where in a case of defamation the Magistrate prceeded without a complaint and without examining the complainant on oath issued process against the accused and the accused pointed out the irregularity to the Court at the first opportunity but the objection was disallowed,

Held: that there was no acquiescence by the accused in the procedure followed and that the proceedings were vitiated by the irregularity. [P 706 C 1]

(b) Criminal P.C., S. 530—Magistrate trying case transferred to another without retransfer to his own file—Proceedings are void.

The proceedings of a Magistrate trying a case transferred by him to another Magistrate but which has not been retransferred to him are without jurisdiction and altogether void: 30 *Cal.* 449 and 32 *Cal.* 783, *Appr.* [P 706 C 2]

V. L. Ethiraj and *A. S. Sivakaminathan*—for Petitioner.

K. S. Vasudevan—for the Crown.

Order.—This is a petition to revise the conviction of the petitioner for defamation of the complainant recorded by the Sub-Divisional Magistrate of Vizagapatam in C. C. 33 of 1928 and upheld by the learned Sessions Judge of Vizagapatam on 16th November 1928.

Objection is taken to the legality of the conviction on the ground that the proceedings before the Sub-Divisional Magistrate were vitiated by one of two alternative grounds: (a) that there was no complaint before the Magistrate on which he could take cognizance of the case and that the Magistrate, though informed of this defect at the very outset and objection was taken to his proceeding further with the case, brushed aside and took cognizance of the case i. e. issued process against the accused; (b) if the proceedings before the Sub-Divisional Magistrate be regarded as a continuation of those which were started by a previous complaint instituted by the complainant, the said complaint had been transferred by the Sub-Divisional Magistrate himself to the Sheristadar First Class Magistrate of Vizagapatam and was pending before him and had not been withdrawn from that file to the file of the Sub-Divisional Magistrate. To appreciate these objections it is necessary to state that the proceedings against this petitioner originally started upon a complaint filed before the Sub-Divisional Magistrate on 21st December 1927. This complaint was transferred to the Court of the Huzur Sheristadar First Class Magistrate of Vizagapatam and was filed there on 27th December 1927. As shown in the order in C. C. 1 of 1928 of that Magistrate that complaint embraced two distinct matters (1) theft or robbery on 14th December 1927 by the present petitioner and others of a brass vessel and a cloth and (2) defamation of the complainant by this petitioner on and after 18th December 1927, by the pasting of defamatory leaflets and handbills. At the trial of this complaint the present petitioner took objection to the trial of both matters going on together as they constituted

distinct offences. On this, the complainant's vakil in the words of the order in C. C. 1 of 1928 dropped that portion of the complaint which relates to the offence of defamation punishable under S. 500, I. P. C. The trial proceeded on the charge of theft and ended in a discharge dated 25th February 1928. Thereupon on 17th April 1928, Mr. Narasimha Rao, pleader for the complainant, put in a petition to the Sub-Divisional Magistrate accusing the former vakil who had conducted the complainant's case in the Huzur Sheristadar Magistrate's Court of having improperly added a charge of robbery into the complaint and of having dropped the charge of defamation, stating that the same complaint is still pending and that therefore no new complaint is necessary and praying for process on the charge of defamation. The complainant did not sign this petition nor was she examined on oath. But the Sub-Divisional Magistrate on 18th April 1928 passed this order "Take on file under S. 500, I. P. C." and posted the case to the 2nd May 1928. On that day the accused through his vakil put in a long petition pointing out the irregularity, that there was no complaint and that there was no case and that the Court had no jurisdiction to proceed. The pleader Mr. Narayana Rao for the complainant answered these objections and as far as can be gathered, the petitioner's objections were overruled and the trial proceeded and ended in a conviction under S. 500 and a sentence of a fine of Rs. 100.

From the above facts it is quite clear that treated as a new case started before the Sub-Divisional Magistrate there was in C. C. 33 of 1928 no complaint nor was the complainant examined on oath. This is certainly a grave irregularity. Whether it might have been cured or not by acquiescence, there was certainly no acquiescence. This was immediately pointed out but was brushed aside. I can therefore see no ground for saying that this objection was waived or acquiesced in. This would in itself be a sufficiently grave irregularity to vitiate the subsequent proceedings.

The only way in which that objection could be met is by supposing that there was originally a complaint including the charge of defamation, namely, the one made on 21st December 1927. But this supposition only involves a still greater error because in that case the Sub-Divisional Magistrate would have no jurisdiction to proceed with that complaint because it was transferred to the Huzur Sheristadar First Class Magistrate and had not been recalled. Several decisions have been cited to me to show that once a case is transferred by a Sub-Divisional Magistrate or District Magistrate to another, a Subordinate Magistrate, he cannot proceed with that case without withdrawing or transferring it back again. It is only necessary to refer to *Radha Bullar Roy* v. *Benode Behari Chatterjee* (1) and *Ajab Lal* v. *Emperor* (2). That proposition appears to me not to require any authority for its support and it has not been stated by the Public Prosecutor that there was any order by the Sub-Divisional Magistrate withdrawing the complaint from the Sheristadar Magistrate to himself. It was suggested by the learned Public Prosecutor that that also was a curable defect and must be held to have been cured in this case because that objection was not taken in that form in the Courts below. In the first place I am not at all sure, because no authority has been cited for that proposition, that it is a curable defect. If a Magistrate having no jurisdiction to try a case does so, his proceedings are void (See S. 530, Cl. p) and a Magistrate trying a case which has not been taken cognizance of by him or has not been sent to him in the proper way or withdrawn by him in the proper way has certainly no jurisdiction to try it.

Then assuming it was curable there is nothing in the case to show that it was cured or was acquiesced in. On the contrary at the earliest possible moment the Sub-Divisional Magistrate was informed of the defect that there was no complaint in the case. That was quite sufficient to put the Court and the opposite party upon notice of the objection which went to the root of the case. It could only have been met by the answer that there was a previous complaint in the case which itself would have been met by the still more fatal objection that that complaint was pending in another Court. It seems to me that the prosecution in this case is on the horns of a dilemma as has been

(1) [1903] 30 Cal. 449.
(2) [1905] 32 Cal. 783=9 C. W. N. 810.

stated above and the learned Public Prosecutor has not satisfied me how he can escape from the one or the other horn of this dilemma. The proceedings in the lower Courts must therefore be set aside as without jurisdiction. The complaint was started by a private party and it is not therefore right that I should not allow her after all this time, further opportunity to prove her case, if she desires it, to the satisfaction of the Magistrate. The records will be sent back to the Huzur Sheristadar First Class Magistrate before whom the first complaint is pending for disposal according to law. The fine, if paid, must be refunded.

P.R.S./J.M. *Proceedings set aside.*

A. I. R. 1930 Madras 707

WALLACE, J.

(*Kaluri*) *Narasimham*—Defendant—Appellant.

v.

(*Kaluri*) *Narasinga Rao* and *others*—Plaintiffs—Respondents.

Second Appeal No. 937 of 1925, Decided on 14th November 1929.

(a) Civil P. C., S. 100—Refusal to act under O. 41, R. 33 is not error of law and need not be interfered in second appeal.

The refusal of the lower appellate Court to act under O. 41, R. 33 which is not peremptory but discretionary is not an error of law with which the second appellate Court is bound to interfere. [P 707 C 2]

(b) Civil P. C., S. 34— Costs refused to party trying to profit by its fraud—Discretion is not improperly exercised.

The matter of costs is always a matter of discretion for the Court, and that discretion cannot be said to have been improperly exercised in refusing costs to a party who was endeavouring to profit by his own fraud. [P 708 C 1]

Y. Suryanarayana—for Appellant.

B. Satyanarayana, V. Govindarajachari and *P. Somasundaram*—for Respondents.

Judgment.—The plaintiffs sued to set aside the Court sale in execution of a decree obtained by defendant 6, the trustee of Vizianagaram Estate, against them and defendants 1 to 4 for arrears of quit rent. At the sale Survey No. 199 and 2/3 of 233 belonging to the plaintiffs and 1/3 of 233 and all lands belonging to defendants 1 to 4 were sold and purchased by defendant 5. Plaintiff's case was that the sale of their properties was fraudulent. The trial Court held that the inclusion of the plaintiff's properties in the sale proceedings was due to a fraud practised by defendant 3 and defendant 6's gumastha, defendant 3 being the real purchaser, although defendant 5 was the nominal purchaser. The District Munsif, therefore, gave the plaintiffs a decree. Defendant 5 appealed. In the lower appellate Court, the plaintiffs and defendant 5 compromised and the appeal was withdrawn. The lower appellate Court exonerated defendant 3 from the plaintiff's costs, but directed him to bear his own costs throughout. The lower appellate Court also held, although it was not necessary for its decision so to hold, that the suit was not maintainable, being barred by O. 21, R. 90. Defendant 3 appeals here on two grounds: first that the lower appellate Court having found that the suit was not maintainable was bound to dismiss it against him; and secondly, that in the circumstances of the case, he should have got his costs from the plaintiff. He relies upon O. 41, R. 33 and claims that that rule is peremptory and that the lower appellate Court should not have refused to set aside the decree against him although he had not appealed against it. I am not shown any authority for holding that R. 33, is peremptory, so that if the lower Court refuses to act under it, its refusal will be an error of law open to be dealt with by a second appellate Court. This Court has, so far as I am aware, always treated the application of R. 33 as a matter of discretion. Clearly, if a second appellate Court is bound to decide as a matter of law whether a lower appellate Court was right in refusing to act under R. 33, it will have to go into questions of fact as well as of law in order to decide whether the lower appellate Court's decree, the application of which it is asked to extend under R. 33, was right or not, since the second appellate Court cannot be asked to extend the scope of a decree which it holds to be a wrong decree. But the second appellate Court is not permitted to go in this way into questions of fact. It would seem to follow from that, the refusal of the lower appellate Court to act under R. 33 is not an error of law with which the second appellate Court is bound to interfere. I, therefore, find no substance in this contention.

Defendant 3 had as a matter of fact put in a memorandum of cross-objec-

tions in the matter of costs in the lower appellate Court, but in that memorandum, although he attacked the maintainability of the suit, the only relief he asked for was as regards his costs. It is urged that although the only relief he asked for in the memorandum of cross-objections was in the matter of costs, nevertheless, the lower appellate Court was bound to hear and give full effect to his memorandum of objections on the maintainablility of the suit, since that Court itself held the suit to be not maintainable. This contention also I do not follow. The matter of costs was the only matter agitated in the memorandum of objections and such matter is always a matter of discretion for the Court. Both the lower Courts held that defendant 3, this appellant, was a party to the fraud by which the plaintiffs' properties had been sold, and the lower appellate Court cannot be said to have exercised its discretion improperly in refusing costs to a party who was endeavouring to profit by his own fraud.

Finally, it was urged that defendant 5 who compromised the suit is really defendant 3, defendant 5 having purchased the suit properties as benamidar for defendant 3. This contention seems to me to be forbidden by S. 66, Civil P. C. In any case, defendant 5 was the appellant and defendant 3 was not. The party entitled to withdraw or maintain the appeal, was defendant 5, not defendant 3. In fact, defendant 3 chose to be absent when the appeal was called and withdrawn and that was the time when he should and could have objected to the withdrawal if it was to his prejudice. I find there is no substance in this second appeal and I dismiss it with costs of respondent 1.

P.R.S./S.N. *Appeal dismissed.*

A. I. R. 1930 Madras 708 (1)

CORNISH, J.

Josyula Venkateswaralu—Petitioner.

v.

Kasturi Seshagiri Rao—Respondent.

Civil Revn. Petn. No. 532 of 1929, Decided on 25th February 1930.

Madras Village Courts Act, S. 21—Suit in Village Munsif's Court — District Munsif ordering interim stay under S. 21—Before this order reached Village Munsif, he decid-

ing case—There remained no suit for being transferred.

Where under S. 21 the District Munsif orders an interim stay of the trial of a suit in Village Munsif's Court, but the latter Court decides the case before the District Munsif's order is communicated to it, there remains no suit which can be transferred for trial and so the District Munsif has no jurisdiction to set aside the Village Munsif's order. [P 708 C 2]

K. Kameswara Rao—for Petitioner.

Judgment.—In this matter the suit was filed in the Village Munsif's Court on 30th October 1928. On 2nd November 1928 the defendant who had filed no written statement applied to the District Munsif, under S. 21, Village Courts Act, to have the suit transferred to the District Munsif. On 7th November 1923, the District Munsif granted an *interim* stay of trial of the suit in the Village Munsif's Court ; but this order was not communicated to the Village Munsif, till 20th November 1928. Meanwhile, on 8th November 1928, the Village Munsif heard the case, examined the plaintiff and his witness and passed a decree ex parte, the defendant not appearing. S. 21 provides that the District Munsif may, on the application of any of the parties, withdraw any suit and try the suit himself, as if it had been instituted in his own Court. But this provision presupposes that the suit still remains to be tried. In the present case, the suit had been decreed before the District Munsif's order reached the Village Munsif; and there was consequently no suit, which could be transferred for trial. With regard to S. 73 of the Act there is no suggestion that the conduct of the Village Munsif calls the provisions of that section into operation. The District Munsif had accordingly no jurisdiction to set aside the Village Munsif's decree. The petition is allowed with costs throughout.

P.R.S./S N. *Revision allowed.*

A. I. R. 1930 Madras 708 (2)

SUNDARAM CHETTY, J.

Sorimuthu Thondaman and *another* —Defendants—Appellants.

v.

Perumal Ammal—Plaintiff—Respondent.

Second Appeal No. 45 of 1926, Decided on 14th August 1929.

(a) Hindu law— Guardianship — Brother assuming management of family property— Minor sister allowed to live in family and

getting support from family property—Brother is de facto guardian.

The elder brother of his minor sister assumed control and management of the family property and the minor sister was allowed to live in her family and received support from out of the family property during her minority.

Held : that there was enough to hold that the elder brother occupied fiduciary relationship of a de facto guardian. [P 70) C 2]

(b) Limitation Act, Art. 144—Possession of de facto guardian or his mortgagee cannot be adverse to minor but of his purchasers can be—Guardian and Ward.

The possession of a de facto guardian or of his mortgagee as a derivative owner cannot be legally deemed to be adverse to the minor, but when the de facto guardian effects a sale of the minor's property, the possession of purchasers would become adverse since the date they got into possession : 35 *Bom.* 79 and 30 *Mad.* 145 , *Rel. on.* [P 710 C 1]

K. Rajah Iyer and *P. N. Appaswami Iyer*—for Appellants.

K. V. Venkata Subramania Iyer—for Respondent.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondent to recover possession of two items of property described in the plaint. Defendants 1 and 2 set up title to the suit property by virtue of a sale effected by defendant 3 (now dead), who was the elder brother of the plaintiff. That the suit properties constituted the stridhanam properties of the plaintiff's late mother is a fact beyond dispute in this case. That being so, the plaintiff would be the nearest heiress entitled to the suit properties on the death of her mother Parvati, which took place in 1901. The main question for consideration in this second appeal is whether the plaintiff's claim to the suit properties is barred by limitation under Art. 144, Lim.Act, by reason of the alleged adverse possession of defendant 3 and his alienees, defendants 1 and 2. According to the finding of the lower appellate Court, the plaintiff's father who married a second wife practically lived with her and the children born to her. in other places, and did not exercise his powers of managership over the rest of the family consisting of his other sons, namely, defendant 3 and his minor brother and also their sister, the minor plaintiff. The lower appellate Court further finds that it was defendant 3, as the next senior male member of that family, in fact exercised the powers of kartha or manager of the family. It is also in the evidence of D. W. 3 that defendant 3, his brother and the present plaintiff, were living in a house in Parvati Singh Raja St. Even D. W. 4 would say that the plaintiff defendant 3 and his brother were living in that street. No doubt the plaintiff in her evidence says that she was living in the house of her maternal uncle. That house appears to be in the same street as stated by D. W. 3. It is not unnatural for the plaintiff, while she was a minor girl, to go to her maternal uncle's house and be there for some time. From the oral evidence on record, it cannot be inferred that the minor plaintiff went over to her maternal uncle's house and that she was never under the control and guardianship of her elder brother, defendant 3. If the plaintiff was also living along with her brothers, and defendant 3 as the eldest brother assumed control and management of the family properties, it would not be a wrong inference that the plaintiff during her minority was at least under the de facto guardianship of defendant 3. It cannot be contended with any degree of force that there is no evidence at all upon which the lower appellate Court has found that defendant 3 was to all intents and purposes the guardian of the minor plaintiff during her minority. The fact that her maternal uncle was managing her mother's properties does not exclude the possibility of defendant 3 being a de facto guardian of the plaintiff. If the plaintiff was allowed to live in her family and receive support from out of the family properties during her minority, that is enough to hold that defendant 3 was occupying a fiduciary position.

If that be the sort of relationship between the plaintiff and her elder brother (defendant 3), what is the reasonable inference as to the character of defendant 3's possession of the suit properties, to which, of course, the plaintiff had legal title? It is not until 1907, when defendant 3 executed a mortgage deed, Ex. 6, that there is any tangible proof of his asserting a title to the suit properties, ignoring the plaintiff's rights. In that deed, though reference was made to the fact that these properties were owned by his mother, he however described them as belonging to him and his

minor brother whom he represented as his guardian. If under Ex. 6 he should be deemed to have set up a title for himself hostilely to the plaintiff, the question arises as to whether he could be allowed to prejudice the rights of the minor plaintiff for whom he was in the position of a de facto guardian. The principle of the decisions in *Vasudeo Atmaram Joshi* v. *Eknath Balakrishna* (1) and *Sriramulu Naidu* v. *Andalammal* (2) would well nigh apply to a case of this kind. The lower appellate Court is, in my opinion, right in viewing the character of defendant 3's possession prior to 1907 in accordance with the principles laid down in these rulings. So long as the properties were in the possession of defendant 3 or his mortgagee as a derivative owner, it could not be legally deemed to be adverse to the minor plaintiff within the meaning of Art. 144, Lim. Act. But since 1910, when the suit properties passed to defendants 1 and 2 by reason of the purchase, though their possession would no doubt be adverse to the plaintiff, the present suit having been filed on 18th January 1922, it would be within 12 years from the dates of Exs. 2 and 3, and therefore, there would be no bar under Art. 144. The learned advocate for the appellant laid stress on one aspect with respect to the judgment of the lower appellate Court, and argued that there was no definite finding as to defendant 3 having been the de facto guardian. Though the lower appellate Court has not used this expression, it is clear on a perusal of its judgment, that its finding amounts to the existence of such relationship between the minor plaintiff and her elder brother, defendant 3. That finding cannot be attacked as one arrived at without any evidence or as an unwarranted inference from the facts proved in the case. I am not, therefore, prepared to disagree with the finding of the lower appellate Court. I hold that the plaintiff's suit is not barred by limitation and this second appeal is dismissed with costs. Leave to appeal is refused.

P.R.S./S.N. *Appeal dismissed.*

(1) [1911] 35 Bom. 79=8 I. C. 639.
(2) [1907] 30 Mad. 145=17 M. L. J. 14.

A. I. R. 1930 Madras 710

ANANTAKRISHNA AYYAR, J.

Prasanna Chidambara Reddiar and *another*—Defendants—Appellants.

v.

Nagammal—Plaintiff—Respondent.

Second Appeal No. 1050 of 1926, Decided on 20th November 1929.

Grant—Inam—Suit for declaration that suit land was Government grant—Mittadar pleading that it was ryoti land—Real question to be decided is whether the inam was or was not granted or continued by Government—So before deciding this question it is not proper to raise the question of limitation under Lim. Act, Art. 14.

Where in a suit for declaration that the suit land being Government grant, the mittadar is not entitled to recover rent in respect of it, the mittadar pleads that the land is ryoti land and not Government grant, the main question to be considered in such a case is whether the inam was or was not granted or continued by the Government. That is the question that has to be decided before any question of limitation under Art. 14 is sought to be raised. It is not therefore right to hold that the defendant's right to claim any relief inconsistent with the order of the Inam Commissioner was barred by limitation because that order was not set aside in a suit, brought within one year under Art. 14, Lim. Act, without recording a finding on the point whether the inam was granted or continued by Government or not: *Suit No. 555 of 1922, Rel. on.*

[P 711 C 2, P 712 C 1]

B. Sitarama Rao—for Appellants.

V. N. Venkatavaradachari—for Respondent.

Judgment.—This second appeal arises out of a suit instituted by the plaintiff, Nagammal, for a declaration that the defendant had no right to bring the holding known as Palamaram Punja to sale for arrears of rent and for a permanent injunction restraining the defendant from bringing the suit property to sale. Her main allegation was that the holding in question was an enfranchised Thandal Manyam, that the plaintiff had to pay quit rent to Government for it as such and that the mittadar had no right to collect rent from her. The plea of the mittadar defendant was that the land was really ryoti land and not Government inam. The first Court dismissed the suit. On appeal the learned District Judge, as I read his judgment, has not recorded any definite finding on the real question that arises in the case.

Paragraph 3 of his judgment begins as follows :

"The bulk of the lower Court's judgment deals with the question whether the suit land

was originally granted to the plaintiffs' predecessor-in-title as inam for Tandal service. I do not propose to go into this question at any length."

Later on, he observes in the same paragraph:

"In the result, the lower Court came to the rather curious conclusion that, although the defendant had not discharged the burden cast on him of proving that the suit land was included in the estate at the time when it was permanently settled by Government on his predecessor, yet, on the strength of the chittas produced by the defendant to show that the plaintiff and her predecessor-in-title had paid rent to the mittadar, it must be held that the land was ryoti land and not Government inam."

He observes earlier in the same paragraph that the lower Court would have been better advised to grant any time that might have been required for the production of some other documents relevant to the case. After making this observation in para. 3, the learned Judge in para. 4 remarks:

"This is a finding in which I am unable to concur, but the real question appears to be whether the order of the Inam Commissioner is binding on the defendant."

As I read paras. 3 and 4, the learned Judge evidently felt himself unable to concur with the finding of the first Court on the question of fact that arises in the case, but that for the reasons mentioned by him in para. 4, which I shall at once advert to, he thought that he was relieved from the necessity of discussing the evidence or recording a definite finding thereon.

The real ground on which the learned District Judge disposed of the case appears to be the following:

"The order of the Inam Deputy Collector and of the Inam Commissioner is not prima facie illegal or ultra vires and if the defendant or his predecessor-in-title wished to dispute that order, their remedy was by a suit, and such a suit should, under Art. 14, Lim. Act, have been filed within one year of the date of the latter order."

Then the learned District Judge noted that the date of the order passed by the Inam Commissioner was 3rd September 1909, and that the title-deed was granted on 30th June 1910, whereas the plaint was filed only on 28th February 1921. Later on he was pressed evidently with the argument on behalf of the defence, that, though a person's right to file a suit as plaintiff might have become barred by a limitation, yet as a defendant, he was entitled to forward his right. To that the learned Judge answered in the last portion of that para. 4 as follows:

"It is not open to him (the defendant) to raise now, by way of defence, pleas which he could and should have put forward in a suit for the cancellation of those proceedings. I therefore allow the appeal and give the appellant the declaration and injunction prayed for."

As I understand the judgment of the learned District Judge, he was under the idea that the defendant was under an obligation to set aside the order of the Inam Commissioner in a suit filed within one year under Art. 14, Lim. Act, and that the fact that he was a defendant in the present suit did not matter, and the defendant's right to impugn the correctness or validity of the Inam Commissioner's order being therefore barred by limitation, the plaintiff is entitled to succeed since a title deed has been granted in her favour by the Inam Commissioner. I think the argument of the learned District Judge is not sound, and the question whether an order passed by the Inam Commissioner in such circumstances should be set aside or not, and whether Art. 14, Lim. Act, would apply to suits in which reliefs inconsistent with such order are claimed, was recently discussed by a Bench of this Court consisting of Wallace and Thiruvenkatachariar, JJ., in *Appeal Suit No.* 355 *of* 1922. I wish to quote one sentence from that printed judgment at p. 10 where the net result of the authorities is mentioned as follows:

"The net result of this discussion on limitation is that in any case in which it is shown that the order of enfranchisement was intra vires i. e., that the inam was granted or continued by Government, the suit is barred under Art. 14 and in any case in which it is shown that the enfranchisement was ultra vires, i. e., that the inam was not granted, or continued by Government, then the suit is within time under Art. 142 or Art. 144."

Thus, the main question to be considered in such a case is whether the inam was or was not granted or continued by the Government. That is the question that has to be decided in this case before any question of limitation under Art. 14 is sought to be raised. I am therefore clear that the learned District Judge was not right in holding that the defendant's right to claim any relief inconsistent with the order of the Inam Commissioner was barred by limitation because that order was not set aside in a suit brought within one

year under Art. 14, Lim. Act, without recording a finding on the point whether the inam was granted or continued by Government or not.

The learned advocate for the respondent, however, sought to support the judgment of the learned District Judge on the ground that paras 3 and 4 properly read do contain the learned Judge's finding on the real question that arises in the case. I am unable to agree with the learned advocate on this point. As I read para. 3 and especially the sentence

"I do not propose to go into this question at any length,"

it appears to me that that learned Judge thought that the decision of this question was unnecessary in the view that he took of the other question in the case. I am strengthened in this opinion by his remark in para 4:

"This is a finding in which I am unable to concur, but the real question appears to be whether the order of the Inam Commissioner is binding on the defendant."

I think the learned advocate for the respondent is not right in stating that there is a discussion by the learned District Judge of the points that arise in this case. He has not discussed t he evidence nor recorded any definite findings thereon. Obviously he did not purport to do so because he thought that the case could properly be disposed of on the question of limitation.

Having come to the conclusion that the view of the learned District Judge about the obligation of the defendant to file a suit to set to aside the Inam Commissioner's order within one year is not sustainable in the absence of proper findings on the merits, I must reverse the decision of the learned District Judge and remand the appeal for fresh disposal according to law. Costs will abide the result. Stamp on the appeal memorandum will be refunded on application.

P.R.S /S.N. *Appeal remanded.*

A. I. R. 1930 Madras 712

RAMESAM AND CORNISH, JJ.

Krishnaswamy Gounder—Claimant.

v.

Nagarathnammal—Respondent.

Original Side Appeal No 77 of 1927.

Decided on 18th December 1929,

Civil P. C. S. 21, R. 58,—Claim Petition does not lie in the case of sale-decree in mortgage suit,

A claim petition does not lie in the case of a sale-decree in a mortgagesuit. The remedies of the aggrieved person being either to file a suit for recovery or to resist delivery proceedings if he is really in possession : 14 *Cal.* 621, 19 *All.* 480 and 27 *All.* 700, *Foll.* [P 712 C 2]

Vere Mockett and *T. M. Venugopala Mudaliar*—for Appellant..

T. R. Kothandarama Mudaliar—for Respondent.

Ramesam, J.—This is an appeal from an order of our brother Waller, J., dismissing a claim petition. The respondent obtained a sale decree in C. S. No. 510 of 1924 on a mortgage deed executed in 1914 by the defendant in that suit. The present appellant then filed a claim petition claiming the property basing his claim on a sale deed executed in 1904. The learned Judge dismissed the claim. The appeal is against that order.

The learned advocate for the respondent draws our attention to an objection that a claim petition does not lie in the case of a sale decree. It is true, this objection was not taken before Waller, J. but all the same it is an objection which must be given effect to; see *Deefholts* v. *Peters* (1) *Sanwal Das* v. *Bismillah Begam* (2) and *Hukam Singh* v. *Raghubar Saran* (3). The remedies of the appellant are as indicated in the decision in *Sanwal Das* v. *Bismillah Begam* (2) either to file a suit for recovery or to resist delivery proceedings if he is really in possession. The appeal must be dismissed on this ground but as the objection was not taken in the lower Court we disallow costs in appeal. The costs awarded in the lower Court will stand. The respondent is entitled to draw her costs if deposited in Court; the balance if and will be paid to the appellant.

Cornish, J.—I agree.

P.R.S./S.N. *Appeal dismissed.*

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(1) [1887] 14 Cl. 631.
(2) [1897] I9 All. 480=(1897) A. W. N. 115
(3) [1905] 27 All. 700=(1905) A. W. N. 157.

A. I. R. 1930 Madras 713

ANANTAKRISHNA AYYAR, J.

Madammal and *another*—Plaintiffs—Appellants.

v.

Devayya—Defendant—Respondent.

Second Appeal No. 1032 of 1926, Decided on 7th November 1929, against decree of Sub-Judge, Coimbatore, in Appeal Suit No. 96 of 1925.

Will—Construction—Will in favour of granddaughter's husband—Legatee to maintain testator, his wife and daughter-in-law, to perform their obsequies and after their death to enjoy testator's properties with absolute rights—Will gives vested interest to legatee but postpones his right to possession till after death of testator's wife and daughter-in-law.

A testator made a will in favour of his grand daughter's husband which recited: "As I am now 60 years of age, you and my granddaughter also should maintain me, my wife and my daughter-in-law during our lifetime and act up to what we order you to do. After our death you yourselves should perform our obsequies etc., and enjoy all the properties belonging to us with absolute rights with power to dispose of them by way of gift, sale, etc.,

Held: that the words in the will give a vested interest in the properties in favour of the legatee but postpones his right to possession till after the death of both the testator's wife and daughter-in law: 33 *All.* 558; 47 *I. C.* 758 and *Den* v. *Tout*, 104 *E. R.* 893, *Rel. on.* [P 714 C 1]

C. S. Venkatachariar—for Appellant.

T. R. Rama Chandra Iyer and *S. R. Dikshit*—for Respondent.

Judgment.—One Devayya Gowda executed a will, Ex. 1, dated 3rd July 1907. He left behind him his widow (Madammal, plaintiff 1) and his daughter-in-law (named Bowrammal, plaintiff 2, in the suit). The plaintiffs' suit was for a permanent injunction restraining the defendant from entering on the plaint properties and for other consequential reliefs. The defendant is the husband of Marammal, the daughter of the deceased son of Devayya Gowda and he claims right to possession, under Ex. 1. The question turns on the construction of Ex. 1. The first Court decided the suit in favour of the plaintiffs adopting substantially the construction put upon it by the plaintiffs. But the lower appellate Court dismissed the suit adopting substantially the construction contended for by the defendant. Hence this second appeal by the plaintiffs.

The document is not very happily worded, and I have to make the very best I can out of the same. But having carefully considered the terms of the document, I have come to the conclusion that the testator gave the defendant a vested interest in the properties, but the right of possession has been postponed till after the death of the testator's widow and the testator's daughter-in-law (plaintiffs 1 and 2). The testator, after reciting that he had no male heirs, and that he had been maintaining the defendant for the past four or five years, and looking after him as his own son, and after reciting that his granddaughter had been given in marriage to the defendant, proceeded to state as follows:

"As I am now 60 years of age, you and my granddaughter also should maintain me, my wife Madamma and my daughter-in-law Bowramma, during our lifetime and act up to what we order you to do. After our death you yourselves should perform our obsequies etc., and enjoy all the undermentioned properties belonging to us with absolute rights with power to dispose of them by way of gift sale, etc."

The question is whether under the terms of this document the defendant would be entitled to present possession and management of the same as of right, being only under an obligation to maintain the plaintiffs in a fair and proper manner, or whether the will, on a proper construction, supports the contention of the plaintiffs namely, that after the testator's death, his widow and the daughter-in-law should have each a life-interest in the properties. and that, though the defendant was to have a vested interest in the property, the defendant should have possession and enjoyment only after the death of those persons.

It was argued by the learned advocate for the respondent that in the absence of proper words in the will giving the daughter-in-law a life-estate, the Courts would not be inclined to adopt such a construction. But I am met with some difficulties in accepting the contention urged on behalf of the defendant. If the defendant's contention be accepted, I think I will not be giving proper effect to the words "*engal anumathiyin paril*" Further there are these further words:

"After our death, you yourselves should perform our obsequies etc., and enjoy all the undermentioned properties belonging to us with absolute rights."

No particular rate of allowance has been specified in the document. According to the defendant's contention, both the widow and the daughter-in-law would be practically left to the mercy of the defendant. As I said, the document is rather difficult to construe. If possible, one should like to avoid intestacy in the construction of wills. The words in the will in question, in my opinion, give a vested interest in the properties in favour of the defendant but postpones his right to possession till after the death of both the plaintiffs. Such a construction of similar documents has been held to be proper in cases to which my attention was drawn by the learned advocate for the appellants. In *Bilass* v. *Muni Lal* (1), a document with similar terms was construed in the way that I construe the document, Ex. I. That estate for life could be created by "necessary implication" has been laid down in the case reported in *Srinivasa Seshacharlu* v. *Seshamma* (2), at page 485 (of 34 *M. L. J.*), and also in the English case in *Den* v. *Tout* (3). But after all no other document would practically be of any real use to me in construing this particular document. This document has been drafted evidently without any legal advice. Consequently I could not straightaway import into the construction of this document any settled principles of conveyancing. But at the same time I must remember the principles laid down in these cases, and after giving the best construction that I can, I have come to the conclusion that the defendant is not entitled to possession before the death of plaintiffs 1 and 2. Both the lower Courts have found that the plaintiffs are in possession of the properties and that being so, an injunction will be issued restraining the defendant from entering on the properties.

There is a statement in the plaint that, even after the death of the plaintiffs, the defendant would not be entitled to the properties. That is not a matter for adjudication in the present suit. In my view, the decree of the lower appellate Court is not sustainable, and I therefore reverse the judgment of the lower appellate Court, and restore that of the first Court with costs here and in the lower appellate Court.

P.R.S./S.N. *Decree set aside.*

(1) [1911] 33 All. 558=11 I. C. 516.
(2) [1918] 47 I. C. 758.
(3) 104 E. R. 833.

A. I. R. 1930 Madras 714

REILLY AND CORNISH, JJ.

Amirchand Nagindas & Co. and *others* —Defendants—Appellants.

v.

Raoji Bhai Moti Bhai Patel and *others*—Plaintiffs—Respondents.

Original Side Appeal No. 49 of 1927, Decided on 10th December 1929, against judgment and decree of Beasley, J., D/- 5th May 1927.

(a) Civil P. C., S. 11—Plaintiffs basing suit on agreement to import gold into French India — Defendants urging that agreement was for unlawful purpose being one to import gold into British India — In previous suit against present plaintiffs by present defendants, present plaintiffs raising same objection but Court finding contract to be quite legal — That finding would operate as res judicata in present suit.

Plaintiffs sued the defendants on the basis of an agreement which, according to them, was to import gold into French India from foreign parts. The defendants urged that the contract was for an illegal purpose being one to import gold into British India which was forbidden by law. But in a previous suit by defendants against the present plaintiff and a third person, the present plaintiffs had raised the same objection that the contract was for an illegal purpose and the Court had found that the contract was only to import gold into French Indian and therefore quite legal.

Held: that the finding in the previous suit would operate as res judicata in the present suit and the defendant cannot turn round and urge that in the previous suit he got a decree on an unlawful contract. [P 716 C 1]

(b) Civil P. C., O. 1, R. 3 — Suit for accounts—All partners are necessary parties.

A suit for accounts cannot be maintained between some only of the partners of a firm but every partner must be made a party. [P 716 C 2]

(c) Civil P.C., O. 1, R. 3—Several persons simultaneously entering into contract with *A* and agreeing to work together and to divide profits in certain proportions—One of them suing *A* for account but not impleading others—Suit is bad because others also are necessary parties.

Where there are several servants in one business, each entitled to remuneration by a share in the profits and if such persons have entered into contract with their master separately and independently, each can sue the master without impleading other such servants. Nevertheless when only by one contract a master and a number of servants agree that they will work

together for a certain time or for a certain venture and that the whole profits would be divided among them in certain proportions, a suit for account by one servant will be bad if all others also are not impleaded: 14 *Cal.* 791, *Foll.* [P 716 C 2, P 717 C 1]

(d) Civil P. C., O. 1, R. 9—R. 9 does not enable Court to pass decree against one behind his back.

Rule 9 enables the Court, and makes it the duty of the Court, to make a decree between the parties actually before it, if that can legally and effectively be done. But that rule was never intended, and could never have been intended, to direct the Court to make an illegal decree, a decree which would violate the elementary principle that a decree shall not be made against a person behind his back. If no decree fixing the shares in the profits or for an account can be made in the absence of certain persons without affecting them, Rule 9 can never give the Court power to make such a decree. [P 718 C 1]

(e) Civil P. C., S. 99—Scope.

Section 99 does not prevent the appellate Court from interfering on the ground of misjoinder or non-joinder which affects the jurisdiction of the trial Court. [P 718 C 1]

Advocate-General and *B. Somayya* for *K. S. Rajagopala Iyengar* and *N. T. Shamanna*—for Appellants.

Nugent Grant and *Vere Mockett* for *M. P. Sundararaja Ayyar*—for Respondents.

Reilly, J.—In this case the plaintiffs, who are two brothers, sued for arrears of salary at Rs. 100 each for a certain number of months and for a commission of 2 per cent as their remuneration for services rendered to the defendants in connexion with an expedition sent in 1919 to Saigon and Singapore for the purchase of gold, which was to be brought into India. The learned Chief Justice, who tried the suit as Beasley, J., found that the plaintiffs were not entitled to the remuneration which they claimed but that they were entitled to a share in the profits of this gold importing venture. He found that a certain number of people were concerned in the venture and that of the profits made in it the defendants themselves were entitled to one half, the plaintiffs 50/115ths of the remaining half. One Chunilal was entitled to 31/115ths, one Lakshmichand to 17/115ths and one Maoji Bhai to 17/115ths of the second half; and on that basis he made a decree that the defendants were entitled to one half of the profits and the plaintiffs to 50/115ths of the other half. He referred the matter to the Official Referee for a report what those shares amounted to. The defendants have appealed. The plaintiffs, although they did not get what they had sued for, have not filed any cross-appeal.

The defendants have raised three objections before us at the hearing of this appeal, with only two of which I think it is necessary now to deal. The first objection is that this expedition for importing gold had an illegal object; the contract between the parties and anybody else who was concerned in it was unlawful because its object was that gold bought outside India should be brought into British India, and it happened that at the time with which we are concerned that was prohibited by the Government of India under Act 2, 1916. The learned Advocate-General has urged before us that, if that was the object of the contract, then, even if that object was not entirely fulfilled by gold being brought into British India, it was an unlawful contract and the plaintiffs are entitled to get no relief from the Court in connexion with it. In his judgment Beasley, J., has referred in several places to this matter. In one place he says:

"In my view this expedition had only one object and that was to get gold which could be purchased very much cheaper outside British India into British India."

Again,

"There is very little doubt in my mind that this was a gold smuggling expedition."

Again,

"These observations apply equally to plaintiff 2, to Roopchand, to Lallubhai and to Chunilal, all of whom were clearly engaged in a smuggling enterprise."

And again,

"I can well understand that, as this was a smuggling enterprise, it would not be considered advisible to reduce any of the terms of the agreement into writing."

Those are strong expressions of opinion. But I think it is quite clear that Beasley, J., did not arrive at any definite finding that the object of this contract was unlawful, as, if he had, he could not have made the decree which he has made in favour of the plaintiffs. No doubt, there is, as has been freely admitted for both sides before us, a certain amount of suspicion about the proceedings of the parties in connexion with this gold, a suspicion that they must have intended that eventually it

should be brought into British India, where the defendants conducted a business of dealing in gold and where they could make a very large profit from it. But the contract as shown by the evidence was not necessarily an unlawful one. It is not shown definitely that the object was to bring gold further into India than into French India, Pondicherry or Karaikkal. It must be noticed that the defendants never pleaded that the object was to bring the gold into British India. By some curious process, which has not been explained to us thoroughly and which I do not understand, an issue was raised by consent whether this contract was unlawful. How that appeared upon the issue paper without any pleadings, it is difficult to understand. But, when we look at the actual evidence in the case, defendant 2, defendant 3, and their munim Chunilal all describe the contract as one for bringing gold into Pondicherry. Apart from all that, this matter has been before the Court in previous litigation between the same parties.

In C. S. 212 of 1921 the present defendants sued the present plaintiffs and other members of their family and another defendant called Besson for damages in respect of the first consignment of gold, which was sent as a result of this expedition from Saigon to Pondicherry. In that suit, which was tried by Coutts-Trotter, J., the defendants described this contract as one for bringing gold into Pondicherry. The present plaintiffs strangely enough described the contract as one for bringing gold into British India and pleaded that it was therefore unlawful. But Coutts-Trotter, J., found that the contract was only for bringing gold into Pondicherry and on that finding he was able to give a decree to the present defendants against Besson, though he made no decree against the present plaintiffs. Mr. Grant, who appears for the plaintiffs, has reasonably urged before us that this question of the nature of the contract and its legality is res judicata, having been decided in the previous suit by Coutts-Trotter, J., and that the defendants cannot now succeed by turning round in this curious way and saying that they got a decree in that suit on an unlawful contract. I do not think I need spend any more time on the first objection which has been raised by the defendants in this appeal.

A more serious objection in my opinion is that to this decree Chunilal, Lakshmichand and Maoji Bhai have not been made parties. As I have said, Beasley, J., accepted the defendant's case that there was a contract between the defendants, the plaintiffs, Chunilal, Lakshmichand and Maoji Bhai that they should take part in this expedition and that the profits should be divided in the proportions I have named. If that is so, how can a decree now be made for an account to which Chunilal, Lakshmichand and Maoji Bhai are not parties? If all these persons were partners, it is not disputed that no such decree could be made in the absence of those three persons. It is well known that a suit for account cannot be maintained between some only of the partners of a firm but that every partner must be made a party. The reason is that every partner has an interest in the determination of his share in the profits and in the working out of that share by the account. If a decree is made in the absence of one of the partners, then in a sense that is a decree against that partner, limiting his interest, limiting the amount which he has to recover and determining the amount which he has to contribute to the other partners, and it would be obviously improper, and illegal to make such a decree against him without impleading him.

But in this case it is urged for the plaintiffs that they were not partners with the defendants and the other three men I have named. Beasley, J., has found that they were not partners in the full sense. His finding is that the plaintiffs were "working partners," which he explains as partners who have shares in the profits but have no share in the losses of the business. Mr. Grant has urged that persons in that position are no more than servants. I do not know that it makes any difference whether they are described as working partners entitled to share in the profits but not sharing in the losses or as servants who are to be remunerated by a share in the profits. Servants who are to be remunerated by shares in the profits are entitled to sue for account. But, if there are several servants in one busi-

ness, each entitled to remuneration by a share in the profits, can they sue separately? I think it is clear that they can do so, if their engagements are separate. If a master engaged several servants successively and independently, each to be remunerated by a share in the profits, and if one of those servants wished to sue him for his share in the profits, it would not be necessary for that servant to implead all the other servants. But the position is very different when by one arrangement or contract a master and a number of servants agree that they will work together for a certain time or for a certain venture and that the whole profits will be divided among them in certain proportions. If that is the contract between them and one servant is allowed to sue for his share without impleading the others, we reach the same difficulty as in a case where there is a suit between some of the partners leaving out the other partners. The suit could only result, if it were possible and successful, in a decision which would be against the servants who were not parties to the suit. Now that that is impossible was decided so long ago. *Ramdayal* v. *Jumenjoy Coondo* (1), from which no dissent has ever been expressed.

In the present case was there one contract between the parties before us and Chunilal, Lakshmichand and Maoji Bhai, or were the plaintiffs engaged by the defendants separately from the engagements of those other three persons? As I have said the plea of the defendants, which Beasley, J. has found to be true, is that there was only one contract to which they were all parties. According to the evidence, before this expedition set out to buy gold in foreign parts, there was a meeting at the house of defendant 2 in Madras, at which plaintiff 1, his father, who is not a party here, the defendants and Chunilal were present, and the terms of the arrangement as to sharing profits were settled then. Plaintiff 2 was not present according to the evidence on that occasion, but he appeared the next day or the day after that and agreed to the arrangement. Lakshmichand and Maoji, Bhai, who under the arrangement were each to get 17/115ths of half the profits, were not according to the evidence present. But it appears that they are members of defendant 3's family and there is no question that they did go out on this expedition, and the reasonable inference from that is that they also accepted this arrangement and entered into this contract. It may also be noticed that the arrangement divides up the whole of the possible profits into specific and rather unusual fractions. I find nothing in the evidence to suggest that in this case the defendants engaged the plaintiffs as servants on a certain share of the profits as remuneration and afterwards engaged Chunilal or afterwards engaged Lakshmichand and Maoiji Bhai. That is not the defendant's case, which has been accepted by Beasley, J. nor is it the case as shown in the evidence, though it must be noticed that the evidence on this subject is not very full or explicit because it happened that this aspect of the case was not very prominently before the parties or the Judge at the trial. I think it is clear on principle that in a case like this the plaintiffs cannot get their shares fixed nor get an account of the profits without making Chunilal, Lakshmichand and Maoji Bhai parties to the suit.

It has been urged before us by Mr. Grant that, whatever the plaintiffs should have done in the suit, the defendants did not take this particular objection of the non-joinder of Chunilal, Lakshmichand and Maoji Bhai explicitly at the trial and that under R. 13, O. 1, no such objection can be raised now. An objection was raised in the suit about non-joinder; but I agree with Mr. Grant that that was not an explicit objection relating to this particular point and that in a suit for account it was necessary to add Chunilal, Lakshmichand and Maoji Bhai. It was a rather futile objection on another question of non-joinder, that the plaintiffs' father and other members of their family had not been brought in. Now R. 9, O. 1, as Mr. Grant points out, lays down that

> "no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

Would that enable an effective decree to be made in this case in the absence

(1) [1887] 14 Cal. 791.

of Chunilal, Lakshmichand and Maoji Bhai? That rule enables the Court, and makes it the duty of the Court, to make a decree between the parties actually before it, if that can legally and effectively be done. But that rule was never intended, and could never have been intended, to direct the Court to make an illegal decree, a decree which would violate the elementary principle that a decree shall not be made against a person behind his back. If no decree fixing the shares in the profits or for an account can be made in this case in the absence of Chunilal, Lakshmichand and Maoji Bhai without affecting them, and to make such a decree without impleading them would be to make a decree against them behind their backs, R. 9, O. 1 can never give the Court power to make such a decree.

Mr. Grant also urged that the defendants had treated the plaintiffs very unfairly in this case by raising indeed a plea of non-joinder not directed to this particular point, but keeping this particular plea of non-joinder, that Chunilal, Lakshmichand and Maoji Bhai ought to have been impleaded up their sleeves for use at a later stage. If they had done that, it would certainly have been very unfair and improper. But we must remember that the suit which the plaintiffs brought was one for remuneration by salary and commission; to that suit an objection that Chunilal and Lakshmichand and Maoji Bhai were not joined would have been no objection. We cannot reproach or penalize the defendants for not raising in the suit, as it then was, an objection which would have been wholly inapplicable to it. It happens unfortunately in this case that the suit was never regarded, so far as we can see, at the trial as a suit for an account of these profits on the basis of the contract which the defendants set up. It only became a suit of that nature at the time of the judgment.

Mr. Grant has also urged before us that by reason of S. 99, Civil P. C., we have no power to interfere in appeal on the ground of non-joinder. But I cannot agree that in this case we have no power to interfere, as that section does not prevent the appellate Court from interfering on the ground of misjoinder or non-joinder which affects the jurisdiction of the trial Court. As I view this case, Beasley, J., had no jurisdiction to make a decree for the division of the profits of this enterprise in the absence of Chunilal, Lakshmichand and Maoji Bhai, who were found to be entitled to certain shares in those profits. Unfortunately the matter cannot be put right now as the time for impleading those three persons has long gone by and the bar of limitation prevents them from being impleaded now. I have no doubt myself that the decree was made in the form it was made by Beasley, J., by inadvertence and that when he came to the end of his judgment, he had forgotten for the moment in deciding between the plaintiffs and the defendants that there were three other persons concerned in the matter. And it appears to me extremely unfortunate that no one who was appearing in the case brought that to the learned Judge's notice when he was delivering his judgment. If that had been done, a great deal of time, trouble and money might have been saved.

In my opinion this appeal must be allowed and the plaintiffs' suit dismissed. As to the costs, there are in my opinion two reasons why we should not award costs to the defendants. One is that, as Beasley, J., has pointed out, their conduct in the suit was in some ways reprehensible; and the other is that I think it is largely due to them that they have had to bring this appeal, which they might have avoided by making suitable representations to the learned Judge when he was delivering his judgment. In my opinion, therefore, the proper order will be that each party shall bear his own costs throughout. The Official Assignee may take his costs out of the office charges fund.

Cornish, J.—I am of the same opinion. I think the question whether the agreement between the parties was or was not for an illegal purpose must be treated as res judicata by the finding in C. S. 212 of 1921. The defendants in that suit, who are the plaintiffs here, definitely averred in their written statement that the agreement being for the purpose of importing gold into British India was an illegal agreement and therefore unenforceable. The learned Judge who tried that suit found that the agreement was to bring gold

from Saigon into French India and was not illegal, though he expressed the opinion that it was probably the intention to smuggle gold into British India as opportunity offered. That finding was not disturbed by the appellate Court, and it was, of course, present to the mind of the learned Judge who tried this suit. He expressed a strong opinion upon the real character of the enterprise. But it is clear that he felt himself bound by the finding in the previous suit ; otherwise, he would not have passed a decree upon the footing that the parties were co-adventurers in the enterprise and entitled to share in its profits. Apart from this view of the case, the evidence at the trial would not, in my opinion, justify a finding that the agreement between the parties was for an illegal purpose, although I agree that the evidence gives rise to a very strong suspicion.

On the other point, that of non-joinder, I have felt some doubt upon the evidence. There is no question that on the finding of the learned trial Judge the plaintiffs were employees whose remuneration was fixed on the basis of a share of the profits and that they were not partners with the defendants. And it is conceded by Mr. Somayya, the learned counsel for the defendants that if the plaintiffs were servants or employees and the defendants had entered into separate agreements with them, for their remuneration, it would not have been necessary for the plaintiff in a suit to recover that remuneration to implead the other employees who were engaged on similar terms of remuneration. Three witnesses for the defendants have given evidence as to the circumstances in which this agreement was entered into ; and I think, on the whole, that it is probably correct that their agreement with the plaintiffs and the other three persons Chunilal, Lakshmichand and Maoji Bhai, was entered into at one and the same time, or practically at one and the same time, so that, in fact they are to be regarded as joint contractors in a common undertaking. The agreement was not in writing. It was merely a verbal agreement. I think that it must certainly have been completed before the expedition left Madras for Pondicherry, and that the version given by defendant 3 may be accepted. That being so, it appears to me that the case in *Ramdayal* v. *Junmenjoy Coondoo* (1) applies, and as was there observed, at p. 794 :

" That being the state of things, the suit, as originally framed, was clearly defective, because, when there are three persons who, under one and the same agreement amongst themselves, are entitled to share in the proceeds of a fund which they hope will be brought into existence, it is obvious that all these three persons must be necessary parties to a suit, the object of which is to take an account necessary for the purpose of ascertaining the assets of the fund and dividing them."

On that ground, in my opinion, the plaintiff's suit was defective without impleading the other three persons and should have been dismissed ; and I have no doubt that it would have been dismissed if the objection as to necessary parties not having been impleaded, which is made to us in additional grounds of appeal, had been brought to the notice of the learned Judge at the trial.

P.R.S./S.N. *Appeal allowed.*

A. I. R. 1930 Madras 719

ANANTAKRISHNA AYYAR, J.

(*Thamarapalli*) *Surya Narayana*—Appellant.

v.

(*Gopavajhala*) *Joga Rao* and *others*—Respondents.

Second Appeal No. 1382 of 1926, Decided on 21st November 1929, from decree of Dist. Judge, Vizagapatam, in Appeal Suit No. 125 of 1924.

Civil P. C., O. 22, R. 4—Death of respondent—Party heard on merit cannot re-open case.

It is not open to a party who was really heard at appeal and against whom a decree was passed on the merits to take advantage of the death of his opponent and claim a rehearing of the appeal on merits: 39 *Mad.* 386, *Rel. on. A.I.R.* 1929 *Mad.* 802 ; *A. I. R.* 1924 *Mad.* 713 and 26 *Bom.* 317, *Dist.* [P 720 C 2]

Y. Suryanarayana—for Appellant.

V. Govindaraja Chari — for Respondents.

Judgment.—The plaintiff filed the suit to recover money due for certain instalments of interest which had accrued due under a mortgage bond executed in favour of the plaintiff. The plea of the contesting defendant 3 was that there was a part payment made by him which had not been given credit to by the plaintiff. The first Court

found against that plea and he has preferred an appeal to the lower appellate Court to which he had made as party respondents the plaintiff in whose favour the decree had been passed as also the other defendants 1, 2 and 4. The appeal came on for hearing on 29th September 1925 and judgment was pronounced on 12th day of October 1925. But on 21st September 1925, plaintiff-respondent 1 had died. That fact was not known either to the learned vakil for the appellant or to the vakil who had been engaged by the deceased plaintiff-respondent 1. The hearing of the appeal proceeded with the result that the learned District Judge confirmed the decision of the first Court on the merits and dismissed the appeal with costs. Defendant 3 has preferred this second appeal and he has brought on record as party respondent to this second appeal in addition to the other defendants also the legal representatives of the deceased plaintiff.

The first question raised by the learned advocate for the appellant is that the lower appellate Court had no jurisdiction to proceed with the hearing of the appeal after the death of respondent-plaintiff 1. The learned advocate argued that, when once a party really interested in the subject-matter of the appeal died, the whole of the proceedings should be kept in suspense and it is only after the legal representatives are brought on the record that the litigation regains life and is ready for adjudication by Courts. He cited to me the observations of Wallace and Walsh, JJ., in the case reported as *Balaramier* v. *Vasudevan* (1) in support of his contention. He also brought to my notice the decision in *Seshamma* v. *Venkata Rao* (2) and *Janardhan* v. *Ramchandra* (3).

On behalf of the respondent, that is the legal representative of the plaintiff, the learned advocate who appeared for him distinguished the cases quoted on the appellant's side by observing that those were cases where a decree or order was passed against the party who was dead, by that time in ignorance of the fact of his being dead. They were not cases where the party who complained had been heard, and could not be said to be in any way prejudiced by the legal representative not having been brought on record at the time. He also relied on the decision of this Court in the case reported as *Vellayan Chetty* v. *Jothi Mahalinga Ayer* (4), where Ayling and Seshagiri Iyer, JJ. held that the death of one of the respondents does not abate an appeal and that though the legal representative of the deceased party had the right' if he chose to apply to have the decree vacated and the case freshly decided after hearing him, it was not open to the party who was really heard and against whom a decree was passed on the merits to take advantage of the death of his opponent and claim a rehearing of the appeal on the merits. No doubt the case in *Vellayan Chetty* v. *Jothi Mahalinga Ayer* (4) was a case of the death of one of the respondents in an appeal, but that is not a distinction of importance. The deceased respondent was interested in that appeal, he had engaged a vakil, and the case is an authority for the position that it is only parties who are prejudiced that have got a right to be heard. I need not pause here to consider whether the legal representative of a deceased respondent in those circumstances should really prove prejudice to the satisfaction of the Court before he can claim and obtain a rehearing. The question that arises for decision in the present case as it arose in the case of *Vellayan Chetty* v. *Jothi Mahalinga Ayer* (4) is whether a party who was alive and who was heard was entitled to claim a rehearing of the appeal, because the opposite party was dead at the time, when the legal representative of the deceased does not claim any such rehearing. Following the decision of this Court reported as *Vellayan Chetty* v. *Jothi Mahalinga Ayer* (4) I overrule the first contention raised by the learned advocate for the appellant.

The second contention is whether the lower Courts were right in not upholding the plea of part payment raised by defendant 3. That is essentially a question of fact and the finding of the lower appellate Court on that point is binding on me in second appeal. The result is

(1) A. I. R. 1929 Mad. 802=120 I. C. 374=52 Mad. 933.
(2) A. I. R. 1924 Mad. 713=80 I. C. 397.
(3) [1902] 26 Bom. 317=4 Bom. L. R. 23.
(4) [1916] 39 Mad. 386=28 I. C. 83.

the second appeal is dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

A. I. R. 1930 Madras 721

KUMARASWAMI SASTRI AND WALSH, JJ.

Nallaperumal Chetti — Defendant — Appellant.

v.

Valliyappa Chetti and *others* — Plaintiff and Defendants—Respondents.

Civil Appeals Nos. 212, 257 and 407 of 1925 and Letters Patent Appeal No. 308 of 1926, Decided on 18th September 1929.

(a) Civil P. C., O. 20, R. 16—Suit for accounts—Case need not be sent for taking accounts in every case.

Although ordinarily in a case for an account, even though the defendant may deny his accountability, the proper course is to pass a preliminary decree and send the case for taking accounts, the Court is not bound to send the case for taking accounts in every case; and where facts are so simple that the taking of accounts will be unnecessarily lengthening the proceedings without any benefit to the parties it may withhold sending the case for taking accounts. (*Case law considered.*) [P 722 C 1, 2]

(b) Civil P. C., S. 34 — Interest between date of suit and decree is discretionary.

The question of interest between the date of plaint and the decree is a matter in the discretion of the Court. [P 723 C 1]

T. M. Krishnaswami Iyer and *R. Seturama Sastry*—for Appellant.

M. Patanjali Sastry and *C. S. Rama Rao Sahib*—for Respondents.

Judgment.—These appeals arise out of a suit filed by the plaintiffs, plaintiff 1 claiming to be the legatee under the Will of his grandfather, for an account of the estate and for possession. He also wanted damages for misfeasance and malfeasance of the executors. The executors are defendants 1 and 5. The lower Court passed a decree in plaintiff's favour. Defendant 1's case was that defendant 5 was managing the estate till his disappearance in 1915 and that his management was merely formal, i. e., he merely signed in the deposit account and the receipts Exs. 4 and 4 (a). Defendant 5 was admittedly not heard of for five or six years before the suit and he is not heard of even now. His son has been impleaded as being a member of the undivided family. Defendant 5 is ex parte. Defendant 6's mother and guardian in her written statement denied that defendant 5 (her husband) ever took part in the management of the estate. Upon this issues were raised and the case went to trial. It was found that defendant 5 did take part in the management of the estate, that he put in moneys and collected moneys and that he also sold an item of property in which the testator had a third share. Out of the moneys which belonged to the estate and which were invested, there was a claim in the plaint for Rs. 40,000 against defendant 7. This represented moneys belonging to the estate which had been invested. The Subordinate Judge passed a decree for Rs. 40,000 with interest at 6 per cent per annum. In Appeal No. 120 of 1925 we held that the amount in deposit with defendant 7 was not Rs. 40,000 but Rs. 37,100 on the date of the plaint and we modified the decree by allowing Rs. 37,100 with interest as stated above. That money has been paid into Court and there is no question of any loss to the estate so far as that money is concerned except as regards interest which is the subject matter of Appeal No. 257.

The Subordinate Judge found that there was one more item for which the defendants were accountable and this was a sum of Rs. 3,000 proved to have been collected by defendant 5. He allowed that sum with interest at 9 per cent. per annum. As regards that sum it is not disputed before us that that sum was collected by defendant 5 as that is proved beyond all doubt by the account books filed. What is argued is that the Court should not have allowed Rs. 3,000 and interest, but that an account should have been directed to be taken and defendant 5 given an opportunity of proving certain expenses which he had incurred for the estate and which he was entitled to credit for. When the case was closed defendant 6 put in a petition saying that certain accounts which showed dealings by defendant 5 with the estate were found behind some vessels in the house and wanted admission of these books. The Subordinate Judge, in our opinion, rightly rejected the petition. The question raised in Appeal No. 407 by Mr. Padmanabha Ayyangar is that the Judge ought to have passed a preliminary decree and then sent the case for taking accounts, and he refers to the Privy Council deci-

sion in *Hurronath Roy Bahadoor* v. *Krishna Coomar Bukshi* (1), and to *Mohesh Chunder Bose* v. *Radha Kishen Bhattacharjee* (2), *Degumber Mozoomdar* v. *Kali Nath Roy* (3), *Raghunath* v. *Ganpatji* (4), *Ayeshabai* v. *Ebrahim Haji Jacob* (5), *Thirukumaresan Chetti* v. *Subbaraya Chetti* (6) and *Ram Dass* v. *Bhagwat Dass* (7) in support of his view. He also refers in this connexion to O. 20, R. 16, Sch. 1, Civil P. C., and Rr. 120 to 136 of the Civil Rules of Practice (Mofussil). There can be little doubt on these authorities that ordinarily in a case for an account, even though the defendant may deny his accountability, the proper course is to pass a preliminary decree and send the case for taking accounts. But we do not think that it follows that in every case irrespective of other considerations, the Court is bound to send the case for taking accounts. Their Lordships of the Privy Council in dealing with this point make a reservation. At p. 133 (*of* 13 *I. A.*) they state:

"Their Lordships are not expressing an opinion that in a suit for account it may not appear at the hearing that the issue is so simple and so clearly raised, and met by evidence as to be ready for decision at that time. But the general rule is the other way."

Order 20, R. 16, also does not make it imperative to pass a preliminary decree apart from any other consideration. All that R. 16 says is that a preliminary decree may be passed where it is necessary in order to ascertain the amount of money due to or from any party that an account should be taken. In the present case we have the fact that so far as the liability of the defendants is concerned, it is Rs. 40,000 which was claimed and ultimately decreed, not having been disputed by defendant 7 except as to Rs. 3,000 odd which he says was not deposited. His solvency was not disputed and he has paid the sum due into Court. The only question between the executors and the plaintiff was whether Rs. 3,000 was collected. As regards a sum of about Rs. 780 which was got by the sale of the village, that there was a sale-deed and that the amount was received is not disputed. The plaintiff will be entitled to a half of that amount. As regards the Rs. 3,000, as we have said before, it is proved beyond all doubt that, and it is not denied before us that, that sum was collected by defendant 5. Therefore, when the case came up for disposal, there was the Rs. 3,000 proved to have been collected and no denial in the written statement that the amount was ever collected. No statement was made that any expenses were incurred, nor did defendant 6 ask the Judge at that stage to allow the expenses he had incurred in connexion with that item. The petition to file account-books said to have been discovered behind some brass vessels was rightly rejected. It, therefore, comes, in our opinion, in the category of cases which the Privy Council describes as cases where the facts are so simple that the taking of accounts will be unnecessarily lengthening the proceedings without any benefit to the parties. It may be more complicated if in Appeal No. 257 the appellants insist on the usual procedure being adopted by reason of other items being charged. But their counsel does not want the case to be sent back for a preliminary decree being passed which will only mean unnecessary lengthening of the proceedings without any material benefit to anybody.

Appeal No. 212 is filed by defendant 1. But in view of the fact that the plaintiffs who are appellants in Appeal No. 257 do not object to a decree making defendant 6 liable in the first instance for money collected the further point raised needs no consideration.

Then we come to Appeal No. 257 filed by the plaintiffs. Their advocate confines his case to two points: (1) that the Subordinate Judge was wrong in giving interest at 6 per cent on the Rs. 37,000 which was in the firm at the date of the plaint and he must have given 9 per cent; and (2) that in making defendant 6 liable in respect of plaintiff's share of the village sold by defendant 5, Rs. 390 should have been awarded and not Rs. 360. So far as the deposit with defendant 7 is concerned plaintiff 1 repudiated the terms under which it was made, on the ground that the arrangement during his minority does bind him. The arrangement was that the

(1) [1887] 14 Cal. 147=13 I. A. 123=4 Sar. 751 (P. C.).
(2) [1907] 6 C. L. J. 580=12 C. W. N. 28.
(3) [1881] 7 Cal. 654=9 C. L. R. 265.
(4) [1905] 27 All. 374=(1905) A. W. N. 3.
(5) [1908] 32 Bom. 264=10 Bom. L. R. 117.
(6) [1897] 20 Mad. 313.
(7) [1905] 1 A. L. J. 347=(1905) A. W. N. 1.

amount should be paid to both defendant 1 and defendant 7 who it was said were acting in plaintiff's behalf at the time of his marriage. The right of plaintiff 1 to recover the sum is now disputed. The question of interest between the date of the plaint and the decree is a matter in the discretion of the Court, and the Subordinate Judge allowed 6 per cent. It is not quite clear that if he had been given the tavanai rate of interest which fluctuates, he would have got very much more than 8 or 8½ per cent. Interest has been given at 6 per cent on the principal and interest due at the date of the plaint and a large portion of Rs. 37,000 represents accrued interest. In these circumstances we do not think that there is any ground for interfering with the discretion of the Subordinate Judge who gave 6 per cent on the total of Rs. 37,000.

Then as regards the claim for a third share in the sale-proceeds of lands, the amount got by defendant 7 was Rs. 780 and it is admitted by his advocate here that Rs. 390 would be the proper amount and not Rs. 260. The decree will be modified by making defendant 6 pay Rs. 390 instead of Rs. 260. This disposes of all the contentions raised.

The result is Appeal No. 407 will be dismissed with costs. As regards Appeal No. 212 the decree will be modified by stating that the amounts of Rs. 3,000 and Rs. 390 with interest would, in the first instance, be recoverable from defendant 6 out of the joint family properties of the said defendant and that the portion not recovered will be made recoverable from defendant 1. Each party will bear his own costs. Appeal No. 257 is dismissed with cost, one set given to defendants 1, 6 and 7 to be apportioned in proportion to the amounts in respect of which they are interested in the appeal.

Plaintiff 1 was the legatee under the Will. Plaintiff 1 was not born then. Plaintiff 1 himself was about four years old at the date of the Will. Plaintiff 2 was added to present any objection as to non-joinder. The decree refers to "plaintiff" which evidently means plaintiff 1.

The decree will therefore specify that the amounts will be payable to plaintiff 1.

In the view we have taken in the main judgment no orders are necessary in the Letters Patent Appeal No. 308 of 1926.

P.R.S./V.B. *Order accordingly.*

A. I. R. 1930 Madras 723

COUTTS-TROTTER, C. J., AND ANANTAKRISHNA AYYAR, J.

G. Martirosi—Appellant.

v.

A. K. C. T. Subramaniam Chettiar—Respondent.

Original Side Appeal No. 70 of 1928, Decided on 14th January 1929, from judgment of Waller, J., D/- 17th April 1928.

(a) Arbitration Act, S. 14—Umpire required to ascertain damages on basis of future profits that would have accrued if breach of contract had not occurred—He stating that there were no material to arrive at his estimate but passing award having considered all circumstances—Award was not bad on the face of it.

An umpire who had to ascertain the amount of damages on the basis of future profits that would have accrued if a breach of contract had not been committed, stated that there were no sufficient materials before him from which to arrive at his estimate, but passed his award duly considering all the circumstances placed before him.

Held: that there was nothing to show that the arbitrator misconducted himself in any way in the sense that his award was bad on the face of it and so the Court had no jurisdiction to set it aside. [P 725 C 2]

(b) Arbitration Act, S. 14—Jurisdiction of Court to review awards is very narrow.

Anantakrishna Ayyar, J.—The jurisdiction of Courts to review awards passed by umpires is not the jurisdiction of a Court of appeal while reviewing the decisions of inferior Courts. It is much narrower. [P 726 C 2]

K. S. Jayarama Iyer and *C. R. Rajagopalachariar*—for Appellant.

M. S. Venkatarama Iyer and *S. Nagaraja Iyer*—for Respondent.

Coutts-Trotter, C. J.—This is an appeal from the decision of Waller, J., setting aside an award in favour af Mr. Martirosi in an arbitration between him and the firm of A. K. C. T. Subramaniam Chettiar. This litigation has had a long history, but it is not necessary for me to allude to more than the main features of it. These parties entered into a contract and that contract contained an arbitration clause and in due course they quarrelled in the year after the agreement or less than a year

after the agreement and that duly came before two arbitrators, Mr. Martandam for Subramaniam Chetti and Mr. Moca for Mr. Martirosi. They disagreed as one would expect and Mr. Vaz, a Barrister and a practitioner in this Court was appointed umpire. That was on 17th April 1924. The first award made by Mr. Vaz was set aside by Kumaraswami Sastri, J., on the ground that one party to the arbitration, A. K. C. T. Subramaniam Chetti was not heard and he remitted it to Mr. Vaz to issue another award. Unfortunately that award which was promulgated on 2nd August 1925, was promulgated out of the time extended by Kumaraswami Sastri, J's. order.

The umpire Mr. Vaz then asked for an extension of time. The learned Judge before whom it came, V. V. Srinivasa Aiyangar, J. took the view that he had no jurisdiction to extend the time. The matter ultimately came before a Full Bench and they held—and it is binding on us of course—that there was jurisdiction to extend the time and we accordingly extended the time and the case was sent back ; and in his first award on the extension, Mr. Vaz awarded Mr. Martirosi damages under two heads, Rs. 15,000 for what is now agreed was really damages for deceit and Rs. 5,000 as to which no question arises here. Beasley, J., held that the damages for deceit in the procuring of the contract and so forth was not within the submission to the arbitrators and set aside that part of the award but he remitted it to the umpire to find what, if any, damages were due to Mr. Martirosi on the footing, and strictly on the footing of a breach of the contract after it had been brought to birth. Mr. Vaz, purporting at any rate to base himself on that footing, gave Mr. Martirosi Rs. 15,000 as and for damages for breach of contract ; and his award is before us. That award was objected to on the ground that it was bad on the face of it and to that objection Waller, J., has given effect and has set aside the award and sent it back again. I am just going to read a few passages from Waller, J's., judgment and then I will go back to the award of Mr. Vaz and see how far in my judgment the actual award warrants the criticizm of the learned Judge. It is a feature that one cannot overlook that Mr. Vaz undoubtedly awarded exactly the same sum on the correct basis as he had awarded on the old and wrong basis of damages for deceit. The learned Judge cites a sentence from the award, and, taking it in isolation, no doubt it is capable, to say the least, of misconstruction and what the learned Judge says is this: He quotes the sentence to which I am going to refer and says :

"Moreover, what is the loss of profits referred to ? Is it the loss of future profits for estimating which there were admittedly no materials ? (I will come back to that in a moment) or is it the loss of profits which might have ensued had Martirosi not left the Indo-Italian firm. I have come to the conclusion that the award cannot be sustained. When damages are given for a breach of contract they must be estimated on some comprehensible basis. Here it is not clear on what basis they have been estimated. What, it seems to me, the arbitrator has done is to dress up in another form, not at all convincing from his previous award of exemplary damages founded on a quite different cause of action. As I have already stated I do not think I am disentitled from referring to the award, that is, the former award."

I see no warrant in the present award for supposing that the umpire was not perfectly well aware that he proceeded before on a wrong basis and that he had a mandate from this Court to proceed thereafter on a different basis. Now I am coming to the award itself to see how far I think that these criticizms are justifiable. I will first read from the early part of the award :

"My conclusions are that Sivam failed (1) to supply the necessary capital ; (2) to open a banking account which he was bound to do ; (3) that he deprived Martirosi of the management of the business and assumed it himself ; and (4) that he worked against the interests of the South Indian and Continental Trading Company (that is the matter with which we are concerned) and thus forced, a dissolution on Martirosi. There can be no question, therefore, that there was a breach of contract on the part of Sivam (he was the agent of the respondent) for which his principal is responsible."

I do not think anybody would have the hardihood to say that there was no ample material before the umpire on which he could come to that conclusion. He goes on :

"The next question is that damages Martirosi is entitled to for the breach of contract. Mr. Rajamanickkam contends that I ought to take the estimated profits for three years as the amount of damages to be awarded to Martirosi."

Pausing there for a minute : that might have been right or that might have been wrong as a reasonable basis. But the learned umpire rejects it and he says this and it is this sentence which has given rise to the whole of this trouble :

"There are no materials before me from which to arrive at this estimate except the statements of Sivam and Martirosi, each claiming damages against the other of several thousands of rupees but in both cases on pure speculation without any details as to how those figures are arrived at."

It must be remembered that what the umpire had to come to some conclusion about was not the ascertainment of special damages arising out of a contract which was over and done with. The breach being an anticipatory breach, he had to come to a conclusion as to what, had the breach not occurred, would have been likely to result to Martirosi in the way of profit. Everybody knows that neither a jury nor an arbitrator can expect to have exact materials on such a subject as that. But when I come to the portion of the award where the umpire says what his own procedure was, it seems to me quite clear that all that that sentence means is this :

"I cannot pretend to get an exact figure. I do not accept either Sivam's or Martirosi's attempt to give an exact figure because the thing is not possible,"

and very wisely if I may say that, he was left to form a general impression as best as he could as to what was the probable and reasonable loss likely to result. What he says is this :

"I have come to the conclusion that, if the business of the South Indian and Continental Trading Company had been carried in compliance with the terms of the agreement, it would have been a profitable business."

Why should he come to that conclusion ? He gives a reason for it :

"That Sivam knew it to be so there can be no doubt as his attempt to snatch this business for the benefit of his own firm, the Madras Coal and General Agency, shows ; and if there had been no breach of the contract with Martirosi, neither the severance with the Indo-Italian nor the time spent in working the South Indian, would have involved him in that loss. Sivam must have known that the necessary consequence of the breach of the contract would be loss of profits to Martirosi to at least the extent of the sum awarded by me."

What does that mean ? "I have got this" says the umpire :

"for certain that Sivam's conduct shows that he knew that this was a thoroughly valuable contract. I, therefore, think that, that being so and in the absence of any possibility not merely of any evidence but any possibility of any evidence tending to fix any figure with an exactitude, I shall not be giving any more than Mr. Martirosi must necessarily have lost by giving him Rs. 15,000."

Why an arbitrator should not say that passes my comprehension. The very point of an arbitration of this kind is that you absolve the arbitrator from exact rules of evidence and rules of law and leave him as a business affair to make the best he can and that is what he has done. He is not a business man, it is quite true he is a gentleman practising at the Bar but he must know something about the conditions of trade in Madras and I have not the slightest doubt that during the course of the arbitration considerations of that general kind were put before him. In my opinion there is nothing to show that he misconducted himself in any way in the sense that his award is bad on the face of it. It seems to me a perfectly good award based on such material as was available and he might very easily, I should have imagined, awarded a very much larger sum than he did on the new basis. In my opinion this appeal succeeds and the order of the learned Judge must be discharged.

Anantakrishna Ayyar, J.—I agree, but as we are differing from the judgment of the learned Judge and as the subject-matter of the appeal is about Rs. 15,000, I think it right that I should state in my own words the reasons which induce me to hold that the learned Judge's view is not correct. In matters of arbitration (I speak with reference to the facts of the present case) it is clear that under S. 14, Arbitration Act, the award passed by an arbitrator or an umpire could not be set aside except for misconduct and what is legal misconduct which would justify the setting asside of an award by an arbitrator or an umpire is now settled. In the present case, unless we hold that an objection to the legality of the award is apparent on the face of it, this award could not be set aside by the Court.

The dispute between the parties was referred to two arbitrators who subsequently agreed in appointing an umpire. Mr. Vaz., the umpire, no doubt refers in his present award to his pre-

vious award. But, as I read his award, he refers to his previous award only to avoid the erroneous aspect from which h_ viewed the matter in the first instance. The three main questions that he had to decide were : (1) Was there a breach of contract by the defendant (2) Did the breach result in any loss to Mr. Martirosi, and (3) if so, what is the exact amount of damages? Reading this award, it is absolutely clear that his conclusions as regards the first point could not at all be impugned. In fact, as I understood the argument of the learned counsel for the respondent, I did not understand him to impugn the first finding, namely, that there was a breach of contract by the respondent. The learned umpire says :

"There can be no question, therefore, that there was a breach of contract on the part of Sivam for which his principal is responsible. Then he goes into the question of damages, but before finding what the exact amount of damages that should be awarded to Mr. Martirosi, is, he considers the question whether the breach of contract resulted in any loss to Martirosi. He says I have come to the conclusion that, if the business of the South Indian had been carried on in compliance with the terms of the agreement, it would have been profitable business."

He mentions some reasons which induced him to come to that conclusion and finally, the exact question is answered by him that the result of the breach was that Martirosi lost a profitable business. The last question he had to decide was as regards the exact amount of damages that should be awarded. In considering that question the learned umpire refers to S. 73, Contract Act, which enacts, that in such cases the amount of damages to be awarded is that which naturally arose in the usual course of things to the plaintiff as the result of the breach of contract by the defendant. So far I am not able to see any law or any mistake of law, apparent on the face of the award which could be taken to have vitiated the award of the learned arbitrator. No doubt, as usually happens in such cases in this case also there was a lot of difficulty in assessing the exact amount of damages. If this matter had come to Court, I daresay the Court also would have experienced equal if not greater difficulty in assessing the exact amount of damages, but fortunately the umpire is, in this case, in a better position than the Court. He is not bound by the stringent provisions of the Evidence Act, because S. 1 of that Act says proceedings before an arbitrator are not governed by the Act. There is also the further fact that, having regard to the contingency that in case damages have to be assessed, materials may not be such as would be deemed satisfactory if the matter had to be decided by Courts of law, the parties, as I take it, wisely thought that this was preeminently a matter which should be settled by an umpire. The umpire has taken into account various considerations which were placed before him. He refers to the fact that if he entirely relied upon the statements of one side the amount of damages to be awarded would be very large and as he says, one side claimed several thousands of rupees.

Having found that there was this breach and having also found that Martirosi had sustained damages, he would have been entirely within his rights if he had accepted the figures mentioned by the plaintiff and given damages accordingly. But he discussed the question more carefully and came to the conclusion that the amount of Rs. 15,000 was the proper amount. No doubt it so happens that this was the exact amount at which he arrived in the prior award, approaching the question from another standpoint, but he now approached the question from a new and correct standpoint (the previous award not being binding on anybody and having been set aside). The exact nature of the jurisdiction of the Court with reference to awards passed by umpires was very clearly discussed before us. It is not the jurisdiction of a Court of appeal while reviewing the decision of an inferior Court. Having regard to the very limited jurisdiction which Courts have to review awards passed by arbitrators or umpires, I think that the award in this particular case could not be said to be legally unsustainable in the sense that objection to the legality of the award is apparent on the face of it. With all respect to the learned Judge, I think that the objections raised against the validity of the award are not maintainable and

that this portion also of the award should be upheld. I agree in the order as to costs passed by the learned Chief Justice.

P.R.S./S.N. *Order discharged.*

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* A. I. R. 1930 Madras 727

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Nanchappa Koundan and *others* — Defendants—Appellants.

v.

Vatasari Ittichathara Mannadiar— Plaintiff—Respondent.

Letters Patent Appeals Nos. 255 to 258 of 1925, Decided on 4th September 1929, against judgment of Phillips, J., reported in *A. I. R.* 1927 *Mad.* 47.

*** (a) Interest Act — Improvement lease, under which waste lands were to be cultivated gradually, granted—Tenant agreeing to pay rent when lands would be assessed to revenue till when no rent was payable—Lessor's suit for arrears of rent being decreed, he claiming interest on arrears—Interest could not be allowed under Rent Act for sum payable was not certain nor time at which it was payable was certain, Interest could not be given on equitable grounds under proviso to Interest Act for that covers only cases in which interest allowed prior to passing of Interest Act, when no interest was payable for detention of ordinary debt—Nor could interest be granted by way of damages under Contract Act, S. 73, Illus. (n).**

By a written instrument, a person made a lease of his waste lands. The lease was an improvement-lease under which the lands were to be gradually brought under cultivation and until they were so brought under cultivation nothing was to be payable either to the Government or to the jenmi. The tenant agreed to pay rent at a certain rate from the time lands would be assessed to Government revenue. The landlord brought his suit to recover arrears of rent on the basis of this lease and his suit was decreed He also claimed interest on the arrears of rent decreed to him.

Held: that interest would not be payable under the Interest Act. For interest to be payable under the Act two conditions must be satisfied: (1) a certain sum must be payable, and (2) this sum must be payable at a certain time under the contract. But both of these certainties are absent in the present contract and so no interest could be granted; *A. I. R.* 1929 *P. C.* 185 and 7 *M. I. A.* 263, *Foll.*; 26 *Cal.* 955, *not Appr.*; *Fooks* v. *Horner*, (1896) 2 *Ch.* 188 *Dist.*; (*Other English cases considered*).

Held further: that interest would not be allowed on general equitable grounds under the proviso to Interest Act, because that proviso saves only those cases in which interest was allowed before the passing of the Act, It is only in those cases in which Courts of equity would ordinarily award interest that Courts of India having the powers both of the Courts of equity and of law award interest on equitable grounds. As there is no warrant for saying that prior to the Interest Act, interest was awarded for detention of ordinary debts, no interest could be allowed in this case also: *Miller* v. *Barlow* 3 *P. C.* 733, *Dist.*; *A. I. R.* 1929 *P. C.* 185, *Rel. on.*; 42 *Mad.* 661; *A. I. R.* 1922 *Mad.* 55; *A. I. R.* 1925 *Mad.* 46 and *A. I. R.* 1927 *Mad.* 59, *not Appr.*; (*Other cases also considered*).

Held further: that no interest could also be granted under S. 73 read with Illus.(n) because Illus. (n) does not entitle one for interest by way of damages where interest is not allowed by the Interest Act or any other rule of law. It merely states that if a contract to pay a sum of money is broken, nothing but interest up to the date of payment can be claimed as damages provided such interest can be claimed under the Interest Act or any other rule of law: 20 *Mad.* 481, *Foll.*; 26 *Cal.* 955; 45 *I. C.* 667; 31 *Bom.* 354 and 18 *All.* 240, *not Foll*: (*Other cases considered*).

(b) Interest Act, Proviso—Rent charged on land—No words allowing interest in instrument creating charge—Interest on arrears of rent can be granted.

Where rent is charged on land, interest can be granted on the arrears of rent on equitable grounds although there are no words allowing interest in the instrument creating charge: *Savilee* v. *Dracks*, (1903) 1 *Ch.* 781, *Foll.*

[P 728 C. 2]

B. Sitarama Rao and *P. S. Narayana Swami Iyer*—for Appellants.

T. R. Venkatarama Sastri and *T. B. Balagopalam*—for Respondent.

Venkatasubba Rao, J.—This is a Letters Patent appeal from the judgment of Phillips, J. The question raised is whether the defendants are liable to pay interest on the rent due by them under a written lease. The learned Judge has held that the Interest Act (Act 32, 1839) is not applicable, but that interest is nevertheless payable on general equitable grounds. The case has been argued fully on both sides and numerous authorities have been cited. To my mind the case presents no difficulty, although the state of the law is not satisfactory, and I shall briefly deal with the point, raised without burdening my judgment with needless citation of cases.

The effect of the lease deed is thus stated in the judgment of Phillips, J.:

"It is clear from the terms of the document that the payment of rent to the plaintiff is to commence as soon as the lands are assessed. The lease is an improvement lease under which the lands are to be gradually brought under cultivation and until they are so brought under cultivation nothing would be payable either to the Government or to the jenmi."

Again the learned Judge refers to a clause in the lease:

"under which the tenant agrees to pay, from the year in which Government revenue is paid, rent at the rate of three-fourths of a para for one para seed area."

It is not disputed that these passages correctly represent the effect of the document. The question then arises: Does the Interest Act apply? I leave out the words which are not relevant for the present purpose and reproduce that part of the Act with which we are concerned:

"It is, therefore, hereby enacted that, upon all debts or sums certain, payable at a certain time, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, provided that interest shall be payable in all cases in which it is now payable by law."

The question then is: Is the sum certain and is the time certain? Mr. Venkatarama Sastriar has contended that under the instrument, both the sum and the time should in the eye of the law be deemed to be certain. This contention cannot prevail in view of the authorities by which we are bound. In fact the argument of the learned advocate is precisely that which was adopted in the case of *Duncombe* v. *Brighton Club and Norfolk Hotel Co.* (1). A different view had been taken by the Exchequer Chamber in the earlier case of *Merchant Shipping Co.* v. *Armitage* (2). In the last mentioned case, the Court came to the conclusion:

"that where a sum of money was payable under a charterparty after the right delivery of the cargo, in cash two months after the date of the ship's report inwards at the custom house, although the time was ascertained and became settled by the event, the money was not payable at a "time certain" within the meaning of the statute."

In the former case, the majority of the Court came to the conclusion:

"that although you had not the sum or the time actually mentioned in the written instrument, yet if the written instrument contained provisions which on the happening of an event rendered the time or the sum certain, that was sufficient within the meaning of the statute, and interest could be allowed."

It is in the words of Lord Herschell, that I have stated above the effect of the two decisions to which I have referred: see *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (3) at 435. Having quoted these cases, the learned Lord, though disposed to treat the *Armitage* case (2) as of greater weight, refuses to express any decided opinion as to which of these views is the correct one. Lord Morris feels no doubt that the law is correctly stated in the *Armitage* case (2), see p. 442. But Lord Shand observes that the *Duncombe* case (1) appeals more forcibly to his mind than the other case. We are not concerned with this conflict, for the Indian Courts are bound by the law settled beyond doubt, by two Privy Council cases, one of them being a very recent one. In *Maine Electric Power Co.* v. *Hart* (4), (a case the facts of which closely resemble the facts before us), the following passage contains a very clear statement of the law:

"It is further to be observed that in *Juggomohan Ghose* v. *Manickchund* (5), their Lordships' Board held under an Indian Statute (Act No. 32 of 1839) identical in terms with the relevant section of Lord Tenterden's Act that a sum certain is not payable by the written instrument at a time certain, if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for the happening of those events, if they ever do happen, may be indefinitely postponed."

Judged by this test, in the present case, neither the sum nor the time is certain.

Folks v. *Horner* (6) is not inconsistent with this principle, for the contingency there mentioned was the death of a certain person and:

"death is not a contingent event—it is a certainty which must happen to all."

The sum was there payable within six calendar months after the testator's decease:

"A covenant to pay within six calendar months after death is a covenant to pay on the last day of the six months."

This case does not, therefore, help Mr. Venkatarama Sastri. It is difficult to reconcile *Soorja Narain* v. *Pratap Narain* (7) with the decision of the Privy Council. In that case a specified sum was agreed to be paid in the event of counsel being engaged. The learned

(1) [1875] 10 Q.B. 371=44 L.J. Q.B. 216=23 W.R. 795=32 L.T. 863.
(2) [1874] 9 Q.B. 99=43 L.J. Q.B. 24=29 L. T. 809.
(3) [1893] A.C. 429=58 J.P. 36=69 L.T. 637 =63 L.J. Ch. 93.
(4) A.I.R. 1929 P.C. 185=119 I.C. 615 (P.C.).
(5) [1857-59] 7 M.I.A. 263=4 W.R. 8 (P.C.).
(6) [1896] 2 Ch. 188=44 W.R. 556=65 L.J. Ch. 694=74 L.T. 686.
(7) [1899] 26 Cal. 955.

Judges treated the time of payment as being certain, a view opposed to that taken in the two decisions of the Judicial Committee. I agree with Phillips, J., that a case has not arisen which gives the Court jurisdiction to allow interest under the Act.

The question then arises: Are the defendants liable for interest independently of the Act? In other words: Is interest payable under the proviso above quoted, which says:

"interest shall be payable in all cases in which it is now payable by law?"

Before Lord Tenterden's Act interest was payable at common law and in equity in certain cases. The object of that Act was to make the law more liberal by statute in regard to the granting of interest: see the judgment of Lord Watson in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (3). To carry out this object a proviso was added leaving untouched those cases in which there was already a right to interest when the Act was passed. The Indian Act, as its preamble shows, reproduces for this country the terms of Lord Tenterden's Act. What then are the cases which are saved by the proviso? Lord Lindley in his judgment in *London, Chatham & Dover Co.* v. *South Eastern Railway Co.* (8) attempts to state in what cases before the Act interest was granted first at common law and secondly in equity. The judgment does not of course profess to be exhaustive on the point, but the leading considerations are set forth in some detail. The learned Lord Justice refers to cases where a plaintiff for asserting his legal rights had to invoke the powers of the Court of Chancery and points out that that Court generally followed the law in dealing with legal claims. Such cases are those dealt with under the concurrent jurisdiction of the Court of equity. Then the Lord Justice refers to purely equitable rights which fell within the exclusive jurisdiction of that Court. He thus mentions instances where interest was awarded before the statute at common law as well as in equity. Though, as I have just stated, the Court of equity followed the law in dealing purely with legal claims, sometimes in order to prevent injustice applied to such claims principles such as:

"A Court of equity will treat a wrongdoer as having done that which he ought to have done."

This then is the effect of Lord Lindley's judgment. Bearing this in mind let us examine the contentions now advanced. When it is sought to bring a case within the proviso, the question that really arises is:

"Would interest have been granted in such a case before the Act either at law or in equity?".

It is unnecessary to make a complete list of instances where interest was so awarded. It is sufficient to point out that before the Act, in the case of ordinary debts, interest was not payable at common law unless there was an agreement express or it could be implied as in the case of usage: see the judgment of Lindley, L. J., at p. 140 and the judgment of Bowen, L. J. at p. 146. Vague notions as to what are equitable principles have led to some confusion; and a rule may vaguely be just, but it is not necessarily a principle of equity. This distinction is most clearly brought out in the judgment of Lord Herschell in the House of Lords in the case, *London Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (3), already cited. The Courts at one time granted interest in case of debts on general grounds of justice; for example in one case Lord Mansfield held that a debt carried interest where there was

"long delay under vexatious and oppressive circumstances."

In another case, Best, C. J., observed that the jury might give interest:

"in the shape of damages for the unjust detention of the money."

This view of the law was not approved in later cases and interest was refused in case of debts on any such broad, equitable grounds. It was with the object of relaxing this law by statute, that Lord Tenterden's Act was passed. But the new rights created under that Act were within very narrow limits—too narrow indeed as is pointed out by Lord Herschell for the purposes of justice. Lord Shand similarly regrets that the law, as it stands, allows injustice to prevail.

I have now dealt with the principles that guide the Courts in England. Is the law of this country different?. That would depend upon what the law was before the passing of the Interest Act.

(8) [1892] 1 Ch. 120.

Cases where before the Act interest was granted are saved by the proviso in question. But there is no warrant for saying that the Courts awarded interest on debts on grounds such as were adverted to by Lord Mansfield and Best, C. J. The subject is fully and clearly dealt with in the judgment of Sir John Wallis, C.J., in *Raja of Pittapur* v. *B. Pallam Raju* (9). The Madras cases on which Phillips, J. relies must, with all respect, be held to be wrong. The learned Judge also refers to *Miller* v. *Barlow* (10). That is not a case of a debt at all. But as it is strongly relied on by him it requires a closer examination. That was an action for money had and received. A firm was adjudicated insolvent and the Official Assignee impeached a certain transaction which the insolvent firm had with the plaintiff. He then obtained an order from the insolvency Court directing the plaintiff to hand over to him certain goods and moneys. They were accordingly handed over. In the action that was brought the plaintiff complained that the order was wrongly made and prayed for a declaration of his rights in the aforesaid goods and money. The question was: "Was the Official Assignee liable to pay interest?" The effect of the judgment in the suit was that the order of the insolvency Court was wrongly made.

The money having been retained in the Official Assignee's hands by virtue of an order which was subsequently reversed, their Lordships held that the plaintiff was entitled to interest. The principle underlying this decision is further elucidated by another judgment delivered in the same year by the Privy Council: *Boder* v. *The Comptoir D'Escompte De* (11). The question directly arose in that case whether on the reversal of a judgment, a party is entitled to get interest on the amount that had been recovered from him under that wrong judgment. It was held that he was. These cases give effect to definite and well-recognized rules of equity. They have never been treated as authorities in English Courts for the position that interest can be allowed on a debt, on what are termed general equitable grounds.

The Privy Council case of *Maine Electric Power Co.* v. *Hart* (4), to which I had already referred, is a decisive authority also on this point. The facts there, as I have said, are very similar to the facts of the present case. Their Lordships after disposing of the contention that interest was payable under the statute, further, held:

"There is no place in the matter for the exercise of equitable jurisdiction and therefore no rule of equity in regard to interest can have any application."

I am therefore clearly of the opinion that under the proviso the plaintiffs cannot claim interest on what are known as general equitable grounds. Lastly, interest is claimed on the ground that it may be granted by way of damages under S. 73, Contract Act. This contention again is one which has been repeatedly overruled. In the judgment of the Court of appeal of Lindley, L. J. already referred to, it is expressly laid down that damages cannot be granted for non-payment of debts. The question is directly raised by Lord Herschell in the House of Lords: can interest be awarded by way of damages on the ground of wrongful detention of the debt? The question was, after full discussion, answered in the negative. S. 73 is merely declaratory of the common law as to damages: see Pollock and Mulla's Commentaries. If the English rule as to damages has not had the effect of superseding Lord Tenterden's Act in regard to interest on debts, why should it be assumed that S. 73, Contract Act, has produced just the contrary result? I am not prepared to hold that the legislature, by adding Illus. (n) to S. 73, intended to depart from the law which must be treated as having been settled beyond doubt. The view I take is in conformity with several cases, of which *Kamalammal* v. *Peeru Meera Lavvai Rowthen* (12) may be taken as typical. I cannot therefore uphold the contention of Mr. Venkatarama Sastri.

In the result the claim to interest is disallowed except as regards what is claimed in O. S. No. 65 of 1915 (S. A.

(9) A. I. R. 1921 Mad. 76=60 I. C. 353.
(10) [1871] 3 P. C. 733=8 Moore P. C. (n.s.) 127.
(11) [1871] 3 P. C. 465.
(12) [1897] 20 Mad. 481=7 M. L. J. 263.

No. 137 of 1922). In that case a special contention is put forward that the rent being charged on land interest becomes payable. This is taken to be settled law : see *Savile* v. *Dracks* (13). Collins, M. R. thus observes :

"It seems to be well established on the authorities, and the result of those authorities does not indeed appear to be disputed, that a Court of equity has power to give interest, and in point of fact does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge (p. 793)."

Mr. Seetharama Rao has not contested this proposition. In O. S. No. 65 of 1915, the judgment of Phillips, J., is affirmed and the appeal is dismissed with costs. In the other cases, the learned Judge's judgment is set aside and the appeals are allowed with costs.

Madhavan Nair, J.—The defendants are the appellants. They are lessees of the plaintiff holding lands under perpetual lease deeds the terms of which in respect to material particulars are alike in all cases except in Letters Patent Appeal No. 255 of 1925 which will be referred to later. Under the lease-deed waste lands were leased out on condition that rent should be paid on "reclamation" as they are made. The marupat of the lease in Letters Patent Appeal No. 258 of 1925, Ex. A, may be taken as typical to show the terms under which the lessees held their lands. Its main terms, so far as these are relevant for these Letters Patent Appeals are as follows :

". . . . the remaining sthalama'. . . . shall be held and be held as saswatham (permanently) without surrendering the same for ever and enjoyed by me and my sons and grandsons for ever and ever in hereditary succession, and a proportionate pattom (rent) at the rate of 3/4 of a para of paddy for one para of the nadan seed will be paid, by me to you from the year in which the assessment is levied from the Government."

The suits out of which these Letters Patent Appeals arise were instituted by the plaintiff for the recovery of arrears of rent together with "interest" on the arrears. The District Munsif gave decrees to the plaintiff for the arrears claimed and also for the "interest" on such arrears. On appeal the District Judge disallowed the "interest" on the ground that such interest was not claimable under the "Interest Act" (Act 32 of 1839). In the second appeals filed by the plaintiff, Phillips, J, though he agreed with the District Judge that the Interest Act did not apply to these cases reversed his decisions and held that the plaintiffs were entitled to claim interest "on equitable principles." The learned Judge relied mainly on *Miller* v. *Barlow* (10) and the decision in *Abdul Gaffur Rowther* v. *Hamida Bivi Ammal* (14) in support of his conclusion.

The short question for determination in these Letters Patent Appeals is whether the plaintiff is entitled to claim "interest" on the arrears of rent decreed to him. The respondent supports the judgment of Phillips, J., not only on the ground of "equitable principles" on which he has based his decisions but also on two additional grounds, namely, that interest can be claimed under the "Interest Act" and also under S. 73, Contract Act. The appellants argue that none of these grounds afford any justification for awarding "interest."

I shall first deal with the arguments based upon "equitable principles." To understand the operation of these principles in relation to the law awarding "interest," it is necessary to consider whether they were given effect to generally in all cases on grounds of equity and good conscience, or whether their application was strictly limited to any special class of cases. At common law in England "interest" was not payable on debts unless by agreement or by mercantile usage nor could damages be given for non-payment of such debts. The law in this respect was altered by 3 and 4 William, Chap. 42 (which corresponds to the Interest Act 32 of 1839). In *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (8), the leading decision on the subject, the law was thus stated by Lindley, L. J., at p. 140.

"As regards interest it was settled by *Higgins* v. *Seragent* (15), *Page* v. *Newman* '16), *Foster* v. *Weston* (17), that at common law interest was not payable on ordinary debts unless by agreement or by mercantile usage nor could damages be given for non-payment of such debts. The law in this respect was altered by

(13) [1903] 1 Ch. 781=72 L. J. Ch. 505=51 W. R. 612=88 L. T. 510.

(14) [1919] 42 Mad. 661=52 I. C. 505.

(15) [1823] 2 B. & C. 348=3 D. & R. 613=2 L. J. (O. S.) K. B. 33.

(16) [1829] 9 B. & C. 378=7 L. J. (O. S.) K. B. 267=4 M. & Ry. 305.

(17) [1830] 6 Bing 709=4 M. & P. 589=8 L. J. (O. S.) C. P. 225.

3 and 4, William 4, Chap. 42 . . . . . Except as altered by the Act 3 and 4, William 4, Chap. 42, the old law as to interest remains the same." (p. 142).

This decision was affirmed by the House of Lords in *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (3). According to this decision, under the English law "interest" is not payable on debts nor could damages be given except in three cases:

(1) Where there is an agreement to pay interest; (2) where it is payable under the mercantile usage; and (3) where it is payable under the "statute". To this may be added a fourth case: certain other actions in which also Courts of common law gave interest by way of damages, as for example, for breach of contract to give a bill of exchange, which, if given, would carry interest: see the judgment of Key, L. J., at p. 151. Before the Judicature Act some cases in connexion with debts etc., where the question of "interest" was involved, ordinarily triable in Courts of common law, were tried in the Court of Chancery as the plaintiff's right in such cases could not be enforced at law owing to the defective legal machinery. "The Court of Chancery followed the law in dealing with legal claims." In cases of purely equitable demands, for instance, in suits against trustees who misapplied trust moneys and in suits for equitable waste, the Court of Chancery usually decreed interest: see the observations of Lord Lindley at p. 142. The cases in which interest is payable by the rules of equity are thus described in Halsbury's Laws of England, Vol. 21, p. 40:

(1) Money obtained by fraud and retained by fraud can be recovered with interest.

(2) Interest may also be recovered in equity in some cases where a particular relationship exists between the creditor and the debtor, such as mortgagor and mortgagee, obligor and obligee on a bond, executor and beneficiary, principal and agent, principal and surety, trustee and cesti que trust, vendor and purchaser, or in the case of arrears and annuities.

(3) Where a person who is an officer of the Court, such as a sheriff, a solicitor or a receiver wrongfully withholds money which he has obtained in the course of legal proceedings, he may be ordered to pay it with interest.

So, unless a claim for "interest" on "debts" fell within any one of the above seven cases—assuming that the classification is exhaustive, for it is possible that further research may disclose more cases in "equity"—including in this number the four cases under "the common law" already mentioned, interest was not awarded under English law. No authority has been cited to show that the abolition of the distinction between Courts of common law and equity and their fusion by the Judicature Act resulted in enlarging the scope of cases in which interest could be claimed on debts or in increasing the power of Courts in awarding "interest." As a result of the fusion the same Court was enabled to deal with "legal" as well as "equitable claims" and to award interest on "equitable principles" as well. The same Court being a Court of law and equity recognized not only "legal" claims to interest but also gave effect to such "equitable" constructions as would be recognized in Courts of equity only.

As regards a party's claim to interest, apart from the Interest Act, the law in India may be taken to be the same as in England: see *Kamalammal* v. *Peeru Meera Levvai Rowther* (12), *Juggomohun Ghose* v. *Kaisreechund* (18). I shall now consider how far the principles referred to above and given effect to by English Courts have been followed in the decisions of this Court. As numerous cases were discussed in detail before us and as the case was very fully argued by both sides, a consideration of the case-law at some length becomes necessary. From 1863, that is *Kisara Rukkumma Rao* v. *Cripati Viyana Dikshatulu* (19), onwards, the decisions of our Court proceeded on the view that interest not payable under the terms of the contract could only be paid under the Act or as being in accordance with the usage as to the particular class of instruments: see *Kamalammal* v. *Peeru Meera Levvai Rowther* (12), *Subramania Iyer* v. *Subramania Iyer* (20), *Gopalaswami Chettiar* v. *Ramier* (21) and *Nanu Nair* v. *Ashtamoorthi Nambudripad* (22). In 1919 in *Abdul Gaffur Rowther* v. *Hamidas Bivi Ammal* (14) Ayling and Seshagiri Iyer, JJ., for the first time held that the Interest Act is not exhaustive of all cases where interest is allowed and that even in cases where payment of interest is not

(18) [1861-63] 9 M. I. A. 260 (P. C.).
(19) 1 M. H. C. R. 369.
(20) [1908] 31 Mad. 250=18 M. L. J. 245.
(21) [1910] 5 I. C. 817.
(22) [1915] 29 I. C. 386.

justified under the Interest Act interest may be allowed on 'equitable principles'. In so doing they mainly relied upon the decision in *Miller* v. *Barlow* (10) in which the Judicial Committee pointed out that Indian Courts are Courts both of law and equity and that they can award as damages 'interest' on equitable grounds. They also referred to the decisions of the Privy Council in *Hurropersaud Roy* v. *Shama Persaud Roy* (23), *Hamira Bibi* v. *Zubai De Bibi* (24), and *Ahmed Musaji Salaji* v. *Hashim Ebrahim Salaji* (25), and also to some decisions of other High Courts in which interest was allowed apart from the Act.

Though Seshagiri Aiyar, J., who delivered the judgment in *Abdul Gaffur Rowther* v. *Hamida Bivi Ammal* (14) expressed this view, it may be noticed that it is not consistent with the view in *Nanu Nair* v. *Ashtamoorthi Nambudripad* (22) to which he was a party and also with the subsequent decision in *Rajah of Pittapur* v. *Ballapragada Pallamraju* (9) to which also he was a party. In that case Sir John, Wallis, C. J., followed the prior decisions of this Court and declined to award interest apart from the provisions of the Act. The learned Judge distinguished the case in *Abdul Gaffur Rowther* v. *Hamida Bivi Ammal* (14) by pointing out that that was not a case of a contract and also observed in the course of his judgment that cases in which interest was allowed by the Privy Council in the absence of a contract and independently of the Act must be regarded as cases coming within the proviso to the Act saving cases in which interest was payable by law when the Act was passed. Seshagiri Iyer, J., who delivered a separate judgment agreed with the conclusion arrived at by the learned Chief Justice and pointed out that he and the other learned Judge in *Abdul Gaffur Rowther* v *Hamida Bivi Ammal* (14) did not differ from the prior decisions of this Court. The view that interest might be awarded apart from the Act on broad equitable considerations first adumbrated in *Abdul Gaffur Rowther* v. *Hamida Bivi Ammal* (14) gradually began to find favour in this Court and that decision has been followed in three cases namely, *Arunachalam Chettiar* v. *Rajeswara Sethupathi* (26) by Oldfield and Krishnan, JJ., *Venkatachalam Chettiar* v. *Ponnusami Iyengar* (27) by Wallace, J., and *Krishnan* v. *K. Ambu Kurup* (28) by Curgenven, J. It is not necessary to refer to the facts of these cases as I shall presently consider how far and to what extent the cases relied on by Seshagiri Ayyar, J., in *Abdul Gaffur Rowther* v. *Hamida Bivi Ammal* (14) support the conclusion that apart from the Act interest can be awarded on equitable considerations. Before proceeding further I may here state, to make the position clear, that, so far as the point under discussion is concerned, if the true nature and scope of the equitable considerations affecting the award of interest is correctly understood, the question whether the Interest Act is exhaustive or not, is not in itself a very important one, for the cases in which "interest" could not be awarded on equitable considerations may be brought within the proviso of the Interest Act as observed by Wallis, C. J., in which view the Interest Act may be said to be exhaustive or those cases may be treated as a separate class of cases not coming within the Act strictly, in which view the Act will not be exhaustive. However that may be, the important question to consider is to what extent do equitable considerations afford justification for decreeing "interest". The main case relied on in *Abdul Gaffur Rowther* v. *Hamida Bivi Ammal* (14), and which was referred to in the present case also with great insistence is the decision in *Miller* v. *Barlow* (10). The facts of the case which it may be observed is not one of contract are somewhat complicated but the headnote states them sufficiently to enable us to understand the scope of the decision so far as it relates to the point under discussion :

"Proceedings were taken under the Insolvency Act, 11 and 12 Vic. Ch. 21, and the proceeds of certain goods claimed by the Official Assignee, paid by the Assignee into the Bank of Bengal. In a suit brought in the

(23) [1877] 3 Cal. 654 = 5 I. A. 31 = 3 Sar. 782 (P.C.).
(24) A. I. R. 1916 P.C. 46 = 36 I. C. 87 = 43 I. A. 294=38 All. 531 (P.C.).
(25) A. I. R. 1915 P. C. 116=28 I. C. 710=42 I. A. 91=42 Cal. 914 (P.C.).
(26) A. I. R 1922 Mad. 55=71 I. C. 257.
(27) A I. R 1925 Mad. 46=82 I. C. 536.
(28) A. I. R. 1927 Mad. 59=98 I. C. 802.

High Court at Calcutta, by *A* against the Official Assignee, claiming the proceeds of the goods paid into the insolvent Court, held, on the Court making a decree in favour of the plaintiff, that the High Court being a Court of law and equity had power to award interest on the amount as against the Official Assignee."

On the facts the learned Judges came to the conclusion that

"by the wrongful act of the defendant, the plaintiff has been deprived of the money which was actually making interest."

After observing thus, their Lordships proceed as follows :

"Their Lordships are of opinion that under these circumstances a Court of equity would clearly be entitled to give interest, and it is by no means clear that even in a Court of law, although the ordinary rule is that in actions for money had and received interest is not given, the fact of the defendant having received interest would not be a sufficient ground for making the defendant liable to pay interest, and as the High Court have the powers both of a Court of equity and a Court of law, their Lordships are of opinion that interest has been properly given."

These observations make it clear that their Lordships never intended by this decision to lay down a general rule that interest may be awarded in all cases on account of equitable considerations for they draw our attention to the special circumstance that :

'by the wrongful act of the defendant the plaintiff was deprived of money which was actually making interest,"

and they state also that in such circumstances a Court of equity certainly and even a Court of law departing from its usual rule would probably award interest. In this connexion it is important to note that in cases of this kind where officers of the Court withhold money they have wrongfully obtained in the course of legal proceedings interest was always made payable by the rules of equity. The case we are dealing with falls within the last class of cases mentioned in Halsbury, Vol. 21, p. 40 already referred to where interest is payable by the rules of equity. Courts of Equity having been accustomed to give relief in such cases their Lordships state taat Indian Courts being Courts of equity as well as Courts of law may properly award interest. When we propose to apply equitable considerations in deciding the question whether a party may be awarded interest we have to ask ourselves the question whether a Court of equity in such a case would usually award interest and unless a particular case falls within the well recognized class of cases in which interest is demandable in equity, the Indian Courts, in my view have no power to award interest in such a case on equitable grounds. If the case is one in which Courts of equity would ordinarily award interest then Courts of law in this country having the powers both of the Court of equity and of law can also award interest on equitable considerations. This seems to me to be the true scope of the decision in *Miller* v. *Barlow* (10) and understood in this light it is clear that decision cannot be relied upon in support of the view that the plaintiff is entitled to interest in this case on broad equitable grounds for it is not shown that the nature of the claim made by the plaintiff is one which will bring the suit within the purview of a Court of equity in which it will award interest. In a very recent case on appeal from the Supreme Court of New Brunswick : see *Maine Electric Power Co.* v. *A. M. Hart* (4) which will be referred to later on in connexion with the Interest Act also, their Lordships of the Privy Council had to consider whether any rule of equity entitles the plaintiff to interest and in considering that question they state the rule thus :

"In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as for example, the non-performance of a contract of which equity can give specific performance. It must, however, be borne in mind that when once such a contract has been executed then apart from cases where rescission on the ground of fraud is sought there remains nothing to attract the equitable jurisdiction and the parties left to their remedies at law."

Applying this principle to the case before them their Lordships held that where covenants between the parties when construed according to the ordinary rules of construction do not give the plaintiff interest he cannot claim interest unless it is given to him at common law or under statute and apart from the case where rescission of payment on the ground of fraud is sought, there is no place in the matter for the exercise of equitable jurisdiction and therefore no rule of equity in regard to interest can have any application. As the plaintiff to use the

language of their Lordships of the Privy Council

"has not established in this case the existence of a state of circumstances which attracts the equitable jurisdiction,"

I think he is not entitled to interest on equitable grounds.

I shall now briefly consider the other Privy Council cases referred to by Seshagiri Iyer, J., in *Abdul Gaffur Rowther* v. *Hamida Bivi Ammal* (14) in support of his decision, namely, *Hurro Persaud Roy* v. *Shama Persaud Roy* (23), *Hamira Bivi* v. *Zubai De Bibi* (24) and *Ahmad Musaji* v. *Hashim Ebrahim* (25). In *Hurro Persaud* v. *Shama Persaud Roy* (23) interest was allowed on mesne profits. This decision as explained by Wallis, C. J., in *Rajah of Pittapur* v. *Ballapragada Pallamaraju* (9) was based on the long settled practice of the Court and as the learned Judge remarked must be regarded as a case coming within the proviso to the Act save in cases in which interest is payable by law when the Act was passed. In *Hamira Bivi Ammal* v. *Zubai De Bibi* (24) which was a case of unpaid dower the Judicial Committee allowed interest as reasonable compensation to a Mahomedan widow on account of the special features of the case and their Lordships observed that her right to claim "interest" was consistent with the rules recognized under the English as well as under the Mahomedan law. It seems to me that this does not support the broad proposition that :

"interest may be charged on "debts" in all cases on general equitable considerations."

In *Ahmad Mussaji* v. *Hashim Ebrahim* (25) interest was awarded on the well-settled principle that

"in certain cases where on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of account and applies them in continuing the business for his own profit he may be ordered to account for these assets with interest thereon and this apart from fraud or misconduct in the nature of fraud."

As I understand these Privy Council cases they do not support the general proposition for which they are cited in *Abdul Guffur Rowther* v. *Hamida Bivi Ammal* (14). In support of this portion of the argument Mr. Sastri cited a new case, namely the decision in *Canadian Pacific Ry.* v. *Toronto Corporation* (29). In that case interest on the arrears of rent was allowed by the Privy Council ; but from the facts it will appear that the suit was one for "specific performance" and for the enforcement of a covenant in a lease. Having regard to its nature the suit fell within the special jurisdiction of the equity Courts and apparently it was on that account that interest was allowed. In this connexion I may also refer to the decision in *Johnson* v. *Rex* (30), cited by Mr. Sitarama Rao. In that case their Lordships of the Privy Council held that interest on two sums, which one Johnson, a Government contractor in Sierra Lieonne, admittedly received from the Army Paymaster in excess of what was due to him and which he retained in his own hands for over a year, was not payable by him to the Crown. In so holding they gave effect to the law as settled by the judgment of the House of Lords in the case of *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (3). In the course of the judgment their Lordships indicated the view that if the Crown had rested its case on fraud then interest would have been awarded as interest is recoverable both at law and in equity on money obtained by fraud and retained by fraud. If fraud had been alleged and proved, the case would have come specially within the jurisdiction of the equity Courts and would have fallen within the first class of cases mentioned in Halsbury, Vol. 21, p. 40. On this part of the case my view is that the Interest Act is exhaustive and that only such equitable grounds as were generally recognized in Courts of equity could be relied on in awarding interest on equitable grounds and that the case in *Abdul Guffur Rowther* v. *Hamida Bivi Ammal* (14), having regard to the principles which I have discussed here, has not been correctly decided. The remarks of Lord Blackburn as regards Lord Tenterden's Act in *Duncombe* v. *Brighton Club and Norfolk Hotel Co.* (1) that

"the statute ought to have said that wherever there is a debt at all it should bear interest, unless there is some strong reason to the contrary. But as the statute stands, this is not the case,"

may well be applied to the Indian enactments also. But however much we

(29) [1905] A. C. 33=74 L. J. P. C. 15=21 T. L. R. 44=91 L. T. 703.

(30) [1904] A. C. 817=73 L. J. P. C. 113=53 W. R. 207=20 T. L. R. 697=91 L. T. 234.

may deplore the present state of the law it seems to me that the decisions do not permit us to stretch the doctrine of "equitable grounds" to meet all the cases where we think interest should be awarded. In these circumstances, unless the plaintiff's claim to "interest" comes within the Interest Act or any other rule of law, it cannct be supported.

The next question for consideration is whether the plaintiff is entitled to claim interest under the Interest Act 32 of 1839. That Act provides that

"upon all debts, or sums certain payable at a certain time, the Court before which they may be recovered, may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debt or sums were payable, if such sum, debts or sums be payable by virtue of some written instrument at a certain time. ....."

To attract the provisions of this Act to a written contract, two conditions are necessary: (1) a certain sum must be payable ; and (2) this sum must be payable at a certain time, under the contract. It was pointed out in *Juggomohun Ghose* v. *Manikchund* (5) that

"the certainty required must exist at the time when the promise is made, and the Act does not affect debts contingent in amount and time becoming due."

On this reasoning, their Lordships held that a

"sum certain is not payable by a written instrument at a "time certain" if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when these events happen and that the time for the happening of these events, if they ever do happen, may be indefinitely postponed."

This decision was followed by their Lordships in a very recent decision : see *Maine Electric Power Co.* v. *Hart* (4) in deciding a case under S. 24 (1) of the New Brunswick Judicature Act of 1909 which in this respect is similar in terms to the Interest Act. The Indian enactment was framed in order to extend to India the provisions of Statute 3 and 4, William 4, Chap. 42, S. 28 and substantially adopts the language of it. That these terms are understood in the same way under the English enactment will appear from the decision in *London Chatham and Dover Ry. Co.* which discusses the earlier English decisions on the same point namely, *Merchant Shipping Co.* v. *Armitage* (2) and *Duncombe* v. *Brighton Club and Norfolk Hctel Co.* (1). In that case Lord Herschell expressed the view that where the time of payment is stated to be

"as soon after 1st June as possible and not later than 15th June, it is a little difficult to say that that is a 'time certain' even as regards 15th June."

The decision in *In re, Horner Fooks* v. *Horner* (6) does not lay down any different principle ; for the death of the testator within six months after which the sum was made payable in that case

"is not a contingent event, for death is a certainty which must happen to all and so many days after death is a time certain for the purpose of tne statute."

Having regard to these principles, can it be said that the amount sought to be recovered as rent in the present case is a certain sum recoverable at a certain time within the meaning of the Interest Act ? I think not. I have already referred to the main terms of the document at the commencement of this judgment. According to these terms, as pointed out by Phillips, J., in his judgment, the rent which the lessee has to pay varies with circumstances which are necessary to be proved, such as the extent of the land cultivated in any particular year and also the amount of assessment levied by the Government in that year. It is also noticeable that no definite period is fixed for the payment of rent. In these circumstances it cannot be said in this case that "a sum certain" is payable at "a certain time," within the meaning of the Interest Act. I must therefore hold that the plaintiff is not entitled to invoke the provisions of the Act in support of his claim to interest.

The last question is whether the plaintiff is entitled to interest under S. 73, Illus. (n), Contract Act. This question of law arose for decision in *Kamalammal* v. *Peeru Meera Levvai Rowther* (12). In that case the plaintiff sued to recover some money due to her on an oral contract together with interest. No agreement or usage having a right to interest was alleged and no written demand or notice had been given under the Interest Act. It was held that the plaintiff was not entitled to interest. It was argued in that case that the plaintiff could claim interest under S. 73, Contract Act coupled with Illus. (n). The learned Judges held that to construe the section as giving a right to interest

in those cases in which it cannot be awarded according to the provisions of Act 32 of 1839 would be to hold that the latter enactment was virtually repealed by the former. Their Lordships were not prepared to hold that it was so repealed. They also pointed out that there was no real conflict between S. 73, Contract Act, and Act 32 of 1839 since effect may well be given to S. 73 by holding that the award of interest as compensation contemplated by that section has reference to cases in which such award can be made without infringing the provisions of the other Act. In other words, Illus. (n), S. 73, merely states that if a contract to pay a sum of money on a specified day is broken, nothing except interest up to the date of payment can be claimed as damages provided such interest can be claimed under the Interest Act or any other rule of law. After referring to the "common law rule" regarding interest on debts Pollock and Mulla make the following observations regarding the scope of Illus. (n), S. 73:

"There does not seem to be any sufficient ground for reading into Illus. (n) to the present section an intention to abolish this rule and supersede the Act of 1839. Indeed, the illustration does not say that the defendant is necessarily liable to pay interest, but only assumes that he may be so under the Act of 1839, or otherwise, and says that he is not in any event liable for more: see p. 414, Pollock and Mulla, 5th Edn."

The decision in *Kamalammal* v. *Peeru Meera Levvai Rowther* (12) has been dissented from in Calcutta: see *Surja Narain Mukhopadya* v. *Pratap Narain Mukhopadya* (7), Per Banerjee, J., and *Khetra Mohan Poddar* v. *Aswani Kumar Sahe* (31). The view of the Calcutta High Court, says Sir Frederick Pollock, goes indeed beyond the English common law. The view of the Bombay High Court in *Saundanappa* v. *Shivabasawa* (32), is also opposed to the decision in *Kamalammal* v. *Peeru Meera Levvai Rowther* (12). In that case it was held that:

"Neither the Interest Act nor the Contract Act affects the rule of Hindu law, that in the case of a debt wrongfully withheld after demand of payment has been made interest becomes payable from the date of demand by way of damages. That law was in force when the Interest Act was passed, and under the proviso to the section of the Act it has continued to be in force. The Indian Contract Act has not interfered with that law. On the other hand, that law is consistent with the provisions of that Act."

This view of the Bombay High Court which is somewhat novel was not pressed before us by the respondent's learned advocate. In *Ghan Shyam Singh* v. *Daulat Singh* (33), which was a suit by the landlord for arrears of rent together with interest, it was held that though the lessee was not entitled to "interest" under the N. W. P. Act, he was entitled to claim it under S. 73, Contract Act; but the learned Judges do not discuss the scope of the Illus. (n) on which the judgment is based; nor do they refer to the Interest Act. The observations of the learned Judges in *Jwala Prasad* v. *Hotilal* (34), do not throw any clear light on this question. Two decisions of the Privy Council namely *Mehudi Ali Khan* v. *Yasin Khan* (35) and *Ganesh Bakhsh* v. *Harihara Bakhsh* (36), were referred to in this connexion to show that in one of the cases, namely, *Mehudi Ali Khan* v. *Yasin Khan* (35), their Lordships indicated, though very faintly, that their inclination is in favour of the view that interest cannot be awarded under S. 73, Contract Act and that in the other, namely *Ganesh Bakhsh* v. *Harihar Bakhsh* (36), their Lordships indicated, though inferentially, that their view is in favour of the contention that interest can be so awarded. But the judgments do not bear those interpretations; on the other hand they show that the question was not considered by their Lordships. In this state of authorities I must hold following the decision in *Kamalammal* v. *Peeru Meera Levvai Rowther* (12), which has not been departed from in this Court in any of its subsequent decisions, that the plaintiff is not entitled to claim interest under S. 73, Contract Act, read with Illus. (n).

For the above reasons, the decision of Phillips, J., under Appeal in Letters Patent Appeals Nos. 256 to 258 should be reversed and the plaintiffs' suit so far as it relates to interest should be dismissed with costs.

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(31) [1918] 45 I. C. 667.
(32) [1907] 31 Bom. 354=9 Bom. L. R. 439.
(33) [1896] 18 All. 240.
(34) A. I. R. 1924 All. 711=79 I. C. 1049=46 All. 625.
(35) [1899] 26 Cal. 523=26 I. A. 41 (P.C.).
(36) [1904] 26 All. 299=31 I. A. 116=8 Sar. 628 (P.C.).

L. P. Appeal No. 225 of 1925.

The lease deed in this appeal contains the following additional term:

"If I allow the said janmavakasa pattom (rent) to fall into arrears without paying the same at proper time, there is no hindrance by this saswatha pattom for your duly recovering the same janmavakasa .pattom out these properties or out of my other properties.

By this term, the leased properties and the other properties of the lessee are charged with the payment of rent due under the lease. Having regard to this fact, following the decision in *In re, Savile* v. *Drax* (13), I must hold that the landlord is entitled to claim interest on the arrears of the rent in this case. In *In re, Savile* v. *Drax* (13) the principle to be applied is thus stated by Collins, M. R. at p. 793:

"It seems to me to be well established on the authorities, and the result of those authorities does not indeed appear to de disputed that a Court of equity has power to give interest, and in point of fact does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge. Indeed, we may go back to the principle laid down in many cases showing that, in point of fact, the Court of equity does charge interest."

Romer and Cozens Hardy, L. J., also express the same view. This principle is not disputed by Mr. Sitaram Rao. This Letters Patent Appeal is dismissed with costs.

P.R.S./S.N. *Order accordingly.*

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* A. I. R. 1930 Madras 738

CURGENVEN, J.

Lokanadha Naiko and *others* — Plaintiffs—Appellants.

v.

Lokhono Naiko and *others* — Defendants—Respondents.

Second Appeal No. 968 of 1926, Decided on 18th November 1929, from decree of Sub-Judge, Berhampore, in Appeal Suit No. 160 of 1925.

*** (a) Limitation Act, S. 20 — Some descendants of deceased mortgagor making payment of interest will bind other descendants though divided from family prior to payment—They are not saved by Limitation Act, S. 21 (2).**

Payment of interest made by some of the descendants of a deceased mortgagor binds also the other descendants even though these latter were divided from the family before the payment was made. S. 21 (2) cannot save them because the categories mentioned in that section are not merely illustrative, and it does not cover cases relating to co-heirs and other persons who derive their liability not from direct contract with the promisee: 40 *Mad.* 698; *A. I. R.* 1921 *Mad.* 102; *A. I. R.* 1929 *Mad.* 419 and 17 *I. C.* 619, *Rel. on.*: 14 *I. C.* 128, *not Foll.* [P 739 C 2, P 740 C 1]

(b) Limitation Act, S. 21 (2)—Scope.

The party who pleads S. 21 (2) has to show that he can claim exemption under its terms. [P 740 C 1]

B. Jagannadha Das—for Appellants.

C. Sambasiva Rao—for Respondents.

Judgment.—The suit out of which this second appeal arises was filed to enforce a mortgage bond executed on 4th June 1894 by two brothers Durlobo Naiko and Ratno Naiko. The defendants are various descendants of these two mortgagors. Defendant 15 is a purchaser from defendants 13 and 14. These last three persons alone deny liability for the debt and the only question I have to consider is whether, so far as they are concerned, it is time barred. On 19th May 1913, there was a payment of interest made by two members of the family, Sombari Naiko and Ramo Naiko, and it is argued that this payment would save limitation against those persons who were still bound by the mortgage. The contention of defendant 13, however, who is a brother of Ramo Naiko is that he was divided from the family at the time when this payment was made. The point has been taken that this plea was not the plea set up during the trial of the suit and it is true that it was not expressly alleged in the written statement, although para. 5 of that pleading states that even if any of the endorsements are true the signatories thereto have no power to make payment so as to bind defendants 13 and 14. This formed the foundation of issue 3, namely:

"whether the payments relied on by the plaintiffs are true, valid and binding on defendants 13 and 14."

Inasmuch as both the lower Courts have tried the question of separate status I do not think there is much substance in this objection.

It is then said that the learned Subordinate Judge in reversing the judgment of the District Munsif on this point has misappreciated the evidence. He seems to have relied almost exclusively upon what he terms the admission of the plaintiffs' witness 1 that Ramo Naiko and defendant 13 were divided at the date of the payment. This so-called admission is to be found

towards the close of the cross-examination, where it is stated categorically that :

" Ramo Naiko, Sombari Naiko, and defendant 13 had been divided by that time "

and from the context in which that sentence occurs it is quite reasonable I think to infer that the witness meant that division had taken place between Ramo Naiko and defendant 13. It is to be observed that there was no re-examination upon this point and I cannot accordingly say that the finding of the lower appellate Court proceeded upon lack or misconstruction of evidence.

The learned Subordinate Judge has inferred from the fact of division that the debt, so far as defendant 13 and those who claimed through him are concerned, became time barred, because the payment of interest referred to could not have bound them. In so finding, however, he has not considered the terms of S. 20, Lim. Act, which is relied upon before me as saving limitation even against these persons. The section states that:

" Where interest on a debt or legacy is before the expiration of the prescribed period paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed."

In several cases arising in this Court and others this language has been construed to mean that subject to the provisions of S. 21 (2) of the Act, such a payment saves limitation as against all persons liable to pay the debt. In *Venkatakrishniah* v. *Subbarayudu* (1), the distinction in this respect between Ss. 19 and 20 is pointed out, namely that:

" Section 19 only operates against the person making the acknowledgment while S. 20 makes the part payment good in favour of any suit on that liability."

The case in *Askaram Sowkar* v. *Venkatasami Naidu* (2) relates to the question whether a payment made by a purchaser of the equity of redemption bound the original mortgagors. The learned Judges, adverting to the similarity of the law in England to that in India, refer to the observations of Lord Westbury in *Chinnery* v. *Evans* (3), where the principles underlying the extension of liability to a person other than the one making the payment have been explained. Several other cases relating to the construction to be placed upon S. 20 have been cited but I deem it unnecessary to refer to them because it has not been strenuously argued that S. 20 by itself will not apply so much as that S. 21 (2) will take the case out of the prior section. As authority for this view, which depends upon giving a wide extension to the precise terms of S. 21 (2) referring as it does only to joint contractors, partners, executors, or mortgagees, I am referred to the judgment of a single Judge of the Calcutta High Court *Arjun Ram Paul* v. *Rohima Banu* (4). The question there was whether a payment made by one heir would bind another. The learned Judge decided upon what he described as the analogy of S. 21 (2), Lim. Act, that it would not do so.

A different view has, however, been taken in this Court. In a recent case *Narasimha Rama Ayyar* v. *Ibrahim* (5), Thiruvenkatachariar, J., had to deal with a debt upon a promissory note in respect of which interest was paid by one of several coheirs. The question was whether it bound the other coheirs and there as here the contention was raised that S. 21, Lim. Act, should be read as covering the case. His view was, however, that the extension of the subsection by analogy to coheirs was not warranted and he accordingly dissented from the Calcutta decision which I have just cited. It is to be noted that that case resembles the present one except with regard to the nature of the debt. Another case on the same point is *Velayudam Pillai* v. *Vaithyalingam Pillai* (6), where the executant of a promissory note made a payment after transferring the whole of his property to his universal donee. There are certain observations on p. 67 with reference to the principles underlying S. 20 of the Act. The learned Judges then go on to consider the applicability of S. 21 holding that a case of that description does not come within it. Such authority as there is therefore in this High Court is against the view pressed upon me that the categories named in S. 21 (2) are merely illus-

(1) [1917] 40 Mad. 693=36 I. C. 240.
(2) A. I. R. 1921 Mad. 102=62 I. C. 393=44 Mad. 544.
(3) [1864] 11 H. L. 115=13 W. R. 20=4 N.R. 520=10 Jur. (n.s.) 855=11 L. T. 68.
(4) [1912] 14 I C. 128.
(5) A. I. R. 1929 Mad. 419=118 I.C. 302.
(6) [1912] 17 I. C. 619.

trative and that cases relating to co-heirs and other persons who derive their liability not from direct contract with the promisee may be brought within its scope. It must I think be laid upon the party who pleads the section to show that he can claim exemption under its terms. My conclusion is that the payment of interest is valid under S. 20 of the Act to keep alive the liability of defendants 13 to 15. I accordingly allow this second appeal, set aside the decree of the lower appellate Court and restore that of the District Munsif with costs to the plaintiff throughout.

P.R.S./S.N. *Decree set aside.*

A. I. R. 1930 Madras 740

ANANTAKRISHNA AYYAR, J.

(*Chanda*) *Pullamma Garu* — Defendant—Appellant.

v.

(*Jasti*) *Satyanarayana* and *others* — Plaintiffs—Respondents.

Second Appeal No. 719 of 1926, Decided on 28th October 1929, against decree of Addl. Sub-Judge, Masulipatam, in A. S. No. 24 of 1924.

(a) Minor—Decree against—Executant of document, executed on behalf of himself and minor, respresenting minor in subsequent suit—Decree passed on basis of such document is not necessarily invalid and not binding on minor — Question of its validity and binding nature depends on pleas taken in any case.

The mere circumstance that the executant of a document which was purported to be executed both by himself personally and on behalf of certain minors, also represented the minors in a subsequent suit, could not be taken by itself to make any decree passed on the basis of the document invalid and not binding upon the minors. The question of validity and binding nature of such decree should be considered having regard to the particular pleas taken in any case: *A. I. R.* 1929 *Mad.* 213, *Foll.*

[P 741 C 1]

(b) Decree — Form of — Judgment in subsequent suit; setting aside decree in previous suit so far as interest of plaintiff in subsequent suit was concerned—Proper form of decree is merely to declare that decree in previous suit is not binding on plaintiff.

Where in a subsequent suit the judgment purports to set aside the decree in a previous suit so far as the interest of the plaintiff is concerned the proper form of the decree is merely to declare that the decree in the previous suit is set aside as not binding on the plaintiff. It is not further necessary to state that the prior suit would be reopened and gone into on the merits : 2 *Cal.* 184 (*P. C.*); 35 *All.* 487 (*P. C.*); 28 *All.* 585(*P. C.*) and 36 *Mad.* 295 (*P. C.*), *Rel. on.*; [P 741 C 1, 2]

B. Satyanarayana—for Appellant.

A. Lakshmayya—for Respondents.

Judgment.—Defendants 3 and 4 and the plaintiff were brothers. Defendant 3 for himself and as guardian of his younger brothers (defendant 4 and plaintiff) both of them then minors, executed a hypothecation bond in favour of defendants 1 and 2 on 14th December 1922 for Rs. 700. A suit was instituted by defendant 2 (O. S. No. 511 of 1918) making the present defendants 3 and 4 party defendants to recover money due on the mortgage. Defendant 3 would seem to have become a major at the time of that suit. The present plaintiff being a minor at that time, in fact he is a minor even now was represented by his elder brother, defendant 3, as guardian ad litem. None of the defendants appeared, and the result was that a decree was passed in favour of the mortgagee (plaintiff). Execution proceedings were started and the properties were sold and purchased by the decree-holder himself. The present suit, O. S. No. 226 of 1922 on the file of the Court of the District Munsif of Gudivada, was instituted by the plaintiff, even now a minor, making his two brothers as defendants 3 and 4. Defendants 1 and 2 represent the mortgagee. The case of the plaintiff was that the mortgage, the subject-matter of O. S. No. 511 of 1918, was not executed for necessity by his eldest brother, that the registration of the document was invalid in law because it was registered by a Sub-Registrar within whose jurisdiction no portion of the property intended to be given as security was situated, that defendant 3 the executant of the mortgage, was not in law competent to represent the minor (himself), and that in fact the guardian was also guilty of gross negligence in the conduct of the prior suit. Both the lower Courts have found in favour of the plaintiff substantially as regards all the contentions put forward by him. Defendant 2's legal representative has preferred this second appeal.

The learned advocate for the appellant contended that the guardian is not bound to put forward technical pleas such as that the document was registered by a Sub-Registrar in whose jurisdiction the property intended to be

given as security was not situated. He also contended that the lower Courts had approached the case from an erroneous standpoint. He urged that defendant 3, the elder brother of the present plaintiff, who was admittedly a major at the time of the prior suit, was ex-parte, and that if the plaintiff's present contentions were considered to be good, surely defendant 3 would have himself put forward such contentions. He finally urged that in any event it should be made clear that it is only with reference to the plaintiff's interest that the mortgage decree and the subsequent sale would not be binding and that the interests of defendants 3 and 4 would not in any way be affected by the result of the present suit.

I do not propose to say anything on the question of fraud on the registration law. Both the lower Courts have concurrently found that the guardian was grossly negligent in the conduct of the defence in the prior suit. They have also found that there was no necessity for borrowing Rs. 700 mentioned in the mortgage-deed. Cogent reasons have been given by both the Courts in respect of their findings. I think they had ample materials on which they could have arrived at such findings. If these findings are upheld in second appeal, it follows that the decree passed in favour of the plaintiff is clearly right. The result of the recent Full Bench decision in *Venkata Someswara Rao* v. *Lakshmanaswami* (1) is that the mere circumstance that the executant of a document which was purported to be executed both by himself personally and on behalf of certain minors, also represented the minors in a subsequent suit, could not be taken by itself to make any decree passed on the basis of the document invalid and not binding upon the minors. The Full Bench held that the question of validity and binding nature of such decree should be considered having regard to the particular pleas taken in any case. Having regard to the findings mentioned by me, the plaintiff was properly given a decree by both the lower Courts.

The learned advocate for the appellant drew my attention to the fact that the learned Subordinate Judge expunged from the decree passed by the first Court some words on the ground that they were really unnecessary. The first Court's decree is printed at p. 7 and 8 of the pleadings book. After declaring that:

> 'the decree in O. S. No. 511 of 1918 on the file of the Court and also the Court sale held in execution thereof are set aside as not valid and binding on plaintiff in any way whatsoever."

the decree proceeds to state that the prior suit, O. S. No. 511 of 1918, will be reopened and gone into on the merits allowing the present plaintiff to contest it by some guardian other than defendants 3 and 4. The learned Subordinate Judge on appeal thought that these words need not be inserted in such a decree and that the declaration granted in the first portion of the trial Court's decree would be sufficient, as the Court before whom any further application would be made in respect of O. S. No. 511 of 1918 would naturally respect the declaration in the decree. I think that the view of the learned Subordinate Judge on that point is correct.

The form of the decree that should be passed in such a case has been discussed in some of the Privy Council cases, as also what the effect of such decree in the subsequent suit would be with reference to a prior decree regarding which relief was granted by the decree in the subsequent suit. The Privy Council cases in *Khajoorunnissa* v. *Rowshan Jahan* (2), at p. 186, *Partab Singh* v. *Bhaputi Singh* (3), at p. 494, *Manohar Lal* v. *Jadunatha Singh* (4), at p. 539, and *Ganesha Row* v. *Tuljaram Row* (5), at pp. 300 and 304) support the view taken by the Subordinate Judge.

In *Manohar Lal* v. *Jadunath Singh* (4), it was pointed out by their Lordships that setting aside a prior decree "in its entirety" was not justified when the relief that the plaintiff in the second suit would be entitled to would be only with reference to his own rights and not the rights of anybody else. It has also been pointed out in the other cases that a declaration would ordinarily be the proper form of relief to be gran-

(1) A. I. R. 1929 Mad. 213=115 I. C. 801=52 Mad. 275 (F.B.).

(2) [1876] 2 Cal. 184=3 I.A. 291=26 W. R. 36 =3 Sar. 629 (P.C.).

(3) [1913] 35 All. 487=16 I. C. 247=21 I. C. 288=40 I.A. 182 (P.C.).

(4) [1906] 28 All. 535=33 I.A. 128=3 A. L. J. 710 (P.C.).

(5) [1913] 36 Mad. 295=19 I. C. 515=40 I. A. 132 (P.C.).

ted in such a suit. No doubt, the effect of setting aside the decree in the words of their Lordships' judgment in the case reported in *Khajoorunnissa* v. *Rowshan Jahan* (2), at p. 196, would be "to remit both parties to their original rights." That was what was stated in *Ganesha Row* v. *Tuljaram Row* (5), at p. 304, also. It therefore seems to me that the form of the decree passed by the learned Subordinate Judge is not open to any objection.

The learned advocate for the appellant requested me to make it clear that it was only with reference to the plaintiff's interest that he has now been given relief in the present suit. The learned advocate for the respondent does not dispute that position. As I read the first Court's decree, I think there could not possibly be any doubt that that was what was contemplated, and in fact the decree specifically says that the decree in the prior suit and the sale in execution thereof are set aside as not valid and binding on "plaintiffs." That being so, I do not think it necessary to add anything to the decree passed by the lower appellate Court. For the above reasons, the decision of the learned Subordinate Judge is right and this second appeal is dismissed with costs.

P.R.S./S.N. *Appeal dismissed.*

A. I. R. 1930 Madras 742

CURGENVEN, J.

Subbarayulu Naidu and *others* — Defendants—Appellants.

v.

Vengama Naidu — Plaintiff—Respondent.

Second Appeal No. 985 of 1926, Decided on 21st November 1929, from decree of Judge of Small Causes, Trichinopoly, in Appeal No. 62 of 1925.

(a) Evidence Act, S. 66 — Plaintiff suing on pro-note transferred to him under settlement deed—Note not produced but alleged to be in possession of widow of transferrer —Widow on that account joined as defendant but not given notice under S. 66 — Settlement deed cannot be admitted as secondary evidence of pro-note.

The plaintiff sued on a promissory note transferred to him under a settlement deed. The note, however, was not produced but was alleged to be in the possession of the widow of the person making the settlement deed. The widow was on that account joined as defendant but no notice to her was given as required by S. 66.

Held : that it could not be said that notice to the widow would have been ineffectual and so failure to give it was a fatal objection to the admissibility of the settlement deed as secondary evidence of the promissory note.

[P 743 C 2]

(b) Evidence Act, S. 32 (7) — Settlement deed under which pro-note is transferred, if admissible as secondary evidence, may be employed to prove pro-note under S. 32 (7) read with Evidence Act, S. 13 (a) — *(Obiter)*.

A settlement deed under which a promissory note is transferred to the plaintiff, if admissible as secondary evidence, may be employed to prove the promissory note under S. 32 (7) read with S. 13 (a), since the settlement deed constitutes a transaction by which a right was asserted : *(Obiter)* 26 *I. C.* 747, *Rel on.*

[P 743 C 2]

(c) Evidence Act, Ss. 101 and 102—Burden of proving when cause of action arose (e. g., date of pro-note on which suit is based) is on plaintiff—Civil P. C. O. 7, R. 1—*(Obiter)*.

The plaintiff has to state when his cause of action arose (e. g., the date of the execution of a promissory note on which a suit is based) and it lies upon him to substantiate that statement. To cast the burden on the defendants would run counter to the provisions of Ss. 101 and 102, Evidence Act:5 *Cal.* 36; 9 *Cal.* 744 and *A. I. R.* 1926 *P. C.* 9, *Rel. on.*; 7 *All.* 677, *Dist.*

[P 744 C 1]

M. S. Vaidyanatha Iyer, *M. Krishna Bharathi* and *B. Venkataraman* — for Appellants.

K. V. Sesha Iyengar—for Respondent.

Judgment.—This second appeal is preferred by defendants 1 and 2 against the decree of the Court of the Small Causes of Trichinopoly reversing the decree of the Additional District Munsif of Kulitalai dismissing the plaintiff's suit upon a promissory note. The plaint alleged that the defendants jointly executed a promissory note, for Rs. 500 in June 1919 to Virasami Naidu, the divided brother of the plaintiff. Virasami Naidu died in October 1919 and about a month before his death executed a settlement deed, Ex. A, making his brother the plaintiff manager for the purpose of applying certain properties to charitable objects. One of the items of property named in the deed was the suit promissory note. This note was not produced in the case, the allegation in Ex. A, being that it was with Viraswami Naidu's wives, with whom he had quarrelled. A question for decision in second appeal is whether the entry relating to this promissory note in Ex. A, is evidence of its existence upon

which a decree against the defendants can be passed. Defendant 1 who contested the suit denied having executed any such note. His brother defendant 2 was ex parte. The learned Subordinate Judge in reversing the District Munsif's judgment has held in brief that Ex. A is evidence against both the defendants, that they are in collusion with Viraswami Naidu's widows and that, therefore, they could produce the note if they so pleased. He further considers that the onus of showing that the debt is time barred lies on the defendants.

It is virtually conceded that it is impossible to support the decree so far as it affects defendant 2. The settlement deed names defendant 1 only as an executant of the note. The plaint avers that both the defendants executed it but there is no evidence whatever to show that defendant 2 joined in doing so. The learned Subordinate Judge considers that it is immaterial whether it was executed by defendant 1 alone or by both the defendants, apparently on the ground that defendant 1's action bound his brother. There is no proof of any circumstances which would substantiate this view and since the claim proceeds on the footing that defendant 2 was an executant it must be found that there is no evidence to establish it.

Turning to the case against defendant 1, the first question which arises relates to the admissibility of Ex. A as secondary evidence of the existence of the promissory note. There is some doubt whether Ex. A is even secondary evidence as defined in S. 63, Evidence Act. But assuming it to be so, it was incumbent on the plaintiff before making use of it to satisfy the requirements of Ss. 65 and 66 of that Act. His case as disclosed by the notice Ex. 1 which he sent to defendant 1 and by his plaint was that the note was in the custody of the widows. Indeed upon this ground he impleaded them as defendants 3 and 4. The learned Subordinate Judge, as I have said, inferred collusion between the widows and defendants 1 and 2. But though there may be something to be said for this view there is no evidence whatever that these defendants were at the time of suit in possession of the note and it must be taken I think on the allegations made that the plaintiff had committed himself to the position that the widows possessed it. Under S. 66 secondary evidence may not be given unless the party proposing to give it has previously given to the party in whose possession or power the document is, such notice to produce it as is prescribed by law or as the Court considers reasonable. If it could be held upon the pleadings that the alleged executants of the note had it in their possession, under the proviso to that section the Court might well have dispensed with notice since the only contesting defendant had denied its execution. In the case of the widows, however, I can see no sufficient ground for presuming that the notice would be ineffectual. The omission to give notice to the persons said to possess the note appears to me to be a fatal objection to the admission of Ex. A, as proof of the promissory note and upon that ground alone, therefore, the suit must I think fail. It has been suggested that the inadmissibility of Ex. A was not upon that ground challenged before the lower Courts. But that the question of its admissibility was in general dispute is, I think clear from passages in para. 8 of the District Munsif's judgment and from the general line of argument adopted by the Subordinate Judge.

Since I hold that the suit must fail for lack of legal evidence of the claim it is scarcely necessary to discuss the other points raised. Granting that Ex.A, can be used as secondary evidence I think it may be employed to prove the promissory note under S. 32 (7), Evidence Act, read with S. 13 (a), since the settlement deed constitutes a transaction by which a right was asserted. I may refer to the judgment of Ayling, J., in *Venkatarajagopala Raju* v. *Fota Narasayya* (1), for an illustration of the significance of the word "by" occurring in S. 13 (a).

There remains the question of limitation. The plaint refers the execution of the promissory note to June 1919. Evidence was produced in the suit the effect of which was to show that it was executed in March to May, but this evidence was disallowed by both the Courts. There is accordingly no evidence whatever on the record as to when the alleged promissory note was

(1) [1914] 26 I. C. 747.

executed. In these circumstances the learned Subordinate Judge has laid the onus upon the defendants to show that the note is barred. I doubt very much whether this is a correct view of the law. Under O. 7, R. 1 (e), Civil P. C., the plaintiff has to state when his cause of action arose and I incline to the view that it lies upon him to substantiate that statement, a view which appears to me supported by *Mahomed Ibrahim* v. *Morrison* (2); *Mahomed Ali Khan* v. *Khaja Abdool Gunny* (3) and the Privy Council judgment in *Lalchand Marwari* v. *Mahantu Ramrup Gir* (4). To cast the burden on the defendants would seem to run counter to the provisions of Ss. 101 and 102, Evidence Act. The case in *Radha Prasad Singh* v. *Bhajan Rai* (5), would appear to be authority to the contrary but it relates only to a case where a defendant, admitting the debt, pleads that it is barred. In such circumstances it may well be that he has to prove his plea. Where, however, there is no such admission, I think the plaintiff must prove everything that is required to entitle him to a decree. I find that the plaintiff has failed to substantiate his claim against both the defendants and accordingly I allow the second appeal, set aside the decree of the lower appellate Court and restore that of the District Munsif with costs to the appellants throughout.

P.R.S./S.N. *Decree set aside.*

(2) [1880] 5 Cal. 36.
(3) [1883] 9 Cal. 744=12 C.L.R. 257 (F.B.).
(4) A. I. R. 1926 P. C. 9=93 I. C. 280=53 I. A. 24=5 Pat. 312 (P.C.).
(5) [1885] 7 All. 677=(1885) A. W. N. 202.

A. I. R. 1930 Madras 744

CURGENVEN, J.

(*Swarna*) *Kotayya*—Plaintiff—Appellant.

v.

Karancheti Vardhamma and *others*—Defendants—Respondents.

Second Appeal No. 1214 of 1926, Decided on 28th November 1929, against decree of Sub-Judge, Bapatla, in A. S. No. 202 of 1924.

(a) Will—Construction—Document executed on plain paper and styled as maranasasanam—Transferring properties to daughter—Whole of estate transferred—Revocation power not reserved—Document registered as will—It was will and not gift.

A document was executed on plain paper, and was styled as "maranasasanam." It stated that the executant's properties have been transferred to his eldest daughter. Further the whole estate was transferred under the document but no power of revocation was reserved. Further the document was registered as will.

Held: that the document was will and not gift: 33 *Mad.* 304, *Foll.*

(b) Evidence Act, S. 90 — Presumption applies even to fact that testator was in sound disposing state of mind.

The presumption arising under S. 90 applies even to the fact that the testator was in a sound disposing state of mind, for the phrase "duly executed" if effect is to be given to the word "duly" means execution by a person legally competent to execute the document: 3 *Cal.* 557 and *A.I.R.* 1924 *Cal.* 82, *not Appl.*; *A.I.R.* 1925 *All.* 1, *Rel. on*: *A. S. Nos.* 82 and 295 *of* 1924, *Foll.*

(c) Hindu Law — Will — Construction — Person bequeathing all his properties to his daughter — Will stating that properties "have been transferred" to daughter — Words "have been transferred" unattended by any qualification were sufficient to confer absolute estate to daughter.

Under a bequest or gift a woman gets the estate which Hindu law confers upon her unless there are words to restrict or amplify it. Where, therefore, under Hindu law a bequest to a woman would convey the whole estate (i.e., bequests in favour of women other than wife, such as daughter), it is permissible to construe the will free from any presumptions created by her sex. If the words used would invest a male legatee with absolute estate, so would they invest a female legatee as well.

A person made a will in favour of his daughter which stated that all the testator's properties "have been transferred" to his eldest daughter.

Held: that the words "have been transferred" unattended by any qualification were sufficient to confer absolute estate on the daughter: *A.I.R.* 1925 *Mad.* 254 and *A.I.R.* 1924 *Mad.* 855, *Rel. on*; 2 *M.I.A.* 7; 42 *Cal.* 561 and *other cases Considered.*

P. Satyanarayana Rao—for Appellant.

Ch. Raghava Rao and *K. Kameshwara Rao*—for Respondents.

Judgment. — This second appeal arises out of a suit by a reversioner for a declaration that certain alienations made by defendant 1, daughter of the last male holder, in favour of her daughter's son are not binding on the plaintiff, now appellant, beyond her lifetime. The plaint alleged that the last male holder, Mahadevudu, who was the elder brother of the plaintiff's father, died intestate. In her written statement

defendant 1 set up a will said to have been executed by Mahadevudu in her favour in 1877 and the case turns upon the validity and effect of this instrument. It is in the first place disputed that it is a will and not a gift deed. Both the lower Courts have found that it is a will and have applied the presumption permissible under S. 90, Evidence Act, relying on that provision to find not only that it is genuine, a finding not now disputed, but also that it was executed by Mahadevudu when in a sound disposing state of mind. Whether S. 90 can be used to support a presumption of this latter character is the next question, and the final matter in controversy is defendant 1's claim that under the will she took an absolute estate.

The document, the nature of which is thus disputed and of which Ex. I is a copy, was executed on plain paper, a course correct for a will, incorrect for a transfer inter vivos. It is styled a maranasasanam, a word which is usually translated as "will" but which perhaps more unmistakably than that term connects the execution of the document with the executant's death. Unlike a gift deed it addresses no transferee in the second person. It states that the executant's properties "have been" transferred to his eldest daughter and proceeds to lay down what she shall do, these instructions appearing to relate to the time when he is gone and she has taken his place. Stress has been laid by the appellant upon the use of the past tense "have been transferred." I do not think that this is necessarily incompatible with the view that the document is to take effect as from the moment of the executant's death. When an English testator writes "I give and bequeath" he does not mean that the words are to operate upon the property at the time of execution of the will. Next there is the very significant circumstance that the whole estate is transferred, a course not likely to be adopted in the case of a gift, especially a gift to a woman. It is true that no power of revocation is reserved, but it has never been held that the mere absence of an express provision of this nature disproves the testamentary character of a document. In *Rajammal* v. *Authiammal* (1), it was found upon an examination of the terms of the deed that it was not revocable in character. Finally there is the circumstance that the document was registered as a will. I do not attach weight to the fact because it shows what the Registrar's opinion was; but it does show what course was adopted by those who must have been conversant with Mahadevudu's intentions. It appears to me that those intentions are clear enough from the several indications which I have enumerated, and I have no hesitation in holding that the document is a will.

The point next raised is that, granting the document to be a will, and that the lower Courts were justified in presuming execution and attestation under S. 90, Evidence Act, yet that section does not authorize any presumption in favour of the disposing power of the testator. There is upon this point singularly little authority. I do not find any useful analogy furnished by cases such as *Ubilack Rai* v. *Dallilal* (2), *Ramani Kanta Roy* v. *Bhimanandan Singh* (3) and the English case in *In re Airey Airey* v. *Stapleton* (4) which decide that where a person signs as agent for another the fact of agency cannot be presumed because it is a fact quite outside and apart from the act of execution. Rather closer comes the decision of an Allahabad High Court (Full Bench) in *Haji Sheikh* v. *Sukharam Singh* (5), that when the signature of the executant purports to have been made by the pen of the scribe it may be presumed under S. 90 that the latter was duly authorized to sign for him. Walsh, Ag. C. J. distinguishes the agency cases referred to above, and with reference to the phrase "duly executed" occurring in the section, says:

> "In our view the expression "duly executed" must include all the facts which would be necessary in order to establish due execution before a Court by positive evidence, if the obligation of producing positive evidence were not dispensed with by the presumption."

The question really turns upon the construction to be placed upon "duly

(1) [1910] 33 Mad. 304=7 I.C. 357.

(2) [1877] 3 Cal. 557.

(3) A. I. R. 1924 Cal. 82=85 I. C. 221=50 Cal. 526.

(4) [1897] 1 Ch. 164=66 L. J. Ch. 152=45 W. R. 236=76 L. T. 151.

(5) A. I. R. 1925 All. 1=83 I. C. 5=47 All. 31 (F.B.).

executed." The term "executed" by itself, may mean no more than, as the definition stands in the New English Dictionary, "to go through the formalities necessary to the validity of a legal act, e. g., a bequest, agreement, mortgage, etc." But, unless the word "duly" is purely otiose, the phrase must embrace more than that. That was the opinion expressed by Phillips and Odgers, JJ., in an unreported case, *A. S. Nos.* 82 and 295 *of* 1924, Phillips, J. observing :

" It is argued that this presumption does not apply to the fact that the testator was in a sound disposing state of mind, but in my opinion this contention cannot be upheld for it does not give effect to the word "duly." A will cannot be said to be "duly" executed by an insane person or an imbecile, and therefore by the word "duly" I think must be meant the execution by a person legally competent to execute the document."

This I think agrees with the statement of the law in Taylor (Vol. 1, S. 87) that ancient wills and deeds are said to prove themselves, their bare production from natural custody being sufficient. To hold otherwise would be to render the presumption unavailing in the case of most old wills, because the witnesses to execution, who are ex hypothesi beyond the reach of the Court, would also be the witnesses to the sound disposing state of the testator. I concur, therefore, in the view of the Courts below upon this point.

Taking the will to be validly proved, the question remains of the nature of the estate defendant 1 took under it. There is a considerable number of decisions upon the effect of gifts and devises of immovable property to females ; many of them will be found summarized in the Privy Council judgment in *Mt. Sasiman Chaudhurain* v. *Shib Narain Choudhury* (6). Before considering them, it will I think save some confusion if the relevant provisions of Hindu law are borne in mind. The cases fall into two classes, according as they are gifts or bequests to (1) a wife, and (2), a female relative other than a wife. Cl. (1) is thus dealt with in para. 664 of Mayne, Ed. 9 :

" Immovable property, when given or devised by a husband to his wife, is never at her disposal, even after his death. It is her stridhanam so far that it passes to her heirs, not to his heirs. But, as regards her power of alienation, she appears to be under the same restrictions as those which apply to the property which she has inherited from a male even though the gift is made in terms which create a heritable estate. It is different if the gift or devise is coupled with an express power of alienation. Whether this is so is of course a question of construction of the terms of the particular gift."

Similar restrictions do not by force of law attach to gifts or bequests by relatives other than the husband. The property becomes what is known as saudayika, "the gift of affectionate kindred," and such property is absolutely at a woman's disposal (para. 662). "She may spend, sell, devise or give it away at her own pleasure."

Now if these are the principles of law governing such gifts or bequests, it necessarily follows, unless any intention appears to the contrary, that the effect of the gift (and here and elsewhere I include a bequest) is to confer an estate in conformity with them. To hold otherwise would be to assume, in effect, that the donor intended that the woman should take an estate the incidents of which would be at variance with the Hindu law. This observation may appear to be too obvious to be worth making ; but no little trouble has arisen during the arguments addressed to me through losing sight of the fundamental provisions of Hindu law, and failing to distinguish between an inferred intention and a legal consequence.

In accordance with the two classes of estates given above, the case law may be divided into (1) cases relating to gifts to wives, and (2) cases relating to gifts to relatives other than wives. Cl. (1) does not directly concern us, but some examination of the principles upon which the decisions proceeded will be of assistance before turning to Cl. (2).

Where a gift is made to a wife, the presumption would seem to be, as I have said, that she takes a limited estate unless a contrary intention appears ; and this is in general what the cases show. Difference of opinion at one time arose whether the intention must be shown by an express declaration of power to alienate, as was held by the Allahabad High Court in *Surajmani* v. *Rabi Nath* (7), or whether it was enough that "words of amplitude," some expression sufficient to show the donor's intention to confer more than the estate which

(6) A. I. R. 1922 P. C. 63=66 I. C. 193=49 I. A. 25=1 Pat. 305 (P.C.).

(7) [1903]. 25 All. 351=(1903) A.W.N. 66.

the wife would otherwise get under Hindu law, are used. In *Ramachandra Rao* v. *Ramachandra Rao* (8) and *Bhaidas Shivadas* v. *Bai Gulab* (9) the Privy Council has set this point at rest by pronouncing for the latter alternative. We are not here concerned with the discussions, as for instance, in *Ramachandra Rao* v. *Ramachandra Rao* (10), where the word of amplitude accepted was inam and in *Surajmal* v. *Rabi Nath* (11) and *Bhaidas.Shivdas* v. *Bai Gulab* (9), where it was malik, as to the sufficiency of the language to establish intention. Perhaps the clearest as well as the most authoritative being the most recent pronouncement of the Privy Council upon the principle to be observed in dealing with this class of cases is contained in *Narsingh Rao* v. *Maha Lakshmi Bai* (12).

Their Lordships say at p. 389 (of 50 *All.*) :

"In their Lordships' opinion there is nothing so far in the deed to cut down the gift or prevent the Rani from taking such an estate in the properties, which are the subject of the gift, as a wife takes in immovable property given her by her husband. According to the Hindu Law, such property is taken by her as stridhanam and is descendible to her heirs and not to his, and would devolve first on her daughter's daughter and failing them on her daughter's son thus effectually excluding Balwant, but over such property, it is stated by Mr. Mayne, para. 664, she would have no right of alienation unless the gift was coupled with an express power of alienation, unless the gift was or, as has been held by this Board, unless there are words of sufficient amplitude to confer it upon her."

Here we have clearly expressed the principle which, I suggested at the start, is indisputable, that a woman gets the estate which Hindu law confers upon her unless there are words to restrict or amplify it. Odgers and Jackson, JJ., have in *Chalapati Rao* v. *Subba Rao* (13) decided a case upon this basis. It is unnecessary for me to discuss another case of this Court, *Kanakammal* v. *Baktavatsula Naidu* (14), further than to say that the learned Judge who wrote the leading judgment, Ramesam, J., certainly did not take a less liberal view of the rights passing to a woman by gift or devise than the other authorities I have cited.

If that is the principle to apply to a gift to a wife, it is difficult to find any reason why it should not apply to a gift to a woman other than a wife, for instance, to a daughter, as here. Under Hindu law she takes an absolute estate, and the presumption that she takes it can only be rebutted by the employment of restrictive language. It is true that this method of construction does not appear very clearly upon the face of any early Privy Council judgment, *Jagannadha Jagapathy Raz* v. *Venkataswamy Jagannadha Jagapathy Raz* (15), and if that case stood alone and uninterpreted by later decisions it might be reasonable to deduce from it that whenever a Hindu makes a gift or bequest to a woman not his wife, he intends, unless he demonstrate the contrary, to bestow only a woman's estate. As was pointed out in *Mahimchandra Sarkar* v. *Hara Kumaree Dassee* (16), however, such a view would mean in effect that the presumption was that the donor intended his gift to have an effect different from the effect ordained by Hindu law ; because every Hindu may be supposed to know that a daughter, for example, takes an absolute estate in such circumstances. The judgment, properly understood, seems only to lay down that in construing a will or gift-deed it is necessary to bear in mind that the testator or donor is a Hindu ; and, further, that this consideration should not be lost sight of, in particular, where there is ambiguity in the terms. In *Ramachandra Rao* v. *Ramachandra Rao* (10), Wallis, C. J., observes :

"We must, I think, take it to be now settled, at any rate so far as this Court is concerned, and until the decisions to which I have referred are overruled by higher authority, that the rule laid down by the Judicial Committee in *Jagannadha Jagapathi Raz* v. *Venkatasami Jagannadha Jagapathi Raz* (15), is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument before the Court."

In the same case Seshagiri Iyer, J., thought that where the language was ambiguous, recourse could be had to the ordinary notions of Hindus as a rule of

(8) A. I. R. 1922 P. C. 80=67 I. C. 408=49 I. A. 129=45 Mad. 320 (P.C.).
(9) A. I. R. 1922 P. C. 193=65 I. C. 974=49 I. A. 1=46 Bom. 153 (P. C.).
(10) [1919] 42 Mad. 283=52 I. C. 94.
(11) [1908] 30 All. 84=35 I.A. 17=5 A.L.J.67 (P.C.).
(12) A.I.R. 1928 P.C. 156=109 I.C. 703=55 I. A. 180=50 All. 375 (P.C.).
(13) A.I.R. 1929 Mad. 691=117 I.C. 289.
(14) A.I.R. 1923 Mad. 207=70 I.C. 321.
(15) [1837] 2 M.I.A. 7 (P.C.).
(16) [1915] 42 Cal. 561=30 I.C. 798.

construction to find out what the intention of the donor was ; but where the words employed are clear and unambiguous, no matter who the donee is, the language should be given effect to. He supported this principle by a reference to S. 8, T. P. Act.

A similar view has been taken by Benches of this Court in more than one recent case. In *Rajamanicka Chettiar* v. *Manickam Chettiar* (17) (to which in facts and ratio decidendi, *Yellappa* v. *Golla Swami* (18) is closely parallel as to need no separate notice) a brother bequeathed property to sisters directing that they should "enjoy" it. After holding that there is no presumption against a woman taking an absolute estate, the learned Judges deemed "enjoy" to be a word of sufficient amplitude to convey absolute rights. As to this, it is perhaps worth while to point out that the phrase "sufficient amplitude" was used by the Judicial Committee as in *Bhai DasShivdas* v. *Bai Gulab* (9). *Ramachandra Rao* v. *Ramachandra Rao* (8), where a transfer to a wife was in question and it was necessary to consider whether the language used raised the estate from qualified to absolute. Where the estate conveyed without such words be, under Hindu law, an absolute one, the view to which I can discover no objection, either on general principles or on recourse to the authorities, is that no words of amplitude are necessary.

In a Calcutta case *Mohunchandra Sarkar* v. *Hara Kumar* (16), which I have already mentioned in connexion with the construction of *Jagannadha Jagapathi Raz* v. *Venkatasami Jagannadh* (15) a bequest to a daughter was in question and the testator was deemed to have intended to confer an absolute power of alienation. There is nothing, I think, in this case in conflict with the principle I have attempted to extract. It was presumed that the testator knew the Hindu law and had its effect in contemplation in framing his will.

The conclusion I draw is that where under Hindu law a bequest to a woman would convey the whole estate, it is permissible to construe the will free from any presumptions created by her sex. If the words used would invest a male legatee with an absolute estate, so would they invest a female legatee. If this test is correct, I regard the words "have been transferred" unattended as they are by any qualification, as sufficient to achieve that object. They are appreciably stronger, in my view, than the word "enjoy" which was held to show a similar intention in the two *Madras* cases above cited.

I agree accordingly with the Courts below that the document in controversy is a will, that it has been proved to be validly executed by Mahadevudu ; and that it passed an absolute interest in the property to defendant 1. The plaintiff's suit must accordingly fail and it is unnecessary for me to consider the further question whether in the circumstances of the case, and had those findings been in his favour, he should be found entitled to a declaration under S. 42, Specific Relief Act. The second appeal is dismissed with costs. Single advocate's fee of Rs. 75.

P.R.S./S.N. *Appeal dismissed.*

(17) A.I.R. 1925 Mad. 254=84 I.C. 902.
(18) A.I.R. 1924 Mad. 855=82 I.C. 490.

A. I. R. 1930 Madras 748

ANANTAKRISHNA AYYAR, J.

(*Yella*) *Ramayya* and *others*—Defendants—Appellants.

v.

(*Chukkapalli*) *Kotayya* and *others*—Plaintiffs—Respondents.

Second Appeal No. 97 of 1926, Decided on 17th September 1929, against decree of Dist. Judge, Guntur, in A. S. No. 259 of 1924.

(a) Contract Act, S. 73 — Purchaser of immovable property dispossessed for lack of title in vendor—He can claim as damages from vendor enhanced value at eviction.

Where a purchaser of immovable property is dispossessed owing to lack of title in the vendor, he can claim as damages not only the actual price paid by him, but according to the enhanced value at the time of his eviction: *A. I. R.* 1921 *Mad.* 384, *Foll.*; 21 *Bom.* 175 and 40 *Mad.* 338, *Rel. on.* [P 750 C 1]

(b) Transfer of Property Act, S. 55 (2)—Express covenant of title is not necessary in sale-deed.

An express covenant of title in a sale-deed is not necessary since under S. 55 (2) such a covenant is implied in every sale of immovable property : 25 *Cal.* 298 and 40 *Mad.* 338, *Rel. on.* [P 750 C 1, 2]

(c) Transfer of Property Act, S. 55 (2)—Purchasers suing for damages vendors who could not convey proper title—Purchasers who had sold their share prior to institution of suit cannot get decree in their favour in

absence of their vendees, and in absence of proof that they had settled with those vendees and were themselves entitled to damages in respect of their share.

Under S. 55 (2) the benefit of the covenant mentioned in that section shall be annexed to, and shall go with, the interest of the transferees as such and may be enforced by every person in whom that interest is in the whole or any part thereof from time to time vested.

Hence in a suit for damages against the vendors who could not convey proper title to the plaintiffs, those plaintiffs who have sold their moiety of the property prior to the institution of the suit cannot get a decree in their favour in the absence of their vendees and in the absence of proof that they had settled with those vendees and are themselves entitled to the damages in respect of their moiety.

[P 751 C 1]

A. Viswanatha Iyer and *A. Ramaswami Iyer*—for Appellants.

Ch. Raghava Rao—for Respondents.

Judgment.—Defendant 2 sold certain properties to plaintiff 1, Chukkapalli Kotayya and Bollineni Seshayya (father of plaintiffs 3 to 5) under Ex. B dated 2nd January 1902. As the result of O. S. No. 39 of 1918 instituted by one Somayajulu as the adopted son and heir of defendant 1's husband, the plaintiffs lost about two acres of land, it being held that defendant 2 had not acquired a good title to the same himself and that consequently he could not convey a good title in his turn to the plaintiffs with reference to these two acres. The judgment in O. S. No. 39 of 1918 was passed on 30th September 1919. On the ground that the possession of the said two acres was lost on the same date, the plaintiffs instituted the present suit to recover damages from defendant 2 in respect of the same. Defendants 3 to 5 are the sons of defendant 2. Defendants 2 to 5 contended that defendant 2 was merely a benamidar vendee under Ex. A dated 19th May 1900, and that the sale by defendant 2 to the plaintiffs under Ex. B on 2nd January 1902 was a nominal transaction and that he never had any interest in land and that Ex. B was only a nominal transaction. Both the lower Courts found against the said contention and held that Ex. B evidenced a real and genuine transaction and that defendant 2 received consideration from the plaintiffs in respect of Ex. B. The Courts also observed that the plaintiffs were ejected from the lands soon after the decree in Ex. B. On the question of damages the first Court held that the plaintiffs were entitled to recover only the actual price (Rs. 500) paid to defendant 2 under Ex. B for these lands and not the present market value of those lands on the date of their eviction by the decree-holder in O. S. No. 39 of 1918. The lower appellate Court, however, held that the plaintiffs were entitled to the market value of the land at the time of the dispossession, viz. Rs. 2,132. In this second appeal preferred by defendants 2 to 5 the main argument urged by the learned advocate for the appellants, was that the learned District Judge was in error in decreeing the market value of the land at the time of dispossession of the plaintiffs as a result of O. S. No. 39 of 1918. He drew my attention to a statement in Mayne on Damages that English law was not clear on the point and that the American Courts had held that the plaintiffs in such circumstances would be entitled to be paid back the price paid by them and not the present market value of the lands. He referred me also to the decision in *Dhanrajee Giriji Narasingh Giriji* v. *Tata Sons Ltd.* (1) and to English cases relating to contracts of sale relating to immovable properties, where a vendor not being able to give a good title was directed only to return the advance with interest and not to pay the vendee the (higher) market value when the price of land had increased in the meanwhile. I do not think it necessary to go elaborately into this question, because the question is concluded, as far as I am concerned, by a decision by a Bench of this Court, reported in *Dhadha Sahib* v. *Muhammad Sultan Sahib* (2). The learned Judges, Abdur Rahim and Oldfield, JJ. held that in assessing damages the vendee is entitled to ask that they should be assessed at the present enhanced value of the lands. At p. 169 the learned Judges observed as follows:

"The learned District Judge is evidently wrong in saying that in assessing damages the plaintiff is not entitled to ask that they should be assessed at the present enhanced value of the lands. Surely he is entitled to full compensation, so that he might be restored pecuniarily to the same position as if he had recovered the land which defendant 1 sold to him."

(1) A. I. R. 1924 Bom. 473=49 Bom. 1.
(2) A. I. R. 1921 Mad. 384=59 I. C. 311=44 Mad. 167.

It has been held that the rule enacted by S. 73, Contract Act, is applicable also to cases of sales of immovable property: see *Nagardas Sambhagya Das* v. *Ahmad Khan* (3) and *Ranchhod* v. *Man Mohandas* (4). The Full Bench of the Madras High Court in the case reported in *Adikesavan Naidu* v. *Gurunath Chetti* (5) applied the same principle to cases of contract for sale of immovable property by the manager of a Hindu family. That being so, the party (vendee) who suffers by such breach is entitled to receive from the party who has broken the contract (vendor) compensation for any loss or damages caused to him thereby which naturally arose in the usual course of things from such breach. In *Nagardas Sambhagya Das* v. *Ahmad Khan* (3), the learned Chief Justice and Parsons, J., held that a purchaser evicted from his holding is entitled to recover from a vendor who has guaranteed his title the value of the land on the date of the eviction. At p. 182 their Lordships say:

"It is stated by Blackburn, J., in *Lock* v. *Furze*, that the doctrine laid down in *Flureau* v. *Thornhill*, does not apply to the case of an executed contract and that is stated in Dort's "Vendors and Purchasers" to be the law. A careful perusal of the judgments in the case of *Bain* v. *Fothergill*, in which the House of Lords recognized the doctrine of *Flureau* v. *Thornhill* and established it on the broadest basis, satisfies us that it was not intended by their Lordships to extend the doctrine to cases of executed contracts to which it had not been previously applied."

In the Full Bench case reported in *Adikesavan Naidu* v. *Gurunatha Chetti* (5) it was held that in the case of a contract to sell immovable property, the vendor was liable under S. 73, Contract Act, for damages for failure to perform the contract, and that law in India as laid down by the Contract Act as to the right to the damages for breach of contract to sell immovable property was different from that in England. I am therefore of opinion that the learned District Judge was right in assessing damages at the enhanced value of the land on the date of eviction.

It was next argued that there is no express covenant of title in Ex. B, but that is not necessary since under S. 55 (2), T. P. Act, in the absence of a contract to the contrary such a covenant is implied in every sale of immovable property after the Transfer of Property Act: see *Basareddi Sheikh* v. *Enajaddi Maliah* (6); *Narayana Reddi* v. *Peda Rama Reddi* (7) and *Adikesavan Naidu* v. *Gurunatha Chetti* (5) at pp. 350 and 352. This contention also accordingly fails.

The last contention raised by the learned advocate for the appellants was that the father of plaintiffs 3 to 5 had sold the property purchased by him to the father of P. W. 5 prior to the present suit and that plaintiffs 3 to 5 were not entitled to recover any damages from the defendants, and that the lower Courts should have decreed only the damages sustained by plaintiffs 1 and 2 in respect of the two and odd acres in question. This question was not raised in the written statement. Issue 2 ran as follows: "Who dispossessed the plaintiff of the suit land?" At the hearing, both parties admitted that issue 2 was unnecessary and it was consequently struck off: vide para. 14 of the Munsif's judgment. Against the decree passed by the District Munsif in favour of plaintiffs 1 to 5 for Rs. 500, viz., the price paid for Ex. B, defendants 2 to 5 filed a memorandum of objections in the lower appellate Court in the appeal preferred by the plaintiffs. In that defendants 2 to 5 raised the question that plaintiffs 3 to 5 were not entitled to damages as their father had sold the land to P. W. 5's father before suit. The lower appellate Court in para. 5 of its judgment observed as follows:

"The facts in this connexion appear to be that Seshayya, the vendee from defendant 2 under Ex. B and father of plaintiffs 3 to 5, had sold his share of the property to the father of P. W. 5 who in his turn sold portions of it to two persons Kasim Sahib and Gali Anjayya. Kasim Sahib then sold to Sheik Nabi Sahib. The plaintiffs no doubt called P. W. 5 to say that he had recovered some money from plaintiffs 3 to 5. But as the lower Court remarks, there is no independent evidence, and the receipts which he puts forward, Exs. F and G, purporting to have been given to his father for money paid by the latter as damages to his vendees, have not been proved by the parties who gave them. I take it therefore that plaintiffs 3 to 5 have not proved that they had to pay Seshayya's vendees any compensation for their want of title."

Plaintiffs 3 to 5 were not taken by surprise by this plea of defendants 3

(3) [1897] 21 Bom. 175.
(4) [1908] 32 Bom. 165=9 Bom. L. R. 1087.
(5) [1917] 40 Mad. 33?=39 I. C. 358.
(6) [1898] 25 Cal. 298=2 C. W. N. 222.
(7) [1891] 1 M. L. J. 479.

to 5. In fact plaintiffs 3 to 5 let in evidence and called P. W. 5 to whose father Seshayya had sold the properties. The plaintiffs also produced receipts Exs. F and G, but unfortunately for them they have not been proved by the parties who gave them. Under S. 55, (2), T.P. Act, the benefit of the covenant mentioned in that section shall be annexed to, and shall go with, the interest of the transferees as such and may be enforced by every person in whom that interest is in the whole or any part thereof from time to time vested.

In the absence of those vendees and in the absence of proof that plaintiffs 3 to 5 settled with those vendees and are themselves entitled to the damages in respect of these lands, plaintiffs 3 to 5 are not entitled to a decree in their favour in this suit in respect of their moiety of two and odd acres in question. In the circumstances, I think that the decree should be confined to the damages sustained by plaintiffs 1 and 2 in respect of their moiety of the two and odd acres conveyed by defendant 2 under Ex. B.

I therefore modify the decree of the lower appellate Court by giving plaintiffs 1 and 2 a decree for Rs. 1,066 (being the moiety of Rs. 2,132) with interest thereon at 6 per cent per annum from 30th September 1919 to the date of realization and costs on the same in all the Courts, to be paid by defendants 2 to 5. The claim made in the plaint for the remaining amount will be dismissed. Defendants 2 to 5 will pay the costs of plaintiffs 1 and 2 in respect of Rs. 1,066 in all the Courts and bear their own costs in all the Courts. There will be no order as to costs in any of the Courts regarding the remainder of the claim mentioned in the plaint. The appellant will pay respondents 1 and 2 (plaintiffs 1 and 2) costs of the second appeal calculated on Rs. 1,066 and bear their own costs.

The decree of the lower appellate Court will be modified accordingly.

P.R.S./S.N. *Decree modified.*

A. I. R. 1930 Madras 751

RAMESAM AND CORNISH, JJ.

L. V. Narasimha Sastri— Appellant.

v.

Official Assignee, Madras—Respondent.

Original Side Appeal No. 25 of 1929, Decided on 18th December 1929, from decision of Kumaraswami Sastri, J., D/- 21st January 1929.

(a) Presidency Towns Insolvency Act, S.85 —Ex parte decree passed—Judgment-debtor going to insolvency Court and being adjudicated—This decree being his only debt—Official Assignee holding debt not proved and relying upon want of proper service upon judgment-debtor and upon observation made in another suit between insolvent and third party — Although Official Assignee would go behind such decree, evidence is not sufficient to justify insolvency Court for invalidating decree.

On an ex parte decree being passed, the judgment-debtor instead of trying to get the decree set aside, went to the insolvency Court and was adjudicated. This debt was the only debt for which he was liable. The Official Assignee investigated into the validity of the decree-debt and relying upon the fact that the judgment-debtor was not properly served with a notice and also upon an observation made by a Judge in a previous suit between the insolvent and a third party, held that debt was not proved.

Held : that although the Official Assignee has power to go behind the decree even when the decree-debt is the only debt against the insolvent, still the materials of this case are not sufficient evidence either of collusion or of fraud or of miscarriage of justice as would justify the insolvency Court in invalidating the decree and holding that the debt is not binding upon or proved against the debtor : *Ex parte Revell In re, Tollemache*, (1835) 13 *Q. B.* 720, *In Re, Flaten Ex parte Scottish Whiskey Distillers* (1889), 22 *Q. B.* 83; *Re Van Laun Ex parte Chatterton*, (1907) 2 *K. B.* 23; *Re Vambell Ex parte Seal*, (1911) and 2 *K. B.* 992. *Discussed.* [P 754 C 2]

(b) Presidency Towns Insolvency Act, S.85 —Official Assignee has power to go behind judgment to find validity of debt.

There is no doubt about the powers of the Official Assignee to investigate into the case attempted to be proved before him whatever their nature may be and whether founded on a contract, loan or a judgment or a decree. He has got power to go behind a judgment and enquire into the validity of a debt: *Ex parte Revell, In Re Tollemache*, (1885) 13 *Q. B.* 720 and *In Re Flaten Ex parte Scottish Whiskey Distillers*, (1889) 22 *Q.B.* 83, *Foll.* [P 752 C 2]

(c) Civil P. C., S. 11—Scope—Evidence Act, Ss. 13 and 40.

Observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. [P 754 C 2]

K. S. Krishnaswami Ayyangar—for Appellant.

S. G. Satagopa Mudaliar—for Respondent.

Ramesam, J. — This is an appeal against the order of our brother Kumaraswami Sastri, J., in the course of insolvency proceedings relating to the insolvency of P. Kumaraswami Rao in I. P. No. 263 of 1923. The facts out of which this appeal arises may be stated. The appellant before us, L. V. Narasimha Sastri, got a decree against the insolvent in O. S. No. 282 of 1922 on the file of the District Munsif's Court of Cocanada on a promissory note said to have been dated 28th January 1921 and said to have been lost. This decree was sought to be executed against the insolvent. It was transferred to Madras and in execution of it the insolvent was sought to be arrested on 20th August 1923. He at once sought the protection of the insolvency Court. In that petition he alleged that the promissory note on which this decree was obtained was a fictitious one and that he was also not properly served with summons from the District Munsif's Court of Cocanada. In the schedule to the petition he showed this decree debt as the only debt for which he was liable. He was duly declared insolvent and his properties vested in the Official Assignee.

Immediately, the appellant sought to prove his debt by producing his decree. The Official Assignee held that the debt was not proved. There was an appeal by way of notice of motion seeking to set aside the order of the Official Assignee. This was on 28th April 1925. This petition was adjourned and on 19th August 1925 an order was issued for a commission to examine witnesses. On 4th September two witnesses were examined on commission: (1) Mr. Y. Kameshwara Rao, a first grade pleader of 28 years' standing of Cocanada; and (2) P. Bhimalingamurthy, a Municipal Councillor of Cocanada but these were not cross-examined on that occasion. So a further commission was ordered to issue for the cross-examination of these witnesses and on 24th October 1925 the two witnesses were cross-examined. Afterwards two other witnesses P.Subba Rao and the appellant himself were examined before the Official Assignee. P. Subba Rao was the original payee who was said to have endorsed the note to the appellant. The second witness Bimalingamurthy was an attestor and the first witness, the vakil, says that the note was shown to him, that he issued the registered notice to the insolvent, that afterwards he filed the suit and in the interval the suit note was lost. On 1st February 1926, the case was sent back to the Official Assignee. On 2nd November 1928 the petition was ordered by the Assistant Registrar to be posted before the Court as nothing was done by the Official Assignee but it was not so posted. There were further adjournments in December 1928 and finally on 11th January 1929 the Official Assignee sent his report to the original side. On 21st January 1929 the matter came up before our learned brother and he ordered the application of April 1925 to be dismissed. The present appeal is against this order.

It appears that the only debt to which this insolvent is liable is this decree debt. If this decree debt is a spurious debt and is held to be no debt then there is no insolvency. A man cannot be insolvent without any debts to pay. But in the present case because execution was attempted against him by arrest he applied to be declared insolvent and used the insolvency jurisdiction for attacking the nature of the debt and for contending that that was a fictitious debt. There is no doubt about the powers of the Official Assignee to investigate into the debts attempted to be proved before him whatever their nature may be and whether founded on a contract, loan or a judgment or a decree. In *Ex parte Revell, In re, Tollemache* (1) Bagallay, L. J., says:

"The rule is clearly stated by James, L. J., in *ex parte Kibble*, thus: "It is the settled rule of the Court of Bankruptcy on which we have always acted, that the Court of Bankruptcy can enquire into the consideration for a judgment debt. There was obviously strong reason for this, because the object of the Bankruptcy laws is to produce the distribution of a debtor's goods amongst his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relatives without any debt being due on them at all; it is therefore necessary that the consideration of the judgment should be liable to investigation."

Then he proceeds:

"I do not wish to lay it down as a rule that the Court should enquire into the consideration for a judgment debt when nothing is shown to justify the enquiry. I am disposed to think

(1) [1885] 13 Q. B. D. 720=34 L. J. Q. B. 89 =51 L. T. 376.

that prima facie a judgment ought to be considered as binding. But if a proper case is made I think the Court ought to direct an inquiry into the consideration for a judgment debt."

At p. 725. Cotton, L. J., says :

In bankruptcy a judgment certainly stands in a different position from that in which it previously stood as against the debtor himself, because the rights of the other creditors of the bankrupt have supervened. When a person is sui juris a judgment against him is very strong prima facie evidence against him of the existence of a debt; if he disputes it he must satisfy the Court that there is some reason which requires that the judgment should be set aside."

In *In re, Flatau. Ex parte Scottish Whisky Distillers* (2), Lord Esher, M.R. says:

"When an issue has been determined in any other Court, if evidence is brought before the Court of Bankruptcy of circumstances tending to show that there has been fraud or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a prepostercus proposition."

In *In re, Saville, Ex parte Saville* (3), the same learned Judge observes :

"It does not decide that there being a judgment, on the mere suggestion of the debtor that the judgment debt is bad, the Court of Bankruptcy is bound to go behind the judgment and inquire into the validity of the debt. There is a judgment debt. That is a sufficient debt on which to found a bankruptcy. It is true that if suggestions are made and some plausible evidence given, that the judgment debt does not really exist, the Court may well examine into it. * * * * Nothing was offered against the circumstances except the statement of the debtor, which he had ample opportunity and which it was to his interest, to bring forward before."

In the present case there seems to be some ground for suggesting that the insolvent was not properly served with summons in the District Munsif's Court of Cocanada. At any rate it appears that he was not personally served though the service may be declared sufficient in law. When he was arrested in August 1923 he had an opportunity to contest before the District Munsif's Court to set aside the ex parte decree. Under Art. 164, Lim. Act, he has 30 days to get that decree set aside, but not having done so the decree has now become incapable of being set aside. The debtor himself, therefore, cannot get rid of that decree assuming it is a wrong or an unjust decree. This of course does not prevent the Official Assignee in insolvency from investigating into the nature of the debt if there are grounds for doing so. The cases I have cited show that the basis of his jurisdiction and the reason for his investigating into the judgment claims is the necessity of protecting other creditors. Where there are no other creditors the reason for examining into this judgment debt especially when the debtor himself allowed the opportunity be had to pass by becomes much less.

In *In re, Van Laun Ex parte Chatterton* (4), Cozens Hardy, M. R., says :

"The trustee in bankruptcy can say: You are a person who comes in to prove a debt. It is my duty to see that this bankrupt's assets are distributed amongst those who are justly, legally and properly creditors of the estate. In order to enable me to do my duty, I ask you to furnish me with such information as will enable me to do that which I am told to do by R. 22, Sch. 2, to the Act, to examine every proof and the grounds of the debt."

Buckley, L. J., says :

"The trustee is entitled to say : "It is my business to see that those who seek to rank against this estate are persons who are really creditors of that estate."

In *In re, Vambell Ex parte Seal* (5) a judgment was obtained which was opposed to the terms of the Money Lenders Act. There was afterwards a further agreement with reference to that judgment. It was held that it is open to the Court to find that the judgment and further arrangements are both illegal and as they are opposed to the Money Lenders Act, are unlawful and void and constitute a criminal offence. That case, therefore, does not help the respondent. In the present case, as already stated the only purpose for which the judgment is being attacked is to say that the decree debt was wrongly passed. If the contention of the Official Assignee is upheld then there is no reason for declaring the insolvent an insolvent and if the insolvency is annulled his protection is lost and the decree can be executed against the insolvent by attachment and arrest. In the latter case he will resort to insolvency again. Thus we get into a vicious circle. I do not think this jurisdiction of the Official Assignee to enquire into debts should be used as a device to escape the execution of a decree where the only debt of the

(2) [1889] 22 Q. B. D. 83=37 W. R. 42.
(3) [1887] 4 Morrell 277=35 W. R. 791.
(4) [1907] 2 K. B. 23=76 L. J. K. B. 644=23 T. L. R. 384=51 S. J. 344=14 Manson 91 =97 L T. 69.
(5) [1911] 2 K. B. 992=81 L. J. K. B. 154= 19 Manson 1=105 L. T. 529.

insolvent is the decree and there are no other debts.

It seems to me that the insolvency jurisdiction should not be used as a device to evade execution of a decree which has become final and unimpeachable as in the present case. However, evidence has been adduced by the appellant. His vakil, R. W. 1, says that he saw the promissory-note. It is true that such evidence cannot prove the genuineness of the note. It only shows that the alleged note was shown to the vakil for the purpose of issuing a notice, but that takes the appellant's case to a certain stage. Then we have got the evidence of R. W. 2. He was the attestor. He was a Municipal Councillor of Cocanada. Though it does not appear that he is a man of very affluent circumstances nothing is elicited against him as to why he should join in a conspiracy to support the alleged note or why he should depose against the insolvent.

Then there is the evidence of the appellant, which of course is somewhat interested, but it must be remembered after all that he is only the endorsee of the note and not the original lender, the original lender being R. W. 3, P. Subba Rao. The Official Assignee in his report relies on two circumstances: (1) that the summons was not properly served and therefore the insolvent is not bound by the decree. In the first place it is for the Court which passed the decree to inquire into the question whether the summons was properly served; (2) he relies upon a judgment in Madras Small Cause Court Suit No. 9738, a suit instituted by the insolvent against an advocate of this High Court, Mr. P. C. Venkatramanayya Pantulu, for a sum of Rs. 600 and odd. In that suit it was the case of the insolvent that the Rs. 1300 admittedly sent by Subba Rao according to both the parties was sent not as a loan but as payment on behalf of Mr. P. C. Venkataramanayya who owed Rs. 2,500 to the insolvent, and the suit was for Rs. 600 settled by mediators as the sum still due in respect of the balance of Rs. 1,200. The subject matter of this suit is not this Rs. 1,300 but the remaining Rs. 1,200. The appellant before us was not a party to hat suit. The Small Cause Judge decreed the suit for Rs. 600 odd. Incidentally he made remarks about the nature of the payment of Rs. 1,300. Surely observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. The appellant was not a party to that suit and he had no opportunity to cross-examine the witnesses there. The Official Assignee beyond referring to the judgment of the Small Cause Court and the fact that the summons was not properly served did not go into the matter to examine evidence. The evidence for the appellant was not contradicted by either evidence on behalf of the insolvent or the Official Assignee. The respondent now asks for a further opportunity of adducing further evidence. We do not think there is a case made out for further evidence. The Official Assignee was content to report before the learned Judge on the materials available then. We do not think this is a case in which the suspicions that have been suggested against the appellant's case ought to be allowed to practically vacate the decree of the District Munsif's Court of Cocanada, especially when it is the only debt subsisting against the insolvent. We think the debt must be regarded as proved and we allow the appeal. The Official Assignee will pay the appellant's and his own costs out of fees of his office charges fund. No costs in the lower Court for both sides.

Cornish, J.—I am of the same opinion. Although the debtor was probably ignorant of the suit filed by the creditor in the Cocanada Court he certainly became aware that an ex parte decree had been passed against him when he was arrested in execution of the decree. Instead of taking steps to have the decree set a side and his omission is the more remarkable because in a subsequent affidavit he described the decree as a fraudulent decree, the debtor apparently preferred to take refuge in the Insolvency Act and to get himself adjudicated an insolvent. O. 9, R. 13, Sch. 1, Civil P. C. provides a simple procedure for getting an ex parte decree set aside, and Art. 164, Lim. Act, prescribes the time within which steps must be taken. By allowing this decree to stand, therefore the debtor permitted

strong prima facie evidence of the validity of the debt to remain. No doubt the Offiicial Assignee acted within his rights in investigating the circumstances in which this decree was passed. As observed in *In re Van Laun Ex-parte Chatterton* (4) at p. 30:

"The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right."

It was open to the Official Assignee, therefore, to satisfy by evidence the insolvency Court that, either on account of fraud or collusion or miscarriage of justice, the Court should go behind the decree and invalidate decree debt. But the only evidence —and I am assuming that it is evidence by reason of R. 117, Insolvency Rules—before the insolvency Court was the report of the Official Assignee and the only ground given in the report for treating the decree as not binding on the debtor is the Official Assignee's finding that the summons in the suit was not properly served on the debtor. The only reason given in the report for discrediting the evidence of the creditor and his witnesses in support of his claim is a bare reference to a quite irrelevant finding, that is to say, irrelevant to this enquiry by the Judge of the Small Cause Court in a suit between the debtor and some other person, to which the creditor was not a party and in which he did not give evidence. In my opinion these materials are not sufficient evidence either of collusion or of fraud or of miscarriage of justice as would justify the insolvency Court in invalidating the decree and holding that the debt is not binding upon or proved against the debtor.

P.R.S./S.N. *Appeal allowed.*

A. I. R. 1930 Madras 755
Full Bench

KUMARASWAMI SASTRI, CURGENVEN AND WALSH, JJ.

Pushavati Alakh Narayana—Appellant.

v.

Vuggina Appalaswami and *others*—Respondents.

Letters Patent Appeal No. 117 of 1925, Decided on 5th November 1929, from judgment of Venkatasubba Rao, J., D/- 6th November 1924, in Appeal No. 257 of 1919.

Grant—Resumption—Lands granted about year 1750 and grantees, certain hillmen, being in possession for more than 250 years —Grantees having brought lands under cultivation — Lands having descended from father to son and alienated without question—Onus was heavily on zamindar seeking to resume lands to show that grant was merely one in lieu of service resumable at will.

Where a zamindar wants to resume lands granted before the permanent settlement and held by the grantees from father to son, the onus is always on the plaintiff to prove that grant was one in lieu of wages resumable at will.

A village in the Vizianagaram zamindari was granted as early as 1752. The grantees were hillmen. They and their predecessors were in possession for more than 250 years and had brought the land under cultivation. The lands had been descending from father to son and had been alienated without question.

Held: that on the facts the onus was very heavy on the zamindar seeking to resume the lands, to show that the grant was merely a grant in lieu of wages resumable at will and not a grant burdened with service in which case it could not be resumed without at least showing that the services were required to be done and were refused: 13 *M. I. A.* 438 (*P.C.*); 28 *Bom.* 305 and *A. I.R.* 1926 *Mad.* 511, *Rel. on.* [P 758 C 2]

S. Srinivasa Iyengar and *S. Venkatesa Iyengar*—for Appellant.

G. Lakshmanna, *K. Venkatrama Raju* and *P. Vedachalam*—for Respondents.

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the trustee to the Vizianagaram estate under a trust deed dated 28th October 1912 to eject the defendants from the properties mentioned in the plaint and to direct payment of past mesne profits amounting to Rs. 1,500 and future mesne profits at Rs. 750 a month till delivery of possession.

The case for the plaintiff, as set out in the plaint, was that the village referred to in the plaint formed part of the *mal* as-

sets of the Vizianagram zamindari which is subject to a permanent peishcush, that some time after the permanent settlement the revenues of the suit village were from time to time granted by the former zamindars of Vizianagaram to the ancestors of defendants 1 to 6 as remuneration in lieu of cash allowance for rendering private and personal services to the zamindar and subject to the payment of kattubadi of Rs. 37-8-0 and without any rights of alienation, that the grant was resumable at the will and pleasure of the grantor or his heirs, that the services for the remuneration whereof the grant was made consisted in the grantee or grantees maintaining a certain number of peons for the purpose of the grantees and their peons escorting the zamindar in his trips and shooting and hunting expeditions, attending the annual Dusra durbars at Vizianagaram and rendering such other services as may be ordered from time to time which services were all of a purely personal and private nature, that the village was on several occasions resumed and kept under the management of the zamindar and regranted at the request of the service-holders subject to the same conditions of service as before, that in 1872 the village was last resumed by the late zamindar and regranted to defendants 1 and 2 and the father of defendant 3 to 6 on the same conditions of service and resumability, etc., as before and they executed a registered agreement dated 26th December 1873, that defendants 1 to 6 were rendering their services properly whenever called upon to do so till about three years before the date of the plaint and since then have neglected to render the service, that the defendants have colluded together and brought about some fraudulent mortgages, sales and other documents mala fide and without consideration, that some or all of the defendants 7 to 108 are in possession of the suit village, that the alienations are not valid and binding upon the plaintiff, that the plaintiff has no desire or necessity to continue the services of the defendants or permit them to enjoy the revenue of the village, that notice was given to the defendants on 28th December 1910 terminating their services and calling upon them to vacate and surrender the suit properties, that the defendants have all combined together and failed to do so, and that the defendants have denied the title of the plaintiff setting up an adverse claim in themselves and have forfeited their tenure by reason of the denial and the alienations.

Defendants 7 to 69 were impleaded as they belonged to the family of defendants 1 to 6 and were unlawfully in possession of the suit properties and the other defendants were added as they were collusively in possession under defendants 1 to 6. The contesting defendants filed written statements. They pleaded that the suit village, and not merely its revenues, was granted about 200 years prior to the Permanent Settlement to the ancestors of the present holders by the then local chief of Sringavarpukota, that it is not true that the grant was made as remuneration in lieu of cash allowance for rendering services private and personal to the zamindar, that if the suit village was to be regarded as granted on a tenure connected with service, the grant was an absolute grant conferring a hereditary estate on the grantees for past services rendered and burdened with future services that the grant is not therefore resumable at the will and pleasure of the grantor or of his heirs, that the services connected with the tenure of the suit village were not of the nature set out in the plaint that the services rendered before the grant were of a public nature being help given in keeping the country in a tranquil condition in those days of trouble and disturbance, that the future services expected of the grantee were similar in character if required and if not they were merely nominal services such as attending Dasara, that the village was not on several occasions as alleged in the plaint resumed and kept under the management of the zamindar and regranted at the request of the holders, that the holders have been enjoying the village hereditarily with full power of alienation, that the instrument dated 26th December 1873 referred to in the plaint was executed on account of undue influence and without any consideration for it under a misconception of the rights of the executants and under an erroneous view of the law, that the holders of the vil-

lage had been rendering certain merely nominal services and that the defendants are still willing to render the usual nominal services.

The defendants deny any collusion. They state that the plaintiff has no right to call on them to vacate the properties. They state that they never denied the title of the zamindar or set up any adverse rights. They state that even assuming that the plaintiff has a right to resume, they are the cultivating ryots of the village and are the owners of the kudivaram and that the plaintiff has at best a right to resume the melvaram only and has no right to eject them. They state that the mesne profits claimed are excessive, that the suit is barred by limitation in the case of the alienees and that the plaintiff is entitled to no relief.

The alienees filed written statements denying that the plaintiff has any right against them. The Subordinate Judge dismissed the plaintiffs' suit. He held that the evidence adduced by the plaintiff was too meagre to sustain any finding in his favour, that there was no record to show that the assets of the village were included in the *mal* assets on which peishcush was settled, that there was no record to show that the Vizianagaram zamindar granted the revenue only on land and only after the permanent settlement with the Government that there was no evidence to show the resumptions of the land or revenue and control of the village by the zamindar before the regrants were made and that the evidence did not support the case of the plaintiff that the grant was only a grant made in lieu of remuneration for services. He says that there is no evidence that the Dasara Darbar was even held for the past 20 years or that the defendants refused to attend either as huntsmen or as Dasara attendants with their muskets and the notice terminated the defendants' services without giving them an opportunity to do the services required. He then discusses the evidence oral and documentary and dismisses the plaintiffs' suit.

An appeal was filed and it came on before Venkatasubba Rao and Srinivasa Ayyangar, JJ. The learned Judges differred in their opinion. Venkatasubba Rao, J. agreed with the Subordinate Judge and held that the plaintiff was not entitled to eject the defendants. Srinivasa Ayyangar, J., took the opposite view. The result was that the judgment of the Subordinate Judge was confirmed under S. 98, Civil P. C., and the appeal was dismissed with costs. Owing to the difference of opinion this Letters Patent appeal has been filed.

Although in the plaint it was alleged that the grant was made after the permanent settlement by the zamindar of Vizianagaram, the claim made in the plaint to eject the defendants and that the village should be put in possession of the plaintiff was abandoned. It is also conceded that the averment in the plaint that the grant was made subsequent to the permanent settlement is not true. It was admitted that the grantor was not a member of the present dynasty but was a previous zamindar who held Vizianagaram before the ancestors of the present zamindar's family acquired it. In fact we find from Ex. 7 which is dated 26th September 1852 that the grant was made about 100 years prior to it and that it was made by Srimukhi Kasipathi Raju. Both the learned Judges agreed that although there is no evidence that the properties claimed were included in the permanent settlement as alleged by the plaintiff and although the plaintiff has not produced all the papers regarding the permanent settlement it can be inferred from the subsequent conduct of the zamindar as well as of the grantees that the village was included and that the Government did not at any time put forward any claim to the village. The important question on which the learned Judges differed was whether the grant was a grant of land burdened with service or whether the land was granted merely in lieu of wages and so resumable at pleasure.

The original grant has not been produced by the plaintiff nor has he filed the papers in connexion with the permanent settlement which would throw much light on the matter as to services. As a matter of fact the plaintiff started with the case that the grant was after the permanent settlement. The case was obviously not correct and was contradicted by the evidence on record. As that case was given up at the trial in the High Court, it is not necessary to

proceed with the matter further than to state that it is impossible to see how the claim for ejectment made in the plaint can be supported in the absence of any proof as to the terms of the grant or the nature of the service at the time the original grant was made. No satisfactory explanation has been given why these important records have not been produced or how it came about that the definite allegations in para. 3 (a) of the plaint were made.

The leading case on the subject of resumption is *Forbes* v. *Meer Mahomed Tuqkee* (1). Their Lordships of the Privy Council, after observing that it was a very material issue whether in point of fact the lands claimed were on the occasion of the settlement treated as *mal* assets of the zamindari in which case only their Lordships were of opinion that the question of any resumption would arise, proceeded to deal with the question as regards the right of resumption assuming that they were included in the *mal* assets. After dealing with the various decided cases their Lordships observed:

"The conclusion which they would draw from the decided cases, as well as from the reason of the thing, is, that in every case the right to resume must depend in a great measure upon the nature of the particular tenure or the terms of the particular grant. They agree with the observation of Jackson J., in *Baboo Koolodeep Narain Singh* v. *Mahadev Singh* (2) that there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands."

After dealing with the facts, their Lordships conclude as follows:

"It emphatically lay upon the appellant who is seeking to disposses or to rack-rent the respondents who by themselves, or their ancestors have brought these lands into cultivation and enjoyed them for so long a period who must have been permitted by former zamindars to continue undisturbed in such enjoyment long after the incursion of wild elephants had become mere matter of tradition to make out a clear title to resumption."

The documents in question and the facts in the case have been dealt with in great detail both by the trial Judge and by Venkatasubba Rao and Srinivasa Ayyangar, JJ. in appeal, and we think it unnecessary to repeat what has already been said. The following facts emerge as to which there can in our opinion be no possible dispute.

The grantees were hillmen and the lands are lands situate in hills. The grant was made about 1752 or earlier, long before the present zamindars acquired the villages. According to Ex. 7 the grant was made in 1752 and there could be no doubt on the evidence that the defendants and their predecessors-in-title have been in possession of the lands for over 250 years and that they have brought the land under cultivation. The lands have been descending from father to son and they have been alienating the lands without question. The documents relating to alienation filed in this case take us back to 1844. On these facts we think the onus is very heavy on the plaintiff to show that the grant was merely a grant in lieu of wages resumable at will and not a grant burdened with service in which case it could not be resumed without at least showing that the services were required to be done and were refused. As we have already said, the grant has not been produced nor have the accounts and proceedings in connexion with the permanent settlement, which might have thrown much light on the terms under which the lands were granted, been produced. It is not suggested that they are not available and it seems to us that the plaintiff has utterly failed on the main allegation made in the plaint that the grant was made after the permanent settlement or was merely a grant in lieu of wages for personal service.

As regards the services in respect of which the grant was originally made the Subordinate Judge in dealing with issue 3, which related to the persons who made the grant to the defendants, observed that it was clear that the Mukhi family made the grant to the Dorais about 200 years ago, on the only condition inferable of rendering military aid and to quell disturbances within or quarrel with a neighbour. He disbelieved the plaintiff's case as to the services. We agree with the Subordinate Judge in thinking that the plaintiff has not proved that the grant was made for the performance of the private and personal services referred to by the plaintiff in the plaint. We are of opinion that the plaintiff has

(1) [1869] 13 M. I. A. 438=14 W. R. 26=2 Suther 358=2 Sar. 588 (P. C.)
(2) 6 W.R. 193=B. L.R. Sup. Vol. 559 (F.B.).

failed to prove that the grant was a grant made to the ancestors of the defendants merely in lieu of remuneration for personal services.

A great deal of argument was addressed to us on presumptions which ought to be raised in cases of grants made for services. We are of opinion that where a zamindar wants to resume lands granted before the permanent settlement and held by the grantees from father to son the onus is always on the plaintiff. We think the observations of their Lordships of the Privy Council in *Fortes* v. *Meer Mohamed Taqkee* (1) which we have already referred to are clearly to that effect.

In *Lakhamgavda* v. *Keshav Annaji* (3) Sir Lawrence Jenkins, C. J., states that the combination of an interest in land and an obligation as to service may fall under three heads, viz.: (1) there may be a grant of land burdened with service, (2) there may be a grant in consideration of past and future service, and (3) there may be the grant of an office, the services attached to which are remunerated by an interest in land, that in either of the first two classes of grants it may be made a condition that the interest in the land should cease when the services are no longer required, but in the absence of a provision to that effect cases held under these grants are not resumable at will. The learned Chief Justice held that in cases where there has been long and undisturbed possession enjoyed by the defendant and his predecessors, it will require strong evidence on plaintiff's part to make out his case for eviction. We agree with the observations of Venkatasubba Rao, J., in *Tiruvenkatacharlu* v. *Altso Sahib* (4) that where the question is as to the class to which a specified grant involving service belongs there is no presumption one way or the other.

A great deal of reliance has been placed by the advocate for the appellant on Ex. A which was executed by defendants 1 and 2 and by the father of defendants 3 to 6 in favour of the then zemindar on 26th December 1873. It appears from Ex. M. (1) dated 4th July 1872 that the inhabitants of certain villages belonging to the zemindar petitioned the Raja stating that the persons referred to therein had mortgaged three-fourths portion of their holdings to certain persons and because of their not being able to earn their living upon the remaining portion were committing acts of trespass and mischief referred to therein and they prayed that the zemindar would put a stop to this by attaching the villages and warning the holders of the land not to commit any mischief. Upon this the amin sent a report [Ex. M (2)] on 6th July 1872 stating that those people were holding lands at favourable assessment, that they had mortgaged their holdings and were carrying away the crops of other people, that a complaint was made to him, that there was a balance of Rs. 22-13-6 payable by them to the estate, and that they had not appeared even when summoned many times; and he prayed for permission to attach the village. Upon this, the order Ex. K was passed on 11th October 1872 by the Raja of Vizianagaram asking the amin to collect the sum of Rs. 22-13-6 at once. There is nothing in the order authorizing any attachment as prayed although Ex. K is a reply to Ex. M (2) dated 6th July 1872.

On 12th October 1872 the Mirasidar of Relli wrote Ex. Q to the Amin of Pedagadi Tana stating that one Pandraju, the holder of a sixth share in a village, died leaving no male issue except a foster son, that the deceased was keeping a woman of low caste and a male child was born to her, and that both of them were quarrelling as regards the share. The petitioner prayed that the share may be attached till the succession was settled.

Exhibit Q-1 dated 21st October 1872 is a communication from the Amin to the Raja requesting orders on the petition Ex. Q.

On 8th November 1872 the order Ex. L was passed stating that the one-sixth share of the deceased and the remaining five-sixths share in respect of which cist was not paid should be attached, and leased out and that the rents should be collected. We may point out that the land was never actually taken out of their possession by the grantees and let out to others. Attachment was evidently merely for preventing

(3) [1904] 28 Bom. 305=6 Bom. L. R. 364.
(4) A. I. R. 1926 Mad. 511=94 I. C. 458.

the grantees from cultivating for a short time.

On 20th January 1873 defendants 1 and 2 and others sent the petition Ex. M to the Superintendent of Vizianagaram Estate stating that the lands which had long been in their enjoyment had been attached without any reason, that they were suffering for their maintenance because the crops had been poor and because there was famine the previous year and that if they had committed any fault, the same may be enquired into.

Upon this the Raja sent Ex. M (3) dated December 1873 (the portion bearing the date is torn) stating that these people executed a kararnama on a Rs. 16 stamp paper stating among other things that they would render Sircar service properly with 32 men and that if it was brought to the notice of the Huzur that they behaved improperly they could be dispossessed and the village entered in the Sircar accounts. Then it says:

"We have been pleased to favour and grant Appandorapalem, hamlet of Relli, which bears, out of Gudikattu Doulu of Rs. 203 and a half deducting Rs. 37-8-0 Sircar cist, remaining cist of Rs. 166 for service Muzaravasatu to Uggina China Ramandora and others."

The document referred to in Ex. M, (3) is Ex. A. It purports to be a deed of agreement executed by defendants 1 and 2 and others and recites that the village which was assigned to them for services rendered was resumed in consequence of their failure regularly to perform the services, and that on their representation that they had no no other means of livelihood and that in case the Raja revoked the resumption of the grant they would henceforward be properly rendering service with 32 men, the Raja had out of grace assigned the village bearing a dowle of Rs. 203-8 0 with a kattubadi of Rs. 37-8-0 payable out of the same and measuring 150 acres 36 cents as service grant on condition of their enjoying the same at the will and pleasure of the zamindar as long as he might be pleased. The agreement states that the executants have agreed to be present with 32 men and be rendering such service as was required by the zamindar paying the kattubadi of Rs. 37-8-0 in two instalments. It concludes by saying:

"If it comes to notice that we have in any way acted in contravention of your Highness' orders, to agree to your Highness taking away the said village from our possession and getting it annexed to the estate."

A plea was raised in the lower Court that this document was not executed voluntarily but was got from the executants by coercion. The Subordinate Judge was of opinion that the document was unduly forced upon the executant, that as a contract it had no consideration and that it was not a grant of land by the zamindar.

There is a great deal to be said in favour of the view taken by the Subordinate Judge when regard is had to the position of the parties, the mode of enjoyment for nearly 150 years and the circumstances that led to the execution of Ex. A. It is, however, unnecessary for us to go into the question as even assuming that the agreement is binding on the defendants the plaintiff cannot eject them as there is no evidence that the defendants broke any of its terms.

It seems to us reading Exs. M. 2, M. 3 and A together and having regard to the proceedings which led to the execution of these documents that the zamindar even if the document was enforcible as a fresh grant would have to prove before he could eject the defendants that they had not been rendering services or had been guilty of any improper conduct.

We agree with Venkatasubba Rao, J., in his opinion that the grant is resumable under Ex. A only if the grantees commit default in their performance of services, that the grant is one burdened with a condition of service and not one made in lieu of wages and that as the operative part of the deed is clear and unambiguous the resumption can only be on a breach by the defendants of their agreement to render service. The words "at the will and pleasure of your Highness" and "as long as your Highness might be pleased" are only expressions of subservience and cannot, if the operative part of the agreement is considered, be regarded as converting the position of the other party as a mere tenant at will. We may in this connexion refer to the decision of their Lordships of the Privy Council in *Vizianagaram Maharajah* v. *Suryanarayana* (5) and to *Vizianagaram*

(5) [1886] 9 Mad. 307=13 I. A. 32=1 Sar. 696 (P.C.).

Maharajah v. *Sitarama Razu* (6). We must remember that the document was executed over 55 years ago by men in the hills and forest tracts at a place over 500 miles from Madras at that time unconnected by railway from Madras when the power and influence of the zamindars over the comparatively primitive inhabitants of the hills was very great and when the facilities of control which the Government now has over zamindars was not very great.

It was argued that having regard to the various terms used as regards the defendants it should be presumed that the defendants are merely servants remunerated by the produce of the land but we agree with Venkatasubba Rao, J., in thinking that no inference can be drawn from the use of the words "muddat" "mustajere" or "vasati' because there are other words like "mokhasa," "jodi," "kattubadi" etc., and the lands are described asi nam lands. For example in Ex. 7 the lands are described as inam lands and in the remark column it is said that an annual kattubadi of Rs. 37-8-0 was fixed. "Kattubadi" is a revenue term for favourable quit rent. In

In Ex. 3 dated 22nd August 1844, when referring to these lands the following remark appears :

" Until this village was granted as mokhasa to the Manne people there were no village servants' manyams. After Mokhasa was granted Uggina Appanna and others gave land out of their vasathi to the village servants and have been getting their work and Sirkar work done by them when required. As until it was granted as mokhasa there were no manyams to village servants, there is no measurement."

This shows that the defendants' ancestors while in their time were granting sub-tenure to the village servants for doing their and Government work, the grant is described as mokhasa grant and it is hardly likely that if the grantees' ancestors were grantees more than 250 years ago and were themselves merely tenants at will and servants of the Raja paid for their services by the produce of the land they would in their turn engage servants for doing Government, service and pay remuneration out of their own lands. The probabilities therefore are that the grant was the usual grant burdened with service and not a grant resumable at will.

So far as the grantees are concerned in some of the documents they describe themselves as vasatidars and in some others as mokhasadars. Reliance has been placed on Ex. R. dated 29th September 1905 as containing an admission made by some of these hill-men. Little reliance can be placed on this document as the object of it was to get the alienations set aside and for that purpose as Venkatasubba Rao, J., points out these people were prepared to make any statement so long as the lands which they had alienated were got back. As pointed out it is nobody's case that these were jiroyati lands althcugh Ex. R says so. We are of opinion that the decision of Venkatasubba Rao, J., is right and dismiss the Letters Patent Appeal with costs.

P.R.S./S.N. *Appeal dismissed.*

(6) [1896] 19 Mad. 100.

** A. I. R. 1930 Madras 761
Full Bench

BEASLEY, C. J., AND ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

(*Chintala*) *Venkatasubbiah* and *another*—Appellants.

v.

(*Kattapalli*) *Akkamma*—Respondent.

Letters Patent Appeal No. 250 of 1927, Decided on 24th April 1930, from judgment of Jackson, J., D/- 9th August 1927, in Appeal No. 6 of 1926.

**** Civil P. C., O. 21, R. 84—Auction sale held on 1st September and closed at 5 p. m.—Next two days being holidays fresh proclamation issued on 4th September and sale held on 5th November which resulted in deficiency—It was in auction bidder's interest that there should be fresh proclamation and so sale should be said to have been held " forthwith."**

"As expeditiously as circumstances permit is a good rendering of the word " forthwith."

An auction sale was held on 1st September and closed at 5 p. m. that day. The purchaser failed to give the 25 per cent. of the price. The next two days were holidays. On 4th September fresh proclamation was issued and the sale was held on 5th November which resulted in a deficiency.

Held : that although it was not obligatory for a fresh proclamation of sale to be issued, still it was in the interests of the auction-bidder that there should be a fresh proclamation under the circumstances. Hence there would not be said to be unnecessary delay and the sale should be said to have been held "forthwith." [P 762 C 2]

Ch. Raghava Rao—for Appellants.

Beasley, C. J.—This Letters Patent appeal comes before us on account of a difference of opinion between Jackson

and Thiruvenkatachariar, JJ., upon one point. The facts of the case are as follows. The appellant bid at a Court sale; his bid was accepted but he failed to pay the 25 per cent deposit as is prescribed by O. 21, R. 84, Civil P. C. Having defaulted in the payment of the deposit a fresh proclamation was issued and a resale of the property held. This sale resulted in a deficiency of Rs. 630 and the appellant was ordered under O. 21, R 71, Civil P. C., to make good the deficiency. He objects to that order on the ground that the sale was not held "forthwith" to use the word which appears in O. 21, R. 84, Civil P. C., which provides that upon failure of a bidder to pay the 25 per cent deposit the property shall "forthwith" be resold. The sale at which the appellant defaulted was held on 1st September 1923 and closed at 5 p m. that day. The appellant, as before stated, failed to pay the 25 per cent deposit; the next day and the day after that were holidays, and on 4th September a fresh proclamation was directed to be issued proclaiming the property for sale and the sale was held on 5th November 1923, and resulted, as before stated, in a deficiency.

The District Munsif, before whom the matter came, after going in detail into the facts and into the law, seems to us to have come to the conclusion that although a fresh proclamation was not obligatory, it was necessary in the interests of the defaulting bidder to proclaim the property again for sale. We may say at once that we think that in the interests of the defaulting bidder it was necessary for the property to be again proclaimed for sale. Had the property been put for sale on 4th September, clearly there would have been no notice to prospective bidders and very likely no bidders would have attended the sale at all. In the lower appellate Court, however, the District Judge took the view that, where a bidder defaults in payment of the deposit, the property cannot be resold unless there has been a fresh proclamation of sale; and he held upon that basis that, as the sale of the property had to be freshly proclaimed, the sale had been held "forthwith." When the matter came before Jackson and Thiruvenkatachariar, JJ., they agreed that a fresh proclamation is not necessary under such circumstances, but disagreed on the question as to whether the property had been sold "forthwith." Jackson, J., took the view that although it was not obligatory to freshly proclaim the sale, nevertheless in the interests of the defaulting auction bidder, it should be freshly proclaimed, that there had been no unnecessary delay and that the sale should be said to have been held "forthwith." He gave his understanding of the word "forthwith" and rendered it as follows: "As expeditiously as circumstances permit"; and that in our view would be a good rendering of the word. It is very difficult to say how the word "forthwith" should be defined; but we think that the rendering of it by Jackson, J., is probably as good a one as there can be and that "as expeditiously as circumstances permit" is probably the correct definition of that word. Another rendering might be "such time as appears to be reasonably early having regard to all the circumstances." Obviously in some cases it might reasonably be held that the resale should take place immediately following on the abortive sale. For instance, take the case of a sale of ten lots of property: where the first lot is put up for auction the bid of a bidder is accepted but he then and there defaults in payment of the deposit. Under those circumstances probably it could quite reasonably be held that the property should be sold "forthwith," meaning that it should be sold then and there before the sale of the other nine lots is proceeded with; but it must depend entirely upon the circumstances of each case. In this case we think that although it was not obligatory for a fresh proclamation of sale to be issued, yet it was in the interests of the auction bidder that there should be a fresh proclamation for sale, that being so, there was no unnecessary delay, and in these circumstances the sale can be said to have been held "forthwith." The appeal must therefore be dismissed. No costs as the respondent is unrepresented before us.

P.R.S./S.N. *Appeal dismissed.*

A. I. R. 1930 Madras 763
Full Bench

BEASLEY, C. J., AND ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

Mohamed Kassim Rowther — Petitioner.

v,

Commissioner of Income-tax, Madras —Respondent.

Ordinary Original Civil Petn. No. 145 of 1929, Decided on 14th April 1930.

Income-tax Act, S. 23 (4)—Assessee in British India carrying on foreign business —Income-tax Officer can require him to produce such account books of his foreign business only as are necessary to enable him to check return—If assessee fails to produce them, Income-tax Officer cannot in all cases make assessment under S. 23 (4), but it has got to be shown that assessee could produce them—Income-tax Act, S. 22 (4).

When a foreign business is carried on by an assessee in British India, the Income-tax Officer is entitled to require the assessee to produce such books of his foreign business only as are necessary to enable the Income-tax Officer either to check the return already made by the assessee or himself to form an estimate of the income of the assessee. [P 763 C 2]

Nevertheless if the assessee fails to produce the account books it is not in all cases that the Income-tax Officer is entitled to make the assessment under S. 23 (4), but it has got to be shown that the assessee could comply with the order for the production of the account books. The right view to take of the case is that where an Income-tax Officer calls upon an assessee to produce account books which ordinarily would be in his possession and control, then the assessee has got to show that he is incapable of producing them. But if the Income-tax Officer calls upon an assessee to produce account books which would not ordinarily be in his possession and control, then the onus would lie upon the Income-tax Officer of showing that the assessee could produce them but has failed to do so. [P 764 C 1]

T. V. Muthukrishna Aiyar, H. Subbaraya Ayyar and *N. Muthuswami Aiyer*—for Petitioner.

M. Patanjali Sastri—for Respondent.

Judgment.—The question referred to us by the Commissioner of Income-tax is as follows :

"Whether on the facts found in this case it is open to the Income-tax authorities to require the petitioner who is assessed under S. 23 (4) to produce all the original accounts of the firm carrying on business outside British India."

The facts of the case are that the assessee who resides in British India carries on business in Penang in partnership with another who is in Penang and that in respect of the partnership the assessee is entitled to a four-fifths share and the other partner in Penang to one-fifth share. The Income-tax Officer called upon the assessee to produce all his accounts books, day-book, ledgers, etc., of the Penang business. The assessee did not comply with the request. Before the Income-tax Officer he stated his inability to do so and he produced before him his one-fifth sharer who stated that he was unwilling that the assessee should produce the Penang account books. It is quite clear on reading the order of the Income-tax Officer, and it is definitely so stated in the order of the Commissioner of Income-tax .... that this story was not believed by the Income-tax Officer and certainly, having regard to the fact that in this partnership he is a four-fifth sharer, it does not seem to us to be at all likely that the one fifth sharer would have refused to produce the Penang account books if his partner had so requested. The whole story sounds a most improbable one and we think that the Commissioner of Income-tax has taken up the correct position in disbelieving the story.

The question to be considered here is first of all, whether, when a foreign business is carried on by an assessee in British India, the Income-tax Officer is entitled to require the assessee to produce the books of his foreign business. On this point we are clearly of the opinion that the Income-tax Officer is entitled to do so.

The next point that arises is, what account books is he entitled to call upon the assessee to produce? The answer to this question obviously must be such account books as are necessary to enable the Income-tax Officer here either to check the return already made by the assessee or himself to form an estimate of the income of the assessee. In this case it is conceded by the assessee that the Penang books were relevant. Obviously they were ; because one of the things the Income-tax Officer had to consider was whether the remittances from Penang to British India came out of capital or whether they came out of profits made in the Penang business. If they were profits of an amount sufficient to enable the remittances to be made to British India, then the inference is that the remittances

came out of profits. So the first thing the Income-tax Officer had to consider was whether any profits, and if so to what amount, had been made in Penang. Clearly for the purpose of deciding that question he had to have inspection of the Penang account books and by Penang account books we mean not only the ledger but also the cash and the day-books.

The other question arising is whether, if the assessee does not produce the account books, the Income-tax Officer is entitled under all circumstances to make the assessment under S. 23 (4), Income-tax Act. We think that it has got to be shown that the assessee could comply with the order for the production of the account books. It clearly would not be right to say that the Income-tax Officer is entitled to call upon a person to produce account books which would not ordinarily be in the possession and control of that person. We think that the right view to take of the case is that where an Income-tax Officer calls upon an assessee to produce account books which ordinarily would be in his possession and control, then the assessee has got to show that he is incapable of producing them. Of course, if the Income-tax Officer calls upon an assessee to produce account books which would not ordinarily be in his possession and control, then the onus would lie upon the Income-tax Officer of showing that the assessee could produce them but has failed to do so. In this case, for the reasons we have already stated, it is quite clear that the books were under the control of the assessee, that he could have produced them and that he failed to comply with the notice issued to him to produce them. Under these circumstances, the Income-tax Officer was quite entitled to make the assessment under S. 23 (4), Income-tax Act. The question referred to us is answered accordingly. The assessee will pay Rs. 250 costs to the Commissioner of Income-tax.

P.R.S./S.N. *Reference answered*

A. I. R. 1930 Madras 764
Full Bench

BEASLEY, C. J., ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

Commissioner of Income-tax, Madras —Petitioner.

v.

T. Manavedan Tirumalpad—Respondent.

Ordinary Original Civil Petn. No. 152 of 1929, Decided on 11th April 1930.

Income-tax Act, S. 6—Scope.

The amounts received by sale of timber trees are income liable, as such, to income-tax.

[P 765 C 1]

M. Patanjali Sastri—for Petitioner.

T. R. Venkatarama Sastri and *T. B. Balagopal*—for Respondent.

Judgment.—The question referred to us by the Commissioner of Income-tax is:

"Whether the amounts received by sale of timber trees are income, liable as such, to income-tax."

The assessee is the owner of unassessed forest lands in Malabar and was assessed by the Income-tax Officer, Palghat, for the year 1928-1929 on an income of Rs. 5,395 from property and Rs. 3,07,629 from fees received in respect of timber cut and removed from the forests and other miscellaneous receipts. The assessee objects to the latter assessment. Before the Commissioner his contention was that he had purchased the forests with trees growing therein and that as the trees were cut down and carried away the capital was thereby decreased. The Commissioner of Income-tax has pointed out that similar circumstances exist in the case of mines and quarries—this is conceded by Mr. Venkatrama Sastri who appears for the assessee — and that in neither of those cases is any deduction allowed by reason of the fact that as years go on the amount of coal under the land in the case of the mines is diminished and the amount of stones to be quarried in the case of the quarry is diminished. Similar views have been taken in the English Courts with regard to minerals. Mr. Venkatarama Sastri here argues that this is not to be treated as assessable income at all, although he admits that he can see no difference between the income derived from the sale of coal and the sale of stone quarried in a quarry or from income derived from the sale of paddy grown on land. Of course we are

unable to distinguish between the income derived from the sale of paddy which is grown on land and the income derived from the sale of timber cut in a forest ; but the profits earned from the sale of paddy would be assessable to income-tax but for the special exemption given to that income in the Income-tax Act by reason of its being agricultural income. There is no such exemption in the case of income derived from the sale of timber. Under the circumstances, we answer the question referred to us in the affirmative. The assessee will pay Rs. 250 costs to the Commissioner of Income-tax.

P.R.S./S.N. *Answered affirmatively.*

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* A. I. R. 1930 Madras 765
Full Bench

BEASLEY, C.J., ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

Polur Reddi — Complainant — Petitioner.

v.

Munusami Reddi and *others*—Accused —Respondent.

Criminal Revn. No. 833 of 1929 and Crim. Revn. Petn. No. 746 of 1929, Decided on 15th April 1930, from order of Dist. Magistrate, Vellore, D/- 25th June 1929, in C. M. P. No. 69 of 1929.

*** Criminal P. C., S. 346 (2)—Scope.**

The terms of sub-S. (2), S. 346 are quite clear and sufficiently wide to embrace a reference back of the case to the Magistrate who originally submitted it: *A. I. R.* 1923 *Mad.* 51, *Expl.* and *Appr.*; (1890) *Rat. Un. Cr. C.* 499 and (1891) *Rat. Un. Cr. C.* 554, *Expl.* [P 766 C 2]

S. T. Srinivasa Gopalachari for *A. S. Sivakaminathan*—for Petitioner.

N. S. Mani for *Public Prosecutor*—for the Crown.

Beasley, C. J.—This case comes before us on a reference made by our learned brother Jackson, J. The facts of the case are that a complaint was made against eight persons on a charge of dacoity and came before the Second Class Sub-Magistrate of Tirupattur. The Sub-Magistrate thought that there was no basis for that charge, but as of the eight persons accused before him one was alleged to have been armed with a stick and a deadly weapon, he thought that the charge was one under S. 148, I. P. C., namely rioting armed with deadly weapons, and accordingly sent the case on under S. 346 (1), Criminal P. C. to the Joint First Class Magistrate for disposal. The Joint First Class Magistrate, after going into the case, differed from the view taken by the Second Class Sub-Magistrate and thought that the evidence disclosed that the accused might be guilty of some lesser offence. In dealing with the matter he pointed out that accused 5 who was the only accused stated to have been there armed with deadly weapons and having taken part in the riot was merely a spectator and took no part whatever in the rioting, and dismissed the complaint against him. He referred the case back under S. 346 (2), Criminal P.C. to the Second Class Magistrate on 30th May 1929. The complainant in the case feeling aggrieved at this order preferred a revision petition to the District Magistrate and he dismissed it as he came to the conclusion that the case had been properly dealt with by the Joint Magistrate. Against this order the complainant presented a revision petition to the High Court. Jackson, J., before whom it came, while strongly holding the view that the Joint First Class Magistrate was acting within his jurisdiction when he referred the case back to the Second Class Sub-Magistrate, felt himself very much embarrassed by a decision in *In re, Kothur Hampanna* (1). This decision he took to be one holding that the question of jurisdiction is irrevocably fixed by the lower Court when it submits the case under S. 346 (1) to the Superior Magistrate. S. 346 (2) reads as follows:

"The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial."

If our learned brother Jackson, J., is right in his interpretation of the judgment, in *In re, Kothur Hampanna* (1) then we are clearly of the view that that case was wrongly decided. But, first of all, we have got to see whether the interpretation placed upon that judgment by our learned brother is correct or not. He has taken the last paragraph of that judgment on p. 848 to mean that the Magistrate therein referred to is the Magistrate who makes the submission under S. 346 (1) and not the Magistrate

(1) A. I. R. 1923 Mad. 51=69 I. C. 438=23 Cr. L. J. 710=45 Mad. 846.

who refers the case under S. 346 (2), In that view of the judgment, that case does decide that it is the charge which the Magistrate who submits the case under S. 346 (1) thinks is the right one that the Magistrate to whom he submits the case has to deal with and that charge alone. He has got to try it and dispose of it himself or commit the accused for trial. If that is the correct understanding of that judgment then, as before stated, we are clearly of the opinion that that judgment is wrong. Sub-S. (2), S. 346, is perfectly clear, definite and wide and the Magistrate to whom the case is submitted has got to do three things. He has either got to try the case himself, or after having heard it to a certain point, refer it to any Magistrate subordinate to him who has got jurisdiction to try the case or to commit the accused for trial. We think that that is really what was meant in *In re, Kothur Hampanna* (1), and that the Magistrate therein referred to is the Magistrate making a reference under S. 346 (2). Although the section alone is referred to and no subsections are referred to, we think, having regard to the facts of the case and the observations made at p. 847, that the Magistrate to whom the case has been submitted was intended to be referred to. At p. 847 it is stated as follows :

"It may be urged that the Sub-Magistrate who sent up the case was subordinate to the Sub-Divisional Magistrate and that his order was in effect a reference to him. If so the reference should have been made explicitly and with some distinct indication of what action the Sub-Magistrate was to take, not with an obscure injunction which could afford no real guidance."

What happened in that case was that the First Class Sub-Divisional Magistrate to whom the case had been submitted by the Sub-Magistrate made an order as follows :

"The Sub-Divisional Magistrate declines to transfer the case to the file of another Sub-Magistrate,"

and then later on :

"As regards the section under which the offence, if proved, is likely to fall, the Sub-Magistrate is requested to study the commentary carefully under S. 379, I. P. C."

In the opinion of the Bench that was not the proper way to deal with the case submitted to him. Reference was made in that case to two unreported cases, *Queen-Empress* v. *Fakira* (2) and *Queen-Empress* v. *Purushotam* (3), as authority for the position that a superior Magistrate cannot simply return a case to the subordinate Magistrate from whom it comes but must refer it to some other Magistrate or dispose of it himself. But these cases on examination do not seem to go to that length. If they do we are clearly of the opinion that those cases were wrongly decided, because the terms of sub-S. (2), S. 346, are quite clear and sufficiently wide to embrace a reference back of the case to the Magistrate who originally submitted it. In our view therefore there is no warrant for saying that the Magistrate who acted under S. 346 (2) had no jurisdiction in this case so to act. The question argued before our learned brother Jackson, J., was merely a question of jurisdiction. No argument was addressed to him upon the merits. We have heard a brief argument upon the merits of the case, and in view of the order of the Magistrate in which he states that the evidence points to the fact that accused 5, who is the only person alleged to have been present armed with deadly weapons was merely a spectator, we think that the view he took with regard to the offence possibly committed by the accused persons was correct. As soon as accused 5 was eliminated from the charge obviously no charge against the other accused persons of rioting armed with deadly weapons could possibly lie. In view of the observations we have made the petition must be dismissed.

P.R.S./S.N. *Revision dismissed.*

(2) [1890] Rat. Un. Cr. C 499.

(3) [1891] Rat. Un. Cr. C. 554.

A. I. R. 1930 Madras 766
Full Bench

BEASLEY, C. J., AND ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

Pilla Ramaswami— Accused — Petitioner.

v.

President, Taluk Board, Tadepalligudam—Complainant— Respondent.

Criminal Revn. No. 894 of 1929 and Criminal Revn. Petn. No. 802 of 1929, Decided on 15th April 1930, from judgment of Second Class Stationary Sub-Mag., Tadepalligudam, in Misc. Case No. 44 of 1928.

Madras Local Boards Act, S. 221—Magistrate to whom case is referred under S. 221

can consider whether alleged encroachment was true: 49 *Mad.* 888=91 *I. C.* 529=*A. I. R.* 1925 *Mad.* 1015=108 *I. C.* 414=*A. I. R.* 1928 *Mad.* 495=104 *I. C.* 910=*A. I. R.* 1927 *Mad.* 1113;=97 *I. C.* 947=*A. I. R.* 1926 *Mad.* 1068 and 97 *I. C.* 812, *Overruled.*

The Magistrate, to whom a case is referred under S. 221, for recovering a fine imposed for alleged encroachment, has power to go into the question whether the alleged encroachment was true and therefore justified the imposition of the fine: **49 Mad. 888=91 I. C. 529=A. I. R. 1925 Mad. 1015=108 I. C. 414= A. I. R. 1928 Mad. 425=104 I. C. 910=A. I. R. 1927 Mad. 1113=97 I.C. 947=A. I. R. 1926 Mad. 1068** and **97 I. C. 812, Overruled.** *A. I. R.* 1928 *Mad.* 682; *A. I.R.* 1929 *Mad.* 600; *Cr. Revn* 1089 *of* 1928 and *C. R. Rev. No.* 247 *of* 1929, *Confirmed.*

V. Govindarajachari—for Petitioner.

K. Kameswara Rao and *N. S. Mani* for *Public Prosecutor*—for Respondent.

Curgenven, J.— This criminal revision Case comes before this Full Bench in the following circumstances. Under Sub-S. (1), S. 164, Madras Local Boards Act, the Taluk Board of Tadepalligudam imposed a penalty of Rs. 50 upon the petitioner in respect of an alleged encroachment in the village of Tadepalligudam. He is said to have erected a shed without permission upon ground belonging to the Taluk Board. The petitioner did not pay the penalty and accordingly the matter was referred to the Magistrate's Court under S. 221 which provides that, in default of payment of such a sum, it may be levied under the warrant of a Magistrate. At the hearing of the case the point arose whether the Magistrate was competent to go into the question whether the alleged encroachmont was true and therefore justified the imposition of the penalty and following certain decisions the Court came to the conclusion that it was not open to it to enquire into an issue of this character and accordingly although it recorded the evidence it refused to give an opinion upon the matter and directed that a warrant should issue for recovery of Rs. 50 together with Rs. 10 as costs. The petitioner thereupon presented this criminal revision case, which came in the first instance before Jackson, J. That learned Judge found that there were conflicting decisions with regard to the question at issue, and, deeming it to be an important point which frequently arises, directed that the matter should be placed before the Chief Justice for orders.

The case law upon this subject has been laid before us and opens with the case of *Ramachandran Servai* v. *President, Union Board, Karaikudi* (1) decided by Wallace and Devadoss, JJ. They were of the opinion that, if a contention of this kind were allowed to prevail, the Magistrate would be constituted as a sort of appellate authority over the Local Board in the matter of deciding whether or not there had been in fact an encroachment; and they pointed out what inconvenience would arise from such a situation. Nor did they think that the language of S. 221 would justify such a construction. This case was followed by Devadoss, J., sitting alone, in *Rangesa Rao* v. *Swaminatha Ayyar* (2) and again by myself in *Narayana Ayyar* v. *Subramania Chetty*, *A. I. R.* 1927 *Mad.* 1113. So far as my recollection of that cases goes no cases contra were cited before me and, sitting singly, I was of course bound to follow the ruling of a Bench. In the 1926 *Madras Weekly Notes* volume will be found two succeeding cases, *Union Board Paramakudi* v. *Chellasami Tevar* (3) and *Syid Mustapha Saheb* v. *Union Board of Kaveripatnam* (4) decided by Devadoss and Waller, JJ. In the judgments delivered by Waller, J. he was of opinion that under the parallel procedure by which a prosecution is instituted for breach of the law regarding encroachments and which is provided for in S. 164 (2) and 207 of the Act, it was open to an accused person to raise this question of whether the alleged encroachment was indeed an encroachment or not. But he was of opinion also that anomalous though it might be when the case came before the Court under S. 221 the decision in *Ramachandran Servai* v. *President Union Board, Karaikudi* (1), was right and should be followed.

The first Bench which seems to have taken a contrary view was in *Emperor* v. *Gopayya* (5), where Phillips and

(1) A. I. R. 1925 Mad. 1015=91 I. C. 529=27 Cr. L. J. 97=49 Mad. 888.
(2) A. I. R. 1928 Mad. 495=109 I. C. 414=29 Cr. L. J. 383.
(3) A. I. R. 1926 Mad. 1068=97 I. C. 947=27 Cr. L. J. 1187=(1926) M. W. N. 676.
(4) [1926] 97 I. C. 812=27 Cr. L. J. 1180=1926 M. W. N. 678.
(5) A. I. R. 1929 Mad. 682=110 I. C. 233=29 Cr. L. J. 681=51 Mad. 866.

Madhavan Nair, JJ. had to deal with circumstances which gave rise to proceedings under S. 221, the petitioner in that case having erected a pandal without the permission of the Union Board. The decision proceeded substantially upon other grounds but both the learned Judges, while acknowledging that this point did not really have to be decided, expressed their inability to follow *Ramachandran Servai* v. *President, Union Board, Karaikudi* (1) Phillips, J. oberves with reference to the alleged inconvenience mentioned by Wallace and Devadoss JJ. in that decision.

"The anomaly pointed out by Wallace, J. is that such a view would amount to the Magistrate being set up as a final Judge over the Local Board. When, however, it is remembered that the Board has applied to the Magistrate for the recovery of the dues, it is not open to the Magistrate to decide summarily and recover the amount without enquiry; and he must be satisfied before he issues the order that such order is correct. If the offender had been prosecuted under S. 219 he would be able to plead that no offence had been committed by him and therefore on the facts of this case it is difficult to hold that he must be precluded from such a defence because a different form of procedure has been taken against him."

That in other words, of course, is the anomaly detected by Waller J. in *Syid Mustafa Saheb* v. *Union Board, Kaveripatam* (4). A similar case came before Waller and Pandalai, JJ. in *In re, Rahim Sahib*, (6) and there, after referring to all the previous decisions, the conclusion was come to that *Ramachandran Servai* v. *President, Union Board, Karaikadi* (1) had been wrongly decided and the view was expressed that a Magistrate should go into the question of the merits of the Board's action before enforcing the payment of the penalty. The same point has been decided in the same sense by Waller and Anantakrishna Ayyar, JJ., in *Criminal Revision Case No.* 1089 *of* 1928. As I have already said it has not been disputed before us that, where a prosecution has been instituted for failure to comply with the terms of a notice, it is competent to the Court in disposing of the case under S. 207 to undertake an enquiry of this character. This has been recently decided by a Bench composed of the learned Chief Justice and Cornish, JJ., in a case so far unreported, *Criminal Revision Case No.* 247 *of* 1929.

It appears then that the recent trend of authority has been distinctly in the direction of holding that the nature of an alleged encroachment may be investigated. Mr. Mani, however, for the Crown has asked us to hold on the language of the Act itself that this view of the matter is incorrect. Under S. 164 (1) the land which is occupied must be vested in or belong to a Local Board. It is only then that the occupant shall be bound to pay such sum as may be demanded of him by the Local authority by way of penalty and, "such sum," the section goes on, "may be recovered in the manner hereinafter provided." This seems clearly to mean that the recovery of the sum must be contingent upon satisfaction of the conditions which the section lays down, namely that the land must be vested in or belong to a Local Board and accordingly it would be illegal for the Board to levy a penalty in respect of a so-called encroachment upon any land which does not satisfy that condition. Whether or not, however it is open to the Court which has to enforce this order under S. 221 to enquire into whether the land was so vested or not must of course depend upon the terms of that section. It may be conceded that they are not very clear. The last sentence of sub-S. (1) provides that :

"the amount of apportionment of any such sum shall in case of dispute be ascertained by such Magistrate."

It is possible to give a narrow and also a broad meaning to that direction. But we think that it would be very reasonable to give it the construction which has been adopted by the learned Judges who decided *Emperor* v. *Gopayya* (5), namely that where the Court has power to decide upon the amount or the apportionment of the sum :

"it is difficult to understand why it should not be open to it to decide that the amount is nil."

It seems undesirable to go into the relative advantages and disadvantages of the two constructions. In the one case it has been suggested that the Magistrate would be converted into a civil Court if he had to go into the difficult questions of title upon which many of those encroachment cases are founded. On the other hand there is the disad-

(6) A.I.R. 1929 Mad. 600=1929 Cr. C. 56=118 I. C. 278=30 Cr. L. J. 911=52 Mad. 714

vantage that under S. 164 a Local Board may, perhaps without due enquiry, impose and demand a penalty in respect of an alleged encorachment and that, if the power of the Magistrate to enquire into the truth of the prosecution allegations is withheld, the party has no remedy except that of a slow and troublesome civil suit. The clear preponderance of opinion is in favour of the view that the Magistrate has such a power and we are of the opinion that it is the correct view. In these circumstances, we set aside the order of the trial Court and remand the case for a finding on the evidence whether the alleged encroachment is true, and for disposal, accordingly. Meanwhile the fine and costs paid, if any, will be refunded.

P.R.S./S.N. *Case remanded.*

A. I. R. 1930 Madras 769

CURGENVEN, J.

Nagappan Konan—Petitioner.

v.

Ramaram Padayachi and *others*—Respondents.

Criminal Revn. Case No. 159 of 1929 and Criminal Revn. Petn. No. 138 of 1929, Decided on 18th July 1929, from order of Addl. Dist. Magistrate, Tanjore, in Criminal Revn. Petn. No. 71 of 1928.

Criminal P. C., S. 520--Additional District Magistrate being invested with powers of Court of revision, is competent when disposing of case to make consequential order as to disposal of property.

Where an Additional District Magistrate is invested by the Local Government by virtue of the powers conferred upon it by S. 10 (2), Criminal P. C., with the powers of a Court of revision, he is competent when disposing of a case by virtue of those powers to make any consequential order as to the disposal of the property: (1928) *M. W. N.* 557 (*F.B.*), *Expl.* and *Dist.* (1928) *M. W. N.* 633, *Dist.*

[P 769 C 2, P 770 C 1]

S. Nagaraja Iyer—for Petitioner.

A. Narasimha Aiyar—for the Crown.

N. Rajagopalan—for Respondents.

Order.—The Sub-Magistrate of Tiruvadamarudur in C. C. No. 202 of 1928 on his file discharged three persons of the offence of theft and subsequently passed an order that the property involved, namely three calves, should be returned to them. A petition praying for the revision of the order of discharge was presented by the complainant to the Additional District Magistrate of Tanjore and shortly afterwards he presented a supplementary petition praying that the property should be handed over to him. The Additional District Magistrate passed an order declining to interfere either with the order of discharge or with the directions of the lower Court regarding the property. The complainant then applied to the High Court to revise both portions of the order. The order of discharge has been disposed of in Cr. R. C. 158 of 1929, the petition having been dismissed and I have now to deal with the order with regard to the property.

The contention raised is that the Additional District Magistrate was not a Court of appeal, confirmation, reference or revision, such as is contemplated in S. 520, Criminal P. C., and accordingly that he was not competent to deal with the order which the Sub-Magistrate had passed under S. 517, disposing of the property whether by confirming it or by reversing it. I have been referred to the Full Bench case reported in *Maria Pillai* v. *Ramanathan Chettiar* (1), where the construction of S. 520, has been considered. An examination of that case will however show that the learned Judges divided the cases which might arise for consideration into two classes: firstly those in which an order with regard to property comes before a Court which has at the same time under its consideration an appeal, a reference or an application for revision as regards the main case itself, and secondly those in which an application to that Court to modify or reverse the order relating to property is made independently of any such appeal, reference or revision; and the judgments are concerned with the question how the latter class of cases may be dealt with, the view being clearly expressed that no difficulty arises in cases of the first class. The order subsequently passed by Reilly, J, in the case reported in *Maria Pillai* v. *Gopalakrishna Iyer* (2) was upon an application with regard to property filed independently of any appeal or revisional application. These cases accordingly do not support the petitioner's contention, but in fact run contrary to it; and I think there can be no question that, since an Additional District Magistrate is invested by the Local Government by virtue of the powers conferred upon it

(1) [1928] M.W.N. 557 (F.B.)

(2) [1928] M.W.N. 633.

by S. 10 (2), Criminal P. C., with the powers of a Court of revision, he is competent when disposing of a case by virtue of those powers to make any consequential order as to the disposal of the property. That is to follow the plain terms of S. 520, Criminal P. C., and no authority has been shown me for taking a different view. I can find no reason therefore to interfere with the order of the Additional District Magistrate as contrary to law and I dismiss this criminal revision petition.

P.R.S./S.N. *Revision dismissed.*

A. I. R. 1930 Madras 770

ANANTAKRISHNA AYYAR, J.

Ponnuswami Goundan and *another*—Defendants—Appellants.

v.

Kalyanasundara Ayyar and *others* —Plaintiffs—Respondents.

Second Appeal No. 1852 of 1925, Decided on 14th October 1929, against decree of Dist. Court, Salem, in A. S. No. 115 of 1922.

(a) Evidence Act, Ss. 155 and 157—Depositions of attesting witness in prior proceeding, if he being alive is examined in subsequent case, can be used only to contradict or corroborate him.

Where an attesting witness is dead his depositions in a prior judicial proceeding would be relevant and admissible, if the prior judicial proceeding was between the same parties and the adverse party in that proceeding had the right and opportunity to cross-examine him and the question in issue is substantially the same. But if the witness being alive is examined in the present proceeding, his prior depositions are not available as substantive evidence but can only be used to contradict or corroborate his present statements. [P 771 C 1]

(b) Evidence Act, S. 68—Executant of document denying execution — Attesting witnesses either dead, or turned hostile or not available—Signatures of attesting witnesses proved—There is nothing to prevent Court from holding execution proved.

Where the executant of a document, who is an illiterate man denies execution and having put his mark to it, and all the attesting witnesses are either dead, or have turned hostile or are not available, there is no rule of law which prevents a Court from holding the execution proved when the signatures of the attesting witnesses are proved to its satisfaction having regard to all the circumstances of the case: 11 *Bom.* 690; 37 *Cal.* 467; 12 *B. L. R.* 18, *Adam* v. *Keer*, 1 *Bos. & Pull.* 360 and *Joshua Hands* v. *Harbert James* 2 *Comyns.* 531, *Rel. on.*: *Whitelocke* v. *Musgrove*, 2 *Cr. & M.* 511, *Dist.*; 35 *All.* 364, *not Appr.* [P 757 C 2]

(c) Mesne profits—Amount of mesne profits for years subsequent to suit is ordinarily represented by profits for previous years.

The amount of mesne profits for the years prior to the filing of the plaint would represent the amount of mesne profits for the years after the suit also, in the absence of any special circumstances. [P 776 C 2]

C. S. Venkatachariar and *V. N. Venkatavaradachari*—for Appellants.

T. M. Krishnaswami Iyer and *A. Srirangachariar*—for Respondent.

Judgment. — This second appeal raises a somewhat important question relating to the construction of S. 67, Evidence Act. The original suit was instituted by the plaintiff for a declaration that he is the owner of the lands in suit, that the defendants had no occupancy rights, that the defendants were in possession as lessees under the plaintiff and for the recovery of possession of the land with mesne profits. The defendants pleaded that they were entitled to occupancy rights in the suit lands, that the plaintiff was not entitled to eject them, and that the plaintiff was entitled only to recover a rent of Rs. 10 per annum and not any mesne profits.

To prove the contention of the plaintiff, the plaintiff put in Ex. M, a muchilika alleged to have been executed by defendant 1 to Ramaswami Iyer, the plaintiff's vendor, on 2nd August 1893. Defendant 1 denied having executed Ex. M. He is a marksman, not able to write his name. Ex. M purports to have been executed by defendant 1 and to have been attested by two witnesses, (1) Subbaraya Ayyan and (2) Srinivasa Iyer, and purports to have been written in the handwriting of Nanjundayyan, who purports to have signed the document as writer of the same. Attesting witness Srinivasa Iyer was reported to be dead. The writer Nanjundayya was stated to have "joined an itinerant mutt" and to be beyond the process of the Court, and his whereabouts were not ascertainable and consequently he was not available as a witness. The other attesting witness Subbaraya Ayyan was examined as P. W. 10. He admitted his signature but denied having seen the executant execute the document. In a prior suit O. S. No. 1570 of 1912, between the same parties, this witness Subbaraya Ayyan was examined as a witness when he deposed to his having attested this muchilika and to the exe-

cutant having executed the same in his presence. To prove the signatures of these attesting witnesses, certain other witnesses were examined who swore that they were familiar with the signatures of the witnesses to Ex. M and that the signatures in the document Ex. M were the signatures of Srinivasa Iyer and Naujundayyan, the attesting witnesses to Ex. M. In these circumstances the lower Courts found that execution of Ex. M by defendant 1 was proved, and they took into account Ex. M in deciding the merits of the dispute between the parties.

The question is whether they were entitled, in law, to do so. It is clear that the prior deposition of the attesting witness Subbaraya Ayyan, P. W. 10, in a case between the parties to the present suit could not be utilized as substantive evidence in the present case. If the witness be dead, his prior depositions would be relevant and admissible under S. 33, Evidence Act, since the prior judicial proceeding was between the same parties and the adverse party in the first proceeding had the right and opportunity to cross-examine him, and the question in issue was substantially the same; but S. 33 could not apply to the present case, because the witness is not dead, but on the other hand is alive, and was in fact examined in the present suit as P. W. 10. His prior deposition accordingly is not available as substantive evidence, but could only be utilized to contradict or corroborate his present statements, under Ss. 155 and 157, Evidence Act.

In his present deposition he denied having seen defendant 1 execute the document, even though confronted with his evidence to the contrary in the prior suit. He admits having signed Ex. M as an attesting witness. He does not know the signatures of the other attesting witnesses. The signatures of other attesting witnesses, however, had been proved by some witnesses examined in the suit who were familiar with the writing and signatures of those attesting witnesses. In these circumstances, was it legally open to the lower Courts to find the document Ex. M legally proved? If the above constitute legal evidence of the execution of the document by defendant 1, then the question whether the lower Courts were justified in giving credit to the same and having believed the said evidence in the circumstances is not one for me since in second appeal I am bound by the appreciation of the evidence in the case by the lower appellate Court. I can interfere only if there be no legal evidence on which the lower Courts could have come to that conclusion. As already remarked Ex. M is a muchilika purporting to have been executed by defendant 1 in favour of plaintiff's vendor. He being illiterate and unable to sign his name the writer, Nanjundayyan has written in the document "mark of Chellappa Goundan"; the document also bears the signatures of the attesting witnesses, each of whom signed his name with the addition of the words "I know." The writer also has signed the document expressly stating that he was the writer of the same. If defendant 1 has written his name by way of signature, in the document, then it would have been open to the Courts to compare other signatures of his (admitted or proved), with the signature in the disputed document; but defendant 1 being a marksman has not written his name in Ex. M.

No doubt "signature" generally includes "marking" in cases where the person concerned is unable to write his name; but how to prove execution by a marksman when he denies the same? Could it be done only by the evidence of the attesting witnesses or strangers who are able to say that they were present and saw the executant put his mark, or who speak to the admissions made by the executant about his having executed the same. The document in question is not one which is required by law to be attested, though as a matter of fact three witnesses have attested the document as witnesses (two as witnesses, and the third as writer, and possibly also as a witness, as stated by the lower appellate Court). Supposing the witnesses are all dead, or have proved hostile, or are not available, and the Court is satisfied on independent evidence before it that the writing of the document is that of the writer and that the signatures on the document are the signatures of the attesting witnesses, is it open to the Court in these circumstances to presume that the docu-

ment was properly executed, though the executant denies execution and denies having put his mark, when there is no direct evidence of any person examined in the case who is able to swear that the executant put his mark to the document. S. 90, Evidence Act, does not apply to the present case, because the document was not 30 years old at the time it was sought to be put in in 1921. There is no question about the identity of the alleged executant of Ex. M with defendant 1.

Section 67, Evidence Act, is to the following effect :

"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature of the handwriting or of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

Under S. 3

"a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Under S. 5

"evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."

Under S. 114

"the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case."

In these circumstances it was argued for the plaintiff that Ex. M was properly held by the lower Courts to be proved. My attention was drawn to the decision of the Bombay High Court in the case reported in *Abdulla Paru* v. *Gani Bai* (1), where Farran, J., in a case where the alleged executant of a deed of conveyance (who was a marksman) denying ever having executed the document or having put the mark on it, and all the attesting witnesses were dead, but a witness was called who knew the handwriting of one of the attesting witnesses and who swore that the signature of that witness to the attestation clause of the deed was genuine, held that the deed was admissible in evidence, and that its execution by the alleged executant was sufficiently proved. His Lordship remarked at p. 691 :

"Section 67, Evidence Act, enacts that if a document is alleged to be signed . . . . by any person, the signature must be proved to be his handwriting. This proof may, of course, be by any of the recognized modes of proof, and amongst others by statements admissible under S. 32. The statement of the deed-writer that the mark . . was Gannibai's is, I think, admissible under S. 32, Cl. (2); see Taylor on Evidence, S. 1658."

The learned Judge relied on the case of *Whitelock* v. *Musgrove* (2). In that case it was held that :

"In an action upon an instrument the subscribing witness to which is dead or resides abroad it is necessary besides proving the handwriting of the subscribing witness, to give some evidence of the identity of the party who appears to have executed the instrument."

It appears that the promissory note in that case appeared on the face of it to be signed with "the mark of Francis Musgrove." The handwriting of the attesting witness was proved ; but the witness who proved the handwriting of the attesting witness, and his residence in America said that he knew nothing of Francis Musgrove or of the mark :

"It was stated that in Phillips's Treatise on the Law of Evidence, that proof of handwriting of the attesting witness is in all classes sufficient."

But the difficulty was felt where some evidence of the identity of the party sued whose name appears in the document should not be given. The Court held that it should be so. (I must here remark that there is no question about the identity of the defendant in the present case). The argument of counsel before the Court in *Whitelock's* case (2) was this :

"Proof of the handwriting of the subscribing witness is, in all cases where the absence of the subscribing witness is accounted for, sufficient prima facie evidence to charge a defendant. The practice has been nearly uniform, and it is founded on the rule, that, on proof of the handwriting of the subscribing witness in such case, everything must be presumed to have been rightly done, and a fraud must not be imputed without some evidence of it, which should come from the other side (Bayley, B, interrupted. We do presume that everything was done rightly. We presume that the note was signed by a person of the name of Francis Musgrove ; but how does that appear to be the defendant ?)"

The only doubt entertained in that case was whether any and what evidence should be let in about the iden-

(1) [1887] 11 Bom. 690.

(2) 2 Cr. & M. 511=149 E. R. 502.

tity of the defendant. All the members of the Court were agreed that in cases where the attesting witnesses were dead or were not available, proof of the handwriting of the attesting witnesses was enough from which the High Court may come to the conclusion that the defendant executed the document. In *Mitchell* v. *Johnson Lord* (3) Tenterden observed:

"If the objection were to prevail, it would often be impossible for the obligee of a bond to recover, where the subscribing witness was dead and the obligor a marksman."

On proof of identity of the defendant with the person whose name appeared in the document as the executant the Court held that the plaintiff was entitled to recover against the defendant holding that the execution of the document was duly proved. As remarked by Mr. Starkie in his Law of Evidence, 4th Edn. p. 519:

"The signature of the attesting witness, when proved, is evidence of everything upon the face of the instrument, since it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place."

In the present case the attesting witnesses have signed "as witnesses." Each of them also specifically noted in Ex. M "I know" which is the usual vernacular expression corresponding to to the English expression:

"executed and signed before me, and in my presence."

The writer also has written in the document:

"This is the mark of Challeppa Goundan, executant of the muchilika."

The writer also subscribed himself as the writer. According to the decisions mentioned above it would seem it is open to the Courts in such circumstances to take the document as having been executed by the executant, the marksman, though he denied execution of the same, and that the above afforded legal evidence from which it is open to the Court to hold that execution was proved. It does not of course follow that in any particular case the Court was bound to believe the evidence or circumstances appearing before it in that particular case. The question is one for the Court to decide whether it is satisfied or not with the evidence. It is open to the Court to decline to act upon the evidence and to hold that execution has not been proved to its satisfaction in particular cases. It is a question of fact for the Court to decide in each case taking into consideration all the circumstances that appear in the case. What I am now concerned with is not the question whether the Court was right in believing and acting on the evidence and circumstances in the case; but the question before me is whether the above are in law insufficient to enable the Court to come to that conclusion. If no Court could under any circumstances come to such a conclusion on such materials then I should certainly interfere with their decision in second appeal. The question is then reduced to this: Was there legal evidence before the lower Courts for their finding that Ex. M was executed by defendant 1?

The learned advocate for the appellant drew my attention to the case reported in *Gobardhan Das* v. *Hori Lal* (4). There a Bench of two learned Judges had to consider a similar question. A mortgage deed was on the face of it executed in 1889 by three illiterate mortgagors who affixed their marks, and was attested by more than two witnesses. At the time of the institution of a suit for sale thereon all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (1) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses. There were some other items of evidence also which it is not necessary to mention here. The Court held that having regard to S. 69 and S. 70, Evidence Act, the evidence was not sufficient to prove the mortgage in suit. At p. 367 the learned Judges observed:

"It is quite clear that in England it is recognized that there is a distinction between proof of the handwriting of a person and presumptive or other evidence that a document has been executed. The Indian law does not in a case of this kind appear to allow a party to rely on presumptive or other evidence of execution where he is unable to comply with the provisions of S. 69, either as regards the attestation of the attesting witnesses or as regards the signatures of the executants. In our opinion the evidence adduced by the plaintiff-respondents in the present case, to prove the signatures of the deed in suit, does

(3) 1 M. & M. 176.

(4) [1913] 35 All. 364=19 I. C. 121.

not comply with S. 69, and we must therefore, hold that the deed has not been proved. . . . . It appears to be a hard case, but the plaintiff respondent has himself to thank for the result. He deferred instituting the suit until all the attesting witnesses had died, knowing that the executants, who could only make marks, had made their marks on the deed. In any case he had considerable difficulty in prodhcing proper evidence of execution."

If the learned Judges were not satisfied with the evidence adduced before them, and were not prepared to accept the same as satisfying them in that particular case that the document was executed by the deceased, ... the alleged executants, . . . then of course, no objection could possibly be taken to their observations. They had to be satisfied with the evidence, and no other (except the appellate authority) had any right to make any observation regarding their appreciation of the evidence before them. If however the learned Judges were of opinion that such evidence was in law insufficient to prove execution by the alleged executants and that there is difference between English law and Indian law on this point, then speaking with the utmost respect I am unable to agree with the learned Judges. The decision in *Abdulla Paru* v. *Gani Bai* (1), was not brought to their Lordship's notice, nor other arguments in support of the opposite view. With reference to the observations of their Lordships that the plaintiff was guilty of delay in having waited till all the attesting witnesses were dead, it may also happen that in spite of all due deligence, the plaintiff may find the attestors to be dead though he filed the suit at the earliest possible opportunity, Further the question of the document might arise under circumstances when no laches or negligence could be atributed to the party who wants to rely on the document. In such cases the view taken by the learned Judges of the Allahabad High Court would apparently work hardship in their view of the law. The question to be considered, then, is whether the Indian law is really as was stated by the learned Judges. As observed by Carnduff J. in the case reported in *Barindra Kumar Ghose* v. *The Emperor* (5), see pp. 1209 and 1210 (of 14 *C. W N.*) under the Indian Evidence Act, handwriting may, in addition to the usual methods, be also proved by circumstantial evidence, and that S. 67 does not prescribe any particular kind of proof. I do not understand that the other two learned Judges, Jenkins, C. J. and Harrington, J. took a different view on this question of law. There was difference of opinion as to the weight to be attached to the evidence and the cricumstances appearing in the case, . . . the majority of the Court holding that the proof tendered in that case was not sufficient, while Carnduff, J. held that the proof was sufficient. But the question before me is not about the appreciation of evidence and consideration of the question whether the evidence is sufficient or not. I may also refer to the remarks of Markby, J. in *Neel Kanto Pandit* v. *Juggobundoo Ghose* (6), where the learned Judge observed.

"Now it is contended that S. 67, Evidence Act renders it necessary that direct evidence of the handwriting of the person who is alleged to have executed the deed must be given by some person who saw the signature affixed. But it is not so expressly stated in the section and it does not appear to me that that was the intention of the legislature. It seems to me that that section merely states with reference to deeds, what is the universal rule in all cases, that the person who makes an allegation must prove it. It lays down no new rule whatever as to the kind of proof which must be given. In that respect the rule is precisely the same as it stood before. It leaves it as before entirely to the discretion of the presiding Judge of fact to determine what satisfies him that the document is a genuine one : see also *Abdool Ali* v. *Abdoor Rahiman* (7)."

In an early English case decided on 27th November 1798, *Adam* v. *Keer* (8), in a suit on a bond when one of the attesting witnesses was dead and the other was beyond the process of the Court it was held that it was enough to prove the handwriting of the witnesses that was dead to enable the plaintiff to obtain a decree on the bond. Buller, J , observed :

"In this case one of the attesting witnesses was dead and the other was beyond the reach of the process of the Court ; the best evidence therefore which could be obtained was given (the handwriting of the attestor who was dead was given), the handwriting of the obligor need not be proved ; that of the attesting witness, when proved, is evidence of everything on the face of the paper which imports to be sealed by the party."

(5) [1910] 37 Cal. 467=7 I. C. 359=11 Cr. L. J. 453.

(6) 12 Beng. L. R. Ap. 18.
(7) 21 W.R. 429.
(8) [1798] 1 Bos. & Pull. 360=120 E.R. 952.

In Taylor on Evidence, 11th Edn. Vol. 2, S. 1856, p. 1237 it is stated :

"If the instrument be necessarily attested by more than one witness the absence of them all must be duly accounted for in order to let in secondary evidence of the execution ; but when such evidence is rendered admissible, proof of the handwriting of any one of the witnesses will, in general, be deemed sufficient, provided it be accompanied by some evidence of the identity of the party sued, with the person who appears to have executed the instrument. Proof of the signature of the obligor is an obvious, though by no means the only, mode of establishing his identity."

In the present case, as already observed, there is no question about the identity of the person described in Ex. M as the executant. The only question is whether proof of the signatures of the attestors will in law be enough to prove execution against defendant 1. While proof of the signature of the obligor would be obvious and most convincing mode of establishing his identity yet the same is not absolutely necessary in the sense that absence of such proof of the same would entail dismissal of the suit.

In Thayer on Evidence, (American publication) 2nd Edn pp. 748 and 764, there are statements which support this view. It is remarked at p. 764 :

"We perceive no reason, assuming that a proper case for any secondary evidence was shown, why the proof of the handwriting of one witness to the deed was not quite sufficient to authorize reading the deed to the jury."

In Wigmore on Evidence (American Publication) there is an interesting discussion on the question whether in addition to the attestor's signatures being proved, the maker's signature or identity should also be proved. Arguments in support of both the contentions are set out, with available authorities in support of the same, at pp. 1872 and 1873, S. 1513, Vol. 2, Wigmore on Evidence. The strongest argument in favour of the position that the maker's signature also must be otherwise proved is this : a forged note to which a witness puts his name can be proved to be a genuine note simply because the witness speaks truth to his having put his signature thereto, and thus a paper false in itself might be established by proving nothing but the truth in a Court of justice. Answers to such and similar arguments are also discussed in that paragraph. The learned author concludes the discussion thus:

"the preferable rule is to allow the attestor's signature to suffice, in the absence of special circumstances, which might justify the trial Court in its discretion in exacting something more."

All the then available learning on the point is collected by the learned author. He quotes cases where it was held :

"It is not usual in such cases to prove the executant's handwriting, but where it can be done, it is safest and best to prove it."

It was said in another case that

"the witness's signature when it is all that can be had is an equivalent of the oath of the witness; and being prima facie evidence of execution, it is not indispensable that it be followed by evidence of the handwriting of the grantor or the obligor; and that the signature of the witness with evidence of identity of the marker's name was sufficient."

Thus the better view in America would seem to be that when proof of the signatures of the attestors is given, it seems to be taken that they attested in the usual course of business and after execution by the executant, and after the identity of the executant is established it is open to the Courts, if they think fit to do so in the circumstances, to hold the document to be proved to have been executed by the executant. There is no rule of law which prevents them from doing so, if from the circumstances of the case, the Courts are inclined to do so. Whether in any particular case the Courts should do so or not would depend upon the nature of the circumstances in each case. While there is the possibility of the attestors colluding together and putting their signatures to a forged document, especially where the executant is a marksman and thus committing fraud on Courts, there is the other possibility of a genuine document executed by a marksman and properly attested being found to be impossible to be proved when the attestors are dead. To avoid such extreme cases on both sides, Courts have to be guided by all the circumstances of the particular cases before them. All that I am now concerned to point out is, that there appears to be no rule of law which prevents the Courts from holding the execution of a document to be proved when the signatures of the attesting witnesses had been proved to their satisfaction, having regard to all the circumstances of the case.

In *Joshua Hands* v. *Herbert James* (9) it is stated:

(9) 2 Comyns. 531.

"in case the witness be dead, the proof must be circumstantial, and here are circumstances: (1) three witnesses have set their names, and it must be intended that they did it regularly; (2) one witness was an attorney of good character, and may be presumed to understand what ought to be done, rather than the contrary . . . . It being a matter of fact, was proper to be left to them (jury)."

In *Harris* v. *Knight* (10), Law Reports (by two Judges to one, a profitable case for study) Lopes L. J., said:

"The inference to be drawn in cases of this kind depends upon a number of circumstances peculiar to the cases in which they arise, and the presumption *omina rite esse acta* applies with more or less force according to the circumstances of each case: see p. 184 of the Report."

The English cases support the view taken by the lower Courts in the present case. As I found in the American text books a full discussion of the question raised before me and as they furnished answers to the arguments raised before me, I thought it convenient to refer to the same. I am, therefore, of opinion that the lower Courts were entitled to hold in this case, if they so chose, that Ex. M was executed by the defendant.

If Ex. M be proved, then the finding of the lower Courts on the question of kudivaram rights is not open to be attacked in second appeal. In para. 2 of the lower appellate Court's judgment, it remarked:

"obviously, if the muchilika (Ex. M) is a genuine document, the appellants are out of Court."

Again in para. 5 it is stated that

"this finding (that Ex. M is a genuine document) by itself is sufficient to dispose of the appeal; but I think it desirable to deal briefly with the appellants' positive assertion that they were in possession of the land as occupancy ryots."

Then various circumstances are mentioned. Ex. M is also referred to, and the lower appellate Court wound up the discussion as follows:

"Agreeing, therefore, with the lower Court, I hold that the appellants have never acquired the status of occupancy ryots."

Both the lower Courts have mentioned various circumstances from which it was open to them to arrive at that finding. I am not in a position to interfere with the same in second appeal.

The last contention raised by the learned advocate for the appellant was as regards the amount of subsequent mesne profits. This question was not specifically raised in the lower appellate Court. Prima facie the amount of mesne profits for the years prior to the filing of the plaint would represent the amount of mesne profits for the years after the suit also, in the absence of any special circumstances. No such special circumstances having been proved, I cannot interfere with the lower Court's decree in this respect either. The result is that the contentions raised by the learned advocate for the appellant fail and the second appeal is dismissed with costs of the respondents (one set).

P.R.S./S.N. *Appeal dismissed.*

(10) [1890] 15 P. D. 170=62 L. T. 507.

A. I. R. 1930 Madras 776

COUTTS-TROTTER, C. J. AND MADHAVAN NAIR, J.

Lakshmiah—Appellant,

v.

Official Assignee of Madras—Respondent.

Original Suit Appeal No. 121 of 1926, Decided on 17th April 1928, from judgment of Beasley, J., D/- 22nd September, 1926.

(a) Hindu Law—Joint family—Whether "trade by manager" belongs to joint family should be determined on particular evidence.

The question whether a particular trade carried on by a manager of joint family is joint family trade or not is essentially one which should be decided mainly on evidence in each case: 51 *I.C.* 597; *A. I. R.* 1922 *P. C.* 237 and *A. I. R.* 1922 *P. C.* 397, *Dist.*; 36 *I. C.* 787, *Ref.* [P 777 C 2]

(b) Hindu Law—Joint family—Trade by manager carried on with assistance of only adult member who when he became manager carried it on—No evidence that business separate—Trade held to be joint family trade.

Where the manager of a Hindu joint family started a groundnut business with the family funds and carried it on with the assistance and concurrence of the only other adult member of the joint family who when he became the manager carried on the business and mortgaged the family properties for debts incurred in that business.

Held: that in the absence of evidence that the business was their separate business the mortgage would be binding on the interest of the other coparceners, including minor members, in the joint family property: 51 *I.C.* 597; *A. I. R.* 1922 *P.C.* 237 and *A. I. R.* 1922 *P.C.* 397, *Dist.* [P 778 C 2]

K. S. Krishnaswami Iyer and *P. Sundararaja Ayyar*—for Appellant.

S. Doraiswami Iyer and *V. Varadaraja Mudaliar*—for Respondent.

Madhavan Nair, J.—The question for decision in this appeal is whether

the mortgage executed by one Narayanaswami in favour of one Chinnarappa Reddi is binding on the appellant so as to affect his interest in the property of the joint family of which he is a member. Narayanaswami, the mortgagor, was adjudicated as an insolvent in December 1920 for debts incurred inter alia in a groundnut business. He had two brothers: Subbiah who died in 1909, and Virupakshappa who died in 1917. The father of these three brothers was Kamisetti Subbiah who died in 1906. Subbiah left a son called Subbiah, and Virupakshappa left a son called Lakshmiah. Radhakrishna is the son of the insolvent Narayanaswami. The following table shows the relationship of the members of the insolvent's family which is an undivided one.

Kamisetti Subbiah

Subbiah (d) 1909.	Virupakshappa (d. 1917)	Narayanaswami mortgaged in 1920.
Subbiah.	Lakshmiah.	Radhakrishna.

Subbiah, the son of the insolvent's deceased brother Subbiah, is now a major; Lakshmiah and Radakrishna are both minors. The ancestor of the family, Kamisetti Subbiah, carried on money-lending business. Virupakshappa, when he became the manager, started the groundnut trade by becoming a partner with another in such a trade about four years before his death, namely in 1913. Narayanaswami continued that trade when he became the manager of the family on his brother's death, and in the course of carrying on this business executed the mortgage which has become the subject of these proceedings. After the adjudication of Narayanaswami as an insolvent the Official Assignee filed an application for a declaration that the mortgage debt incurred by Narayanaswami is binding upon the interests of Subbiah, Lakshmiah and Radhakrishna, all of whom opposed the application. The evidence was taken on commission. As the learned Judge points out he had not the advantage of seeing the witnesses, nor had he the opportunity of examining the account books referred to in the evidence of the witnesses. On a consideration of the evidence he held that the mortgage executed by Narayanaswami is binding upon Lakshmiah and Radhakrishna but not upon Subbiah. This appeal has been preferred by Lakshmiah.

It is admitted that the trade in connexion with which this debt was incurred was not an ancestral trade. The argument of the Official Assignee is that, though the trade is not an ancestral one, it was a joint family business carried on in the interests of the joint family and therefore it is binding on the interests of the appellant though he is a minor. The appellant argues contra and says that in the circumstances of the case the trade cannot be considered to be a joint family trade, that it was started by his father in his individual capacity and continued in the same capacity by his uncle Narayanaswami.

Various decisions were brought to our notice in support of the contentions urged by the respective sides. But I think the question is essentially one which should be decided mainly on the evidence in each case. In *Palaniappa Chetty* v. *The Official Assignee of Madras* (1), some indication is given as to the principles which should govern the consideration of the evidence relating to the question whether a business carried on by the head of a Hindu family, the business being started by himself for the first time, is the business of the joint family. Sir Abdur Rahim, Offg. Chief Justice, stated:

> "In order that a presumption may arise, it must be shown that the other members by participating in the conduct of the business or its profits or by a long course of acquiescence treated it as a business in which all the coparceners were interested. That is to say there must be evidence forthcoming to show that such members of the family as were competent to judge for themselves adopted the business as a joint concern of the family. If such conduct is shown on the part of the adult coparceners who may ordinarily be assumed to safeguard the family affairs in which they are all equally interested, that is sufficient to constitute the trade a joint family business so that the infant members would also become sharers in that concern. In the case of a family whose ordinary occupation is trade much less proof than in other cases will no doubt be required of the adoption of a business as a joint family business by the members of the family. Similarly the use of family funds for the purpose of business with the knowledge and concurrence of the other adult members would ordinarily be strong evidence that the business was joint."

In this case the business was started by Virupakshappa four years before his

(1) [1916] 36 I.C. 787.

death when he was admittedly the manager of the undivided family. It is not denied that it was started with joint family funds. The only adult member of the family at that time was Narayanaswami. The business was carried on at Kandukur. How it was being managed is thus spoken to by Ghulam Basappa, witness 2 for the applicant :

"There was a groundnut decorticating machine at Kandukur in 1917. It belonged to Pamidi Kasamsetti Virupakshappa. For the machine he used to buy groundnut . . . . . The insolvent Narayanaswami, brother of Virupakshappa, managed the business at Kandukur. They were undivided. Narayanaswami used to buy groundnut from me for the said machine. For the groundnut bought from me Narayanaswami gave me the pattis I am now producing . . . The figure Rs. 1,830-1-0 at the bottom of Ex. K-1 represents the amount due to me for the groundnut purchased from me by Narayanawami for the machine business."

The evidence with regard to how the business was carried on is very scanty ; and nothing in addition to the above extract on this point has been brought to our notice. It is clear from the evidence that the business was carried on by Virupakshappa down to the time of his death, and during that time Narayanaswami, his brother, managed it ; he used to buy groundnuts for the machine and used to give pattis for the purchase which he made. He apparently never offered any objections to the carrying on of this business by his brother with the family funds. There is no evidence to show that Narayanaswami was working under Virupakshappa as a paid agent. That he participated in the business and was willing to treat it as a joint family business is I think a proper inference that can be drawn from the evidence ; and, when he himself became the head of the family, in his turn, as the seniormost member he carried on the business as a matter of course and incurred this mortgage debt in connexion with it. As the learned Judge says ;

"He does not appear to have come into the business by means of any arrangement entered into in the lifetime of Virupakshappa or in any other way than in his capacity as the senior member of the family."

No doubt the business was not an ancestral business, but it was started by the then manager with the joint family funds, and it was carried on during his life time with the assistance and concurrence of the only adult member who: (1) if he was not agreeable to treating the business as a joint family business could have offered opposition but did not do so; and (2) who, when he became the manager in his own right as the head of the family, carried it on himself. No evidence has been brought to our notice to show that this groundnut trade was exclusively the business either of Virupakshappa or of Narayanaswami. In these circumstances I cannot say that the learned Judge's conclusion that the debt incurred in the course of the business by Narayanaswami is binding upon the appellant and Radhakrishna is not justified by the evidence in the case. It is true that his reasoning would make the debt equally binding on Subbiah though he holds that it is not binding on him. But this I think should not be used as an argument against the binding character of the debt so far as the appellant's interest in the family property is concerned.

Before I conclude I shall refer to two decisions, *Krishnadhan Banerji* v. *Sanyasi Charan Mandal* (2) confirmed by the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (3) and *Sadasiva Mudaliar* v. *Hajee Fakeer Mahomed Sait* (4) on which strong reliance was placed by the appellant in support of his argument that a manager of a joint Hindu family is not entitled to incur debts for carrying on a business recently started by his prodecessor so as to affect a minor's interests in the joint family property. Both these decisions in my view are inapplicable to the present case. The decision in *Krishnadhan Banerji* v. *Sanyasi Charan Mandal* (2) approved by the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (3), dealt with the powers of a karta of a joint Hindu family governed by the Dayabhaga law who was appointed a guardian of a minor under Act 8 of 1890. In one portion of the judgment the learned Judges of the High Court said :

"Whatever the powers of a karta may be the powers of a guardian are more limited."

The circumstances of the case in *Sadasiva Mudaliar* v. *Hajee Fakeer Mahomed Sait* (4) are also very different from those in the present case. In that case,

(2) [1919] 51 I. C. 597.
(3) A. I. R. 1922 P. C. 237=67 I. C. 124=49 I. A. 108=49 Cal. 560 (P.C.).
(4) A. I. R. 1922 P. C. 397=72 I. C. 48.

as will appear from the head-note, two members of a joint Hindu family consisting of three adults and a minor executed a letter to the respondent's firm and borrowed money for the purpose of starting and carrying on a brewery business. The other adult member acted as unpaid agent of the business at Madras and otherwise accepted the benefit of the contract. The minor was not made a party to the suit and no decree was asked as against his interests in the joint family property. No doubt the learned Judges of the Privy Council stated in the course of their judgment : "that the minor brother when he comes of age, can repudiate the contract of 5th January 1916 so far as he and his interest in the joint family property are concerned and that his interests in the joint family property cannot be affected by this suit."

From the circumstances of the case it is clear beyond doubt that the minor's interests in the joint family property could not in any way be affected by the debt created by the adult members in that case. One of the main questions argued was whether the third adult member who accepted the benefits under the contract was bound by it. One feature which distinguishes this case from the one before us is that the trade in this case, namely *Sadasiva Mudaliar* v. *Haji Fakeer Mahomed Sait* (4), was started on borrowed capital. The suit debt was incurred for starting the business and not for carrying it on after it was successfully started and carried on for some time by two successive kartas of the joint family as in the case before us. I do not think that the observation of the Privy Council is to be given effect to irrespective of the special circumstances of the particular case one is dealing with.

On a consideration of the evidence I am satisfied that the learned Judge's conclusion as regards the liability of the appellant's interest in the joint family property is right, and the appeal should be dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

A. I. R. 1930 Madras 779

WALLACE AND ANANTAKRISHNA AYYAR, JJ.

In the matter of G. A. Kuppuswami Nayagar—Petitioner.

Original Petn. No. 231 of 1929, Decided on 4th November 1929.

(a) Letters Patent (Madras), Cls. 11 to 21—Distinction between ordinary original and original civil jurisdiction of the High Court.

There is a distinction between the original jurisdiction of the High Court and the ordinary civil jurisdiction of the High Court. All applications to the High Court are either civil or criminal. They are original civil when matters come for the first time to the High Court, and they are appellate civil when they come in the form of appeals. The granting of probates or succession certificates will come within the original civil jurisdiction, but it would not come under ordinary original civil jurisdiction, which, by the Letters Patent, seems to be confined to suits and matters under Cls. 12 to 21, which refer to the exercise by the High Court of its ordinary original civil jurisdiction. [P 780 C 2]

(b) General Clauses Act, S. 3, Cl. 15 — High Court exercising jurisdiction other than under Cls. 11 to 18, Letters Patent (Madras), would fall under the definition of District Judge—Succession Act S. 264.

For the purpose of determining the meaning the words "ordinary or extraordinary original civil jurisdiction" in S. 3, Cl. 15, General Clauses Act, all that is excluded is the High Court acting under Cls. 11 to 18, Letters Patent, and that the High Court exercising any other original jurisdiction would fall within the definition of District Judge.

Hence the High Court is a "District Court" when it does not exercise its ordinary or extraordinary civil jurisdiction conferred by Cls. 11 to 18, Letters Patent: 13 *Bom.* 520, (*P. C.*), *Foll.* [P 781 C 1 & 2, P 782 C 1]

M. A. Tirunarayanachari, *Krishnamachari* and *M. A. Srinivasan*—for Petitioner.

A. Krishnaswami Ayyar — for the Crown.

Order of Reference.

Kumaraswami Sastri, J.—This is an application for the grant of a succession certificate in respect of certain shares standing in the name of the deceased and the question is whether a succession certificate can be granted by the High Court under the provisions of the Succession Act (39 of 1925).

The Succession Certificate Act (7 of 1889) has been repealed and its provisions have been incorporated in Part 10, Succession Act. In the Succession Certificate Act, "District Court" was defined as meaning a Court presided over by a District Judge, and as the provisions of that Act referred to a District Court, no applications were made to the High Court for grant of succession certificates as that Act in terms gave power only to District Courts to grant succession certificates.

There is no definition of "District Court" in the Succession Act, and we have to fall back on the definition of "District Judge" in the General Clauses Act (10 of 1897). S. 3, sub-Cl. 15, General Clauses Act, defines "District Judge" as the Judge of a principal civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.

Part 9, Succession Act, deals with the grant of probate and letters of administration, and Chap. 4, commencing with S. 264 deals with the practice in granting and revoking probates and letters of administration, and Ss. 264 to 302, in Chap. 4 refer only to the District Judge as the Judge who is to grant probate or letters of administration, and there is no power given to the High Court as such in this chapter. S. 264 refers to the District Judge as having jurisdiction in granting and revoking Probates and letters of administration and the other sections also refer to District Judge.

Section 300 gives concurrent jurisdiction to the High Court. But concurrent jurisdiction can only give the High Court power in such cases where the District Judge would have had the power. It does not confer any independent jurisdiction on the High Court. S. 300 says that:

"the High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge."

In dealing therefore with the definition of District Judge I think the same interpretation should be given to the words "District Judge," in Chap. 4, which refers to the grant of Probates and letters of administration, as in Part 10 which gives the District Judge jurisdiction to grant succession certificates. It seems to me that if the definition of "District Judge" excludes the High Court altogether, the High Court cannot grant probate or letters of administration under the Succession Act.

Clause 34, Letters Patent which gives the High Court jurisdiction in testamentary and intestate matters runs as follows:

(His Lordship quoted the clause).

The definition of "District Judge" as given in the General Clauses Act means a Judge of a principal civil Court of original jurisdiction, and this would apply to the High Court but with a proviso, and the proviso is that it shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.

Ordinary and extraordinary original civil jurisdiction of the High Court is dealt with in Cls. 11 and 21, Letters Patent. The heading is "Civil Jurisdiction of the High Court," and Cls. 11 to 21 deal with ordinary original civil jurisdiction, extraordinary original civil jurisdiction and insolvency jurisdiction. Cls. 22 to 30 deal with criminal jurisdiction. Cl. 31 deals with the exercise of jurisdiction outside the ordinary place where the High Court sits. Clauses 32 and 33 deal with Admiralty and Vice-Admiralty jurisdiction. Section 34 deals with testamentary and intestate jurisdiction.

It is argued by Mr. Tirunarayana Chariar that, under the Letters Patent, the High Court in the exercise of ordinary original civil jurisdiction only means the High Court exercising jurisdiction conferred by Cls. 11 to 21, Letters Patent, and cannot refer to any other civil jurisdiction (for example, granting probate) and that except when the High Court is exercising ordinary original jurisdiction conferred by Cls. 11 to 21, when the word "District Judge" is used, it must be taken to include the High Court when it exercises original civil jurisdiction in matters such as granting probate, etc.

I think there is a distinction between the original jurisdiction of the High Court and the ordinary original civil jurisdiction of the High Court. All applications to the High Court are either civil or criminal. They are original civil when matters come for the first time to the High Court, and they are appellate civil when they come in the form of appeals. The granting of probates or succession certificates will come within the original civil jurisdiction, but it would not come under ordinary original civil jurisdiction, which, by the Letters Patent, seems to be confined to suits and matters under Cls. 12 to 21, which refer to the exercise by the High Court of its ordinary original civil jurisdiction.

In *In the matter of Candas Narrondas Navivahu* v. *C. A. Turner* (1) the Privy Council considered the various jurisdictions conferred on the High Court by the Letters Patent and held that the insolvency jurisdiction was part of the original civil jurisdiction having regard to the grouping of the clauses in the Letters Patent. Their Lordships at p. 532 refer to Cls. 11 to 18 as a group of clauses headed "Civil Jurisdiction of the High Court" and they deal with this as one group.

Their Lordships observed:

"Sections 11 to 18 are a group of clauses headed Civil Jurisdiction of the High Court."

Sections 11 and 12 describe the local limits of the ordinary original civil jurisdiction which is said to extend to all kinds of suits within those limits except small cause suits. Section 13 gives to the High Court power to remove, and to try as a Court of extraordinary original jurisdiction any suits falling within the jurisdiction of any Court subject to its superintendence, when it shall think proper, either on agreement of the parties, or for the purposes of justice. Sections 15 and 16 confer appellate jurisdiction. Section 17 confers authority over infants, idiots and lunatics. Section 18 ordains that the Court for relief of insolvent debtors shall be held before one of the Judges of the High Court, and that the High Court and any such Judge shall have such powers as are constituted by the laws relating to insolvent debtors in India.

I think this case supports the view that for the purpose of determining the meaning of the words "ordinary or extraordinary original civil jurisdiction" in S. 3, Cl. 15, General Clauses Act, all that is excluded is the High Court acting under Cls. 11 and 18, Letters Patent, and that the High Court exercising any other original jurisdiction would fall within the definition of District Judge.

There is no reason why the High Court cannot grant succession certificates in cases where it could be granted outside Madras. Part 10 of the Succession Act, gives the limitation under which it could be granted. It cannot be granted where the law requires probate or letters of administration to be produced, and there is no question of any evasion of stamp duty. There is no reason why there should be a facility for persons outside Madras in respect of collections of small debts and securities, such facility being denied to those in Madras.

The Succession Act codifies the whole law on the subject, and repeals the Succession Certificate Act, and the omission in the Succession Act of the definition of "District Court" given in the Succession Certificate Act is I think a matter which deserves notice in construing the definition of "District Judge." As I said before the District Court is the Court which is referred to in the granting of probates and letters of administration and it cannot be contended that the words "District Court" in those sections exclude the High Court.

I may state that in the Probate and Administration Act, 1881, "District Judge" is defined as meaning the Judge of a principal civil Court of original jurisdiction which obviously took in the High Court. But the Probate and Administration Act has been repealed by the Succession Act 1925 and the definition is omitted. So far as the succession certificate is concerned it partakes of the nature of a limited grant. Various forms of limited grants have fallen under the jurisdiction of Courts dealing with intestate matters in England (Tristram and Ccote, p. 224), and I can see no difficulty in the High Court granting succession certificates under its general jurisdiction as regards matters falling within its intestate jurisdiction, unless wherever compelled by the definition of the words "District Judge" in the General Clauses Act to hold that the High Court has no jurisdiction.

For the reasons given by me I am of opinion that, having regard to the Succession Act 1925, which has repealed both the Probate and Administration Act and the Succession Certificate Act, and incorporated the provisions of these Acts in the body of the Succession Act and has omitted to define the words "District Judge," leaving us to fall back on the definition of "District Judge" in the General Clauses Act, the High Court is a "District Court" when it does not

(1) [1889] 13 Bom. 520=16 I. A. 156 (P. C.).

exercise its ordinary or extraordinary civil jurisdictiou conferred by Cls. 11 to 18, Letters Patent.

As the matter is one of considerable importance, and is opposed by the Collector, and as several applications are likely to be filed for the grant of succession certificates, I think it is desirable that the question should be settled by a Bench.

Judgment.—Having regard to the amendment of the Act, we consider that this petition is now maintainable in this Court and order the case to be posted before the learned Judge in Chambers.

P.R.S./K.N. *Order accordingly.*

A. I. R. 1930 Madras 782

RAMESAM, J.

S. P. K. M. Muruga Konar and Co.—Petitioner.

v.

Official Receiver, Madura and *others*—Respondents.

Civil Revn. Petn. No. 1737 of 1929, Decided on 18th March 1930, from order of Dist. Judge, Madura, D/-10th September 1929.

(a) Provincial Insolvency Act, S. 53 — Adjudication dates back to the date of presentation of petition in proper Court.

The adjudication dates back to the date of petition which means the date of presentation of petition in the proper Court and not in the wrong Court : (1917) *M.W.N.* 103, *Appr., Revell* v. *Bhae*, (1874) 8 *Common Pleas* 533 ; *Ransford* v. *Maule*, 8 *Common Pleas* 672 and *other English cases Distinguished* : *A.I.R.* 1923 *Lah.* 425, *not Appl.* [P 783 C 1]

(b) Provincial Insolvency Act, S. 4 — Scope.

The powers given under S. 4 are discretionary. It is a very wide section and unless the Courts feel compelled by the facts of the case to embark upon enquiry they are not bound to do so ; *A. I. R.* 1929 *All.* 105, *Ref.* [P 784 C 2]

K. Rajah Iyer and *S. Nataraja Nadar*—for Petitioner.

Advocate-General and *T. S. Krishnamurthi Iyer*—for Respondents.

Judgment.—The facts of this revision petition are as follows : Two persons (father and son) applied to the District Court of Ramnad to be adjudicated insolvents. The petition was presented on 15th June 1927. It was transferred to the Sub-Court of Ramnad on 17th June 1927. It was posted for enquiry on 8th October 1927. On that day objections seem to have been taken by some creditors that that Court had no jurisdiction. Then the Court passed the following order :

"It is said to-day that this Court has no jurisdiction. Petitioners to answer by 27th January 1927."

On the latter date the petitioners' vakil accepted the contention that that Court had no jurisdiction and requested the Court to return the petition for presentation to the proper Court. The Court accordingly passed an order returning the petition. The petition was immediately presented on the same day to the District Court of Madura. The original petition contained allegations that the petitioners lived at Palayampatti within the jurisdiction of the Ramnad District Court. It must be taken that when objection was taken to the jurisdiction of the Court this fact was denied. It must also be taken that when the petitioners accepted the contention and took back the petition they conceded that they were not living at Palayampatti on the date of the petition. Accordingly they corrected the petition making an allegation that they were then residing in Madura town within the jurisdiction of that Court. This means that the petitioners did not care to take upon themselves the burden of proving that they lived at Palayampatti on 15th June 1927 when the petition was first presented to the Ramnad Court. In the Sub-Court of Madura, the Official Receiver made an application questioning the genuineness of a mortgage bond executed on 12th October 1925 in favour of the respondents therein and inviting a decision on that matter. If the date of presentation to the Madura Court is taken as the date of presentation of the insolvency petition then the date of mortgage is more than two years before the date of filing the petition. On this ground both the lower Courts held that this is not a matter which could be considered under S. 53 Prov. Insol. Act. The petitioner also wanted the matter to be gone into under S. 4, Prov. Insol. Act, if not under S. 53. The Subordinate Judge refused to do so on grounds which are not very clear. On appeal the District Judge, while conceding that the matter may be enquired into under S. 4, Prov. Insol. Act, observed that the power was discretionary and he was of opinion that the Subordinate Judge was

right in referring the petitioner to a regular suit. This revision petition is filed against the order of the District Judge.

The first point argued by the learned advocate for the petitioner is that the date of presentation of the petition in the Ramnad Court must be considered to be the date of the petition. It has been held in *Mohammad Maraikkar* v. *The Official Receiver, Tinnevelly* (1), that the date of presentation for our present purposes must be the date of presentation in the proper Court and not in the wrong Court. The adjudication dates back to the date of presentation which means the date of presentation to the proper Court. Mr. Rajah Ayyar addressed to me lengthy arguments against this view. His arguments are practically to the effect that the decision must be considered erroneous. He referred to a number of English decisions showing in some cases that adjudication may be made by a Court which may turn out to be not a proper Court. The first is *Revell* v. *Blake* (2). That was a decision under the Bankruptcy Act, 1869. The provisions of that Act as to jurisdiction are somewhat peculiar. Under S. 59 of that Act if a person either resides or carries on business within the London Bankruptcy District "the Court" shall mean for the purpose of the Act, the Court of Bankruptcy in London ; but if he does not either reside or carry on business within the London Bankruptcy District, 'the Court' shall mean the county Court of the district within which he resides or carries on business. The effect of this provision is that if a person resides in a county but carries on business in London then the London Bankruptcy Court is the proper Court and not the county Court though he resides there. Similarly if a person resides in London, but carries on business in the county, then also the London Court is the proper Court. The jurisdiction of the London Court is excluded only when a person does not either reside in London or carry on business. The scheme of this Act is different from the scheme of our Act. In that case there was a petition stating that the debtor did not reside or carry on business within the London Bankruptcy District and it was presented in the county Court of the district in which the debtor resided. The debtor did not appear to oppose the petition with the result that the county Court made the adjudication. Later on, before the Court of Common Pleas, there was a question between the trustee in bankruptcy and a person who had taken out execution through the Sheriff by a writ of *fi fa.* It was then contended that the order of adjudication by the county Court was not proper as it appeared that the bankrupt was carrying on business in London. It was held that the adjudication was right. In this case on the facts of the petition the adjudication was perfectly proper. If, as a matter of fact, the facts on which it was based were incorrect any person interested might have taken an appeal. Nobody did so. The proceedings before the county Court were collateral proceedings. I do not see how this case helps the petitioner. In the same volume there is another case at p. 672, *Ransford* v. *Maule* (3). Here a petition was filed before the county Court of Peterborough. On account of some misrepresentation by the Registrar the petition was taken and filed on a later date, namely the 14th October, the original date being the 12th. Meanwhile the Sheriff took out a writ of *fi fa.* It was held that the first date was the correct date and that the petition was taken back only by the Registrar's mistake and that the petitioner never abandoned the idea of filing it in the original Court.

In the case before me, the facts are different. The petitioners practically admitted that they could not proceed in the Ramnad Court and presented it in the Madura Court. Then two other cases *Ex-parte May In re, Brightmore* (4) and *In re, French Ex-parte French* (5) are cited. Both these cases turned upon the construction of Ss. 95 and 97, Bankruptcy Act, 1883. Here again I observe that the scheme of the Act was

(1) [1917] 1 M. W. N. 103 = 36 I. C. 828=5 M. L. W. 123.
(2) [1874] 8 C. P. 533=42 L. J. C. P. 165=22 W. R. 96=29 L. T. 67.
(3) [1874] 8 C. P. 672=42 L. J. C. P. 231=21 W. R. 740.
(4) [1885] 14 Q. B. D. 87=1 Morrell 253=32 W. R. 598=51 L. T. 710.
(5) [1890] 24 Q. B. D. 68=38 W. R. 52=62 L. T. 93.

different from our Act. It is unnecessary to state the elaborate provisions of S. 95 (1) and (2), but S. 97 (1) provides that

"subject to the provisions of this Act every Court having original jurisdiction in bankruptcy shall have jurisdiction throughout England."

The scheme of the Act is that the Courts in England have concurrent jurisdiction. We have nothing of the sort here. Then another group of cases were cited. Those are *Ex-Parte Villars In re, Rogers* (6), a decision on the Act of 1869; *Fawcett* v. *Fearne* (7) which was a decision on 2 and 3 Vic. Ch. 29: *In re, Reis—Ex-parte Clough* (8), a decision on the Act of 1883, *Edwards* v. *Gabriel* (9), a decision on the Act of 1849. All these cases are reviewed in Williams on Insolvency at p. 211. According to these decisions the adjudication dates back not to the filing of the petition but to the commencement of the act of bankruptcy and the question arises, what is meant by the commencement of the Act of bankruptcy. The scheme of our Act is different. I do not see how these cases can help the petitioner. It is said the jurisdiction does not depend on the will of the petitioner; for instance he cannot withdraw the petition without leave of Court vide S. 14. It may be that a petition presented properly cannot be withdrawn and the petitioner has no further control over it. But when the opposite party objects that it is filed in a wrong Court the opposite party plays into the petitioner's hands and they make it possible for the petitioner to say that he will take it back and file it in the proper Court. I do not see how anybody can question this. In the present case it is not suggested that while some creditors objected to the petition being presented to the Ramnad Court on the ground of want of jurisdiction other creditors insisted on its going on in the Ramnad Court. If they had done so the Court would have gone into the matter. But on the events that happened everybody allowed the petitioner to take back his petition. The learned advocate for the petitioner has argued that just as it is impossible for parties to confer jurisdiction upon a Court by consent when there is no jurisdiction, similarly the parties cannot by consent take away from it the jurisdiction of a Court where it exists. I think that the proposition is too broadly stated. If one party objects to the jurisdiction and another party agrees to the objection practically it is in the power of the parties to get away from its jurisdiction. The case in *Kidri Prasad* v. *K. R. Khosala* (10), where it was held that agreements that disputes should be settled in particular Courts and not in other Courts are unenforceable, does not help the petitioner.

I am of opinion that the lower Courts are right in holding that the date of petition means the date of presentation of petition in the proper Court. In this case on the events that happened and the objection of some creditors and the concession of the petitioners debtors we must take it that the proper Court was the Madura Court and not the Ramnad Court.

The next point argued by the learned advocate is that even if S. 53, Prov. Insol. Act, does not apply, an enquiry can be made under S. 4 of the Act, and that the lower Court is wrong in refusing the enquiry. The decision in *Anwar Khan* v. *Muhammad Khan* (11) is relied on in support of this position. While saying nothing about this Full Bench judgment which is a judgment of a majority of two Judges against one dissenting Judge, assuming that the Courts have jurisdiction to make an enquiry under S. 4 of the Act, it seems to me that the District Judge was right in saying that the powers given under S. 4 are discretionary. It is a very wide section, and, unless the Courts feel compelled by the facts of the case to embark upon such enquiry, I do not see why they are bound to do so. Whatever the Subordinate Judge might have done in this case the District Judge has exercised his discretion in thinking that this case should be referred to a regular suit. On these grounds I think that the District Judge's order is right and the petition is dismissed with costs.

P.R.S./S.N. *Revision dismissed.*

(6) [1822] 9 Ch. 432=43 L. J. B. K. 76=22 W. R. 603=38 L. T. 348.
(7) [1844] 6 Q. B. 20=13 L. J. Q. B. 300=8 Jur. 645.
(8) [1904] 1 K. B. 451.
(9) [1862] 31 L. J. Ex. 113.
(10) A. I. R. 1923 Lah. 425=75 I. C. 590.
(11) A. I. R. 1929 All. 105=113 I. C. 819=51 All. 550 (F. B.).

A. I. R. 1930 Madras 785 (1)

JACKSON, J.

Kolandaswami Pillai—Petitioner.

v.

Rajaratna Mudaliar—Respondent.

Criminal Revn. No. 72 of 1929 and Criminal Revn. Petn. No. 58 of 1929, Decided on 17th October 1929, against order of Town Sub-Magistrate, Trichinopoly in Criminal Case No. 585 of 1928.

Criminal P. C., S. 403—Judgment-debtor escaping from Amin who had arrested him—Decree-holder complaining but accused acquitted—This acquittal is an effective bar against subsequent complaint by Amin.

A judgment-debtor escaped from the Amin who had arrested him. The decree-holder then lodged a complaint against him but he was acquitted. Thereupon the Amin lodged another complaint.

Held: that the judgment-debtor's acquittal in the decree-holder's complaint is an effective bar against the subsequent complaint by the Amin under S. 403: *A.I.R.* 1928 *Bom.* 143 and 36 *Mad.* 308, *Ref.* [P 785 C 2]

K. S. Jayarama Ayyar for *S. R. Dikshit*—for Petitioner.

C. S. Swaminathan for *A. V. Narayanaswami Ayyar*—for Respondent.

K. Venkataraghavachari — for the Crown.

Order.—The order of the Town Sub-Magistrate has no merits. A judgment-debtor escaped in the night from the Amin who had arrested him and the Subordinate Judge ordered the Amin to prosecute. There is no question here of sanction; the Amin could have prosecuted without reference to the Subordinate Judge and the Subordinate Judge simply passed the order departmentally to give the Amin a chance of rehabilitating his character. Meanwhile the decree-holder complained. When his case came up for trial the Court held that his complaint was incompetent and acquitted the accused. He was no doubt acquitted owing to the Sub-Magistrate's total misunderstanding of an *Allahabad* case which is not in Indian Law Reports. That case merely laid down that if a civil Court wishes to complain, the Munsif must lodge a complaint or get one lodged and cannot merely send a report. The case adds nothing to S. 190, Criminal P. C. But none the less he was acquitted.

Then the Amin lodged his complaint and the accused pleaded autre fois acquit under S. 403, Criminal P. C. The Magistrate refused to entertain the plea because in *Emperor* v. *Amboji Dhakya* (1) it has been held that a Court confronted with a complaint which requires sanction under law and is not sanctioned is a Court not competent to try the case as contemplated in S. 403, Criminal P. C. This ruling differs in terms from *In re, Ganapathi Bhattu* (2), and it is amazing that the Sub-Magistrate should have gone for his law to Bombay. It is not necessary to discuss here which is the more correct ruling, because neither has any bearing upon the present case, and anyhow the Magistrate was bound by the Madras ruling which he will be well advised to take as a safe guide. In the present case the decree-holder or any other person residing in India was competent to complain, the Court was competent to try, and the acquittal is an effective bar under S. 403, Criminal P. C. The petition is allowed and the order is cancelled.

P.R.S./S.N. *Revision allowed.*

(1) A. I. R. 1928 Bom. 143=52 Bom. 257.
(2) [1913] 36 Mad. 308=24 M. L. J. 463=19 I.C. 310=14 Cr. L. J. 214.

A. I. R. 1930 Madras 785 (2)

RAMESAM AND CORNISH, JJ.

J. A. Sankara Raju—Applicant—Appellant.

v.

Kuppammal and *others*—Respondents.

Original Suits Appeals Nos. 75 and 79 of 1929, Decided on 16th October 1929, from orders of Waller, J., D/- 9th September and 5th August 1929 respectively, in Applications Nos. 1120 and 444 of 1929.

(a) Presidency Towns Insolvency Act, Sch. 2, Art. 18—Art. 18 empowers Court to consider validity of sale.

The power under Art. 18, Sch. 2, involves also the power to consider validity of sale and, if proper case is made out, not to confirm sales. A formal order of confirmation may not be necessary. If a proper case is made out for setting aside the sale, the insolvency Court would have such power. If there is no reason to set aside, it merely confirms the sale: *A.I.R.* 1926 *All.* 124 and 40 *Cal.* 140, *Dist.* [P 786 C 2]

(b) Presidency Towns Insolvency Act, Sch. 2, Art. 18—Insolvency Court has jurisdiction to order delivery to auction-purchaser.

An insolvency Court has jurisdiction to order delivery of possession under the Insolvency Act where all the parties concerned have submitted to the Court's jurisdiction, and co-operated in procuring the order for sale of mortgaged premises. [P 787 C 1]

A. K. Ramachandra Iyer—for Appellant.

V. Varadaraja Mudaly—for Respondents.

Ramesam, J.—The facts of this case are as follows:

One Narayanaswami Naicker became an insolvent. He was adjudicated on 2nd July 1928. One of the creditors mentioned in the schedule was Kuppammal. She was described as a mortgagee by deposit of title deeds. She applied on 3rd October for sale of the secured properties under Art. 18, Sch 2, Presidency Towns Insolvency Act. Before her application came on for orders, there was a meeting of the creditors and a composition scheme was settled according to which the creditors were to be paid Re. 0 3-9 in the rupee; and two guarantors, namely, Sankara Raju, brother-in-law of the insolvent, and Govindarajulu Naicker, promised to find Rs. 11,000 to make up the sum required for paying the creditors. They were to be given possession of the residuary assets of the insolvent and the benefit of the goodwill and possession of the business premises, namely, No. 134, Anna Pillai Street, and an iron safe. The first petition, the application for sanction of the scheme and the application for sale, came on before Kumaraswami Sastri, J., for orders on 18th February. All the parties interested in all the three petitions seem to have appeared before him and, so far as the scheme matter was concerned, handed over the memo of consent, and all the petitions were ordered in the following terms:

"Order in terms within." An order was drafted which purports to be an order disposing of all the three petitions and not merely the composition scheme matter. If there was any mistake in so drafting one order for all the three petitions there would have immediately been an appeal. We have no doubt that all the three matters were discussed outside the Court and were brought up before the learned Judge for being dealt with in one combined order. The mortgagee Kuppammal afterwards advertised the sale of the properties. The advertisement was dated 10th May and the sale was on 13th May. One of the guarantors wanted the premises in Anna Pillai Street to be reserved to the last, but Kuppammal would not do it and the properties were sold. The purchasers filed an application for confirmation of the sale and for delivery of possession of the properties. O. S. A No. 75 is against the order on this petition. Waller, J., having confirmed the sale ordered delivery. Another petition was filed by Sankararaju, one of the guarantors, for vacating the order of Kumaraswami Sastri, J., dated 18th February. Waller, J., refused to consider the order. O. S. A. No. 79 is against this order.

The power under Art. 18, Sch. 2 seems to involve also the power to consider validity of sale and, if proper case is made out, not to confirm sales. A formal order of confirmation may not be necessary. If a proper case is made out for setting aside the sale, the insolvency Court would have such power. If there is no reason to set aside, it merely confirms the sale. We have nothing to do here with the provisions of the Civil Procedure Code confirming sales in execution of decrees. The decision in *Narain Das* v. *Ramachandra* (1), relied on by the learned advocate for the appellant, has no bearing on a matter of this kind. In this case the ground on which the sale was sought to be set aside was that there was misrepresentation and Sankararaju discovered sometime after the order of the learned Judge that Kuppammal was not a mortgagee at all. We have seen his deposition and we do not see any reason to differ from the learned Judge. His attempt to show that the promissory note and the letter showing the deposit of title deeds were antedated does not even seem to have been hinted at in the affidavit and the learned Judge declined to consider that portion of the case. Whether it is recorded as a sale by the Court or as a sale by somebody authorized by the Court, Arts. 18, 19 and 20 imply jurisdiction of the Court to confirm the sale and refuse to set it aside. The decision in *Jogemonay Dassee* v. *Akhoy Kumar Das* (2) relates to an application to the Registrar to enquire into title. We have not got to do with a matter of that kind here. The decision of the learned Judge is right and this appeal (O. S. A. No. 75 of 1929) is dis-

(1) A.I.R. 1926 All. 124=48 All. 209.
(2) [1913] 40 Cal. 140=18 I.C. 954.

missed with taxed costs of the purchasers.

As regards O. S. A. No. 79 of 1929 the learned Judge was right in refusing to vacate the order as no grounds were made out. He had jurisdiction to order delivery of possession, not because of the provision in the Civil Procedure Code relating to such delivery to an auction-purchaser, but he could do so under the Insolvency Act as all the parties concerned have submitted to the Court's jurisdiction, co-operated in procuring the order for sale and ought not to be allowed to resist the purchaser's attempt to get possession: see the judgment of Wallis, C. J., and Spencer, J., in *O. S. A. No.* 6 *of* 1918. The appeal also must fail and be dismissed with taxed costs of Kuppammal.

P.R.S./V.S. *Appeal dismissed.*

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* A. I. R. 1930 Madras 787

ANANTAKRISHNA AYYAR AND CORNISH, JJ.

Anganna Reddi and *others* — Appellants.

v.

Subbaraya Chettiar and *another*—Respondents.

Appeal No. 84 of 1929, Decided on 11th March 1930, from order of Dist. Judge, South Arcot, D/- 30th November 1928.

*** Civil P. C., S. 144 — Where decree attached and executed by attaching decree-holder is reversed in appeal, restitution proceedings can be allowed against attaching decree-holder, who is representative of original decree holder even for purposes of restitution—Civil P. C. S. 146**

Courts in exercising jurisdiction under S 144 do so by virtue of the equitable jurisdiction to set right the injustice caused by the lower Courts passing erroneous decrees and by allowing proceedings to be taken thereunder. It is the duty of the Court as far as possible to restore parties to the position in which they would have been had not the erroneous orders been passed. [P 789 C 1]

The attaching decree holder is a representative of the original decree-holder even for the purposes of restitution proceedings which are only execution proceedings. Where therefore the decree attached by the attaching decree-holder has been reversed in appeal, execution by way of restitution can be allowed to proceed against him and he can be ordered to restore the benefit received by him executing the decree: 37 *I. C.* 863; *A. I. R.* 1922 *P. C.* 269; 51 *I. C* 375 and *A. I. R.* 1922 *Mad.* 228, *Dist*; 38 *Mad* 36, *Ref.* [P 788 C 1]

C. S. Venkatachari—for Appellants.

K. P. Padmanabha Pillai—for Respondents.

Judgment.—This appeal raises a question relating to the construction of S. 144, Civil P. C. In O. S. No. 1 of 1924, on the file of the District Court of South Arcot, Periathambi Dorai obtained a decree against Subbaraya Chetti for money. Subbaraya Chetti had preferred an appeal to the High Court against that decree. Pending appeal appellant before us, Anganna Reddi, who had obtained a decree in O. S. No. 11 of 1923 on the file of the Salem Court against Periathambi Dorai, had his decree transferred to the South Arcot Court and he attached the decree which Periathambi Dorai had obtained against Subbaraya Chetti in O. S. No. 1 of 1924. In execution of the attached decree the appellant, namely the decree-holder in O. S. No. 11 of 1923, was able to realize a sum of Rs. 3,000. The result of Subbaraya Chetti's appeal to the High Court against the decree in O. S. No. 1 of 1924 was that the High Court reversed the judgment of the trial Court and remanded the suit for fresh disposal. The result of the fresh disposal by the trial Court was that Periathambi Dorai's suit was dismissed. It is said that an appeal is pending in this Court against that decree dismissing the suit. In the meantime Subbaraya Chetti, the judgment-debtor on O. S. No. 1 of 1924, applied to the South Arcot Court for restitution against Anganna Reddi, the decree-holder in O. S. No. 11 of 1923, who, as attaching decree-holder of the decree in O. S No. 11 of 1923, had realized Rs. 3,000 from the defendant, Subbaraya Chetti. He alleged that the decree in O. S. No. 1 of 1924 having been ultimately reversed and as things stand at present, he is entitled to have restitution under S. 144 of the Code. The plea of Anganna Reddi was that the right, if any, which Subbaraya Chetti had were only against Periathambi Dorai and not against Anganna Reddi. That contention of Anganna Reddi having been overruled by the lower Court, the lower Court allowed execution by way of restitution to proceed against Anganna Reddi in respect of Rs. 3,000 drawn by him, with interest. It is against that decision that Anganna has preferred the present miscellaneous appeal.

It was argued on behalf of the appellant by his learned advocate that the judgment-debtor Subbaraya Chetti

was not entitled to any relief as against him, and that Subbaraya Chetti's reiief should be sought by proceeding against Periathambi Dorai. He argued that Anganna was not the decree-holder in O. S. No. 1 of 1924, nor an assignee of the decree-holder, and consequently no restitution proceedings should be started as against him. In answer to that contention it was urged on behalf of the respondent that S. 144 read with O. 21, R. 53 (3) and O. 22, R. 10 and also S. 146 of the Code entitled Subbaraya Chetti to relief against the appellant. Now O. 21, R. 53 (3), indicates that

"the holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-R. 1 shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof;"

so that, this section specifically says that such attaching decree-holder shall be deemed to be the representative of the holder of the attached decree and as such entitled to execute such attached decree. Turning now to O. 22, R. 10, which is the section prescribing the procedure to be followed in cases of assignment before final order in suits, Cl. 2, O. 22, R. 10, provides as follows:

"The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procures such attachment to the benefit of sub-R. (1)."

Reading these two provisions of law together it is we think reasonably clear that the attaching decree-holder in these circumstances is the representative of the original decree-holder for purposes of execution. Restitution proceedings are essentially proceedings in execution. If as representative of the original decree-holder, an attaching decree-holder is entitled to the benefit of execution provided for by the Code he must also be liable, similarly, as the original decree-holder, to the burdens imposed upon such decree-holder by the Code when the decree in execution of which proceedings were taken is subsequently reversed on appeal. S. 146 is also relevant in this connexion. That section indicates that

"save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Subbaraya Chetti would undoubtedly be entitled to take out proceedings under S. 144 against Periathambi Dorai, the original decree-holder. Under S. 146, as Anganna Reddi is the representative of Periathambi Dorai for purposes of execution, Subbaraya Chetti is entitled to take similar proceedings against Anganna Reddi. It was argued that there is a difference between the attachment of a decree and an assignment of a decree. No doubt it is so. An assignment of a decree will vest in the assignee all the rights of the original decree-holder, whereas in the case of an attaching decree-holder the section only makes him the representative of the original decree holder to the extent necessary for the purpose of satisfying his decree. It is possible that the original decree which was attached was for an amount much larger than the amount of the decree for which that decree was attached. In the case of an assignment of a decree this Court has laid down in *Govindappa* v. *Hanumanthappa* (1) that an assignee decree-holder would be liable to be proceeded against under S. 144 in case the original decree was reversed in appeal even though the assignee decree-holder was not a party to the final decree which reversed the lower Court's decree.

The learned Judges observed that it was open to the assignee decree-holder to make himself a party to the appeal, and if he trusted the original decree-holder to do the needful, he could not subsequently be heard to say that he was prejudiced by not himself being a party on record in the appeal. Similarly, reading O. 21, R. 53 with O. 22 R. 10, it is reasonably clear that it was open to the attaching decree-holder to make himself a party to the appeal and, not having made himself a party, he cannot be heard to complain that the original decree-holder on record did not sufficiently represent him. The case quoted by the appellant, namely, *Kedar Nath* v. *Jai Berhama* (2) and *Jai Berhma* v. *Kedar Nath Marwari* (3), as also *Jatindra* v. *Sarat Chandra* (4) are not cases where a person standing in the position of a decree-holder took

(1) [1915] 38 Mad. 36=17 I. C. 420.
(2) [1917] 37 I. C. 863.
(3) A. I. R 1922 P. C. 269=69 I. C. 278=49 I. A. 351=2 Pat. 10 (P. C.).
(4) [1919] 51 I. C. 375

coercive steps to have the properties of the judgment-debtor brought to sale by processes in execution. These were cases where money decree-holders finding moneys belonging to their judgment-debtor in Court proceeded to get at the same under S. 73 of the Code. The Courts held, that in the circumstances they could not be said to be decree-holders or representatives of decree-holders in the sense that the judgment-debtor would be entitled to proceed against them in case the orders were subsequently reversed. On the other hand in *Raja Rao* v. *Ananthanarayanan Chetty* (5), at p. 311 (*of* 42 *M. L. J.*) the Officiating Chief Justice remarks as follows:

"The decree-holder in that case was the person responsible for wrongfully bringing the properties to sale. In the present case' refund is asked for from persons who had nothing to do with causing the auction sale, but merely profited by it in the way of rateable distribution under the orders of the Court. This distinction seems to me to be of considerable importance in connexion with the exercise of extraordinary powers which are of a purely equitable and discretionary nature."

Courts, in exercising jurisdiction under S. 144, do so by virtue of the equitable jurisdiction to set right the injustice caused by the lower Courts passing erroneous decrees and by allowing proceedings to be taken thereunder. In such cases it has been pointed out that it is the duty of the Court as far as possible to restore parties to the position in which they would have been, had not the erroneous orders been passed. No doubt in its anxiety to work out justice a Court should not in the exercise of powers under S. 144 work out injustice in particular cases. Having regard to the facts in the present case we are not in a position to say that the lower Court was not entitled to pass orders directing the appellant to restore .the benefit that he received by executing the decree in O. S. No. 1 of 1924 The order passed by the lower Court is accordingly right and we dismiss the appeal with costs. The respondent will however be directed not to draw the money from the lower Court for a period of one month from this date. The stay petition is dismissed.

P.R.S./S.N. *Appeal dismissed.*

(5) A. I. R. 1922 Mad. 228=67 I. C. 369.

A. I. R. 1930 Madras 789

ANANTAKRISHNA AYYAR, J.

(*Saripella*) *Venkatapathiraju* and *others*—Plaintiffs—Appellants.

v.

(*Saripella*) *Subbaraju* and *another*—Defendants—Respondents.

Second Appeal No. 1307 of 1926, Decided on 28th November 1929, from decree of Sub-Judge, Amalapuram, in Appeal Suit No. 148 of 1924.

Easements Act, S. 41—Easements of necessity are extinguished when necessity creating them ends—When once extinguished dominant owner cannot revive them by his acts—Of three consecutive plots, 1st and third being owned by one person who had right of way over middle plot—Third plot being purchased by another person who could pass to it without using 2nd plot—He subsequently purchasing 1st plot—Way of necessity terminated when he purchased third plot and could not be revived by his purchase of 1st plot as well.

In considering the questions of easements of necessity, convenience is not the test, but absolute necessity. They end with the necessity creating them. A way of necessity therefore is extinguished when the necessity terminates by the dominant owner acquiring adjoining property through which he can pass and repass to the old dominant tenement without reference to the servient tenement, and when once extinguished the dominant owner cannot revive it by any acts on his part. [P 793 C 2, P 794 C 2]

Of three consecutive plots of land the 1st and 3rd were owned by person who had a way of necessity through the 2nd plot. The third plot was purchased by another person who could approach it through his own land without using the 2nd plot. The same purchaser afterwards purchased the 1st plot as well.

Held: that the way of necessity was lost when the purchaser purchased the third plot and the same could not be revived by his purchase of the first plot: 33 *All.* 467; 19 *Bom.* 797; 4 *C. L. J.* 367; *Holmes* v. *Goring*, 2 *Bing.* 76 and 60 *I. C.* 504, *Rel. on.*: 28 *Mad.* 495, *not Appr.* [P 794 C 2]

G. Lakshmanna—for Appellants.

P. Somasundaram—for Respondents.

Judgment.—This second appeal raises an interesting question regarding an easement of necessity, and about the proper construction to be put on S. 41, Easements Act. The facts are not now in dispute. The plaintiffs are the appellants. There were four brothers who formed the members of an undivided Hindu family. About 40 years ago the four brothers effected a partition of the joint family properties. A plot of land with some houses thereon was divided among the four brothers. On the north a public street ran east to west, and on

the south there were cultivated fields belonging to strangers. The southern portion of the common land consisted of coconut gardens, the same was divided into three, the western portion (B-3) fell to the share of the second brother, the middle portion C-3 fell to the share of the 3rd brother, and the easternmost portion (D 3) to the fourth brother. The remaining land was practically divided into four portions. The westernmost A, A-1, and A-2, fell to the 1st brother's share; the portion next east of that, B, B-1, and B 2, fell to the share of the 2nd brother; the portion next east of that, C, C-1, and C-2, fell to the share of the 3rd brother; and the easternmost portion, D, D 1, and D-2. fell to the share of the fourth brother. B-2 and B-3 were allotted to the 2nd brother and access from B2 and B-3 could be secured only through C-3. It is admitted that there was an easement of way of necessity from B-2 to B-3 through C 3. Some years later, the 1st brother purchased B-3 from the 2nd brother, and some years still later, B-2 (with B and B-1) was also purchased by the 1st brother. The plaintiffs (the sons of the first brother) filed the suit against defendants (the sons of the 3rd brother) for a declaration that they are entitled to have a right of way from B2 to B3 through C-3 as was used by the 2nd brother when he was owner of B-2 and B-3. The defendants denied the plaintiff's right and urged that the right of way enjoyed by the second brother was extinguished after B-3 was purchased by the first brother, since access to B-3 could be had from the first brother's plot A-2, and that the plaintiffs could not by their purchasing B-2 long after B-3, claim to have a revival of the right of way to pass from B-2 to B-3 through C-3, as now the plaintiffs could pass from B-2 to B-3 through their own land A-2.

Both the lower Courts have dismissed the plaintiffs' suit, and the plaintiffs have preferred this second appeal. An easement of necessity would arise only at the time of severance of tenements, when an easement is necessary for enjoying the transferred or the partitioned property: S. 13, Easements Act. A right of way is not an apparent and continuous easement: see Illus. (b), S. 5, Easements Act. An easement of necessity could not be claimed unless the property divided or transferred could not be enjoyed at all except when an easement is imposed upon the other property:

"An easement of necessity is an easement without which a property cannot be used at all and not one merely necessary to the reasonable enjoyment of the property: see *Sukhdei* v. *Kedar Nath* (1).

As observed by Sir Arnold White Kt., C. J., and Davies, J., in *Krishnamaraya* v. *Marraju* (2):

"If *A* has a means of access to his property without going over *B's* land, *A* cannot claim a right of way over *B's* land under S. 13, Easements Act, on the ground that it is the most convenient means of access."

Their Lordships held that the "law under S 13 Cl. E, Easements Act is the same as the law in England." Their Lordships were not prepared to agree with the suggestion made in *Municipality of City of Poona* v. *Vaman Kajaram* (3), that the question of convenience was a matter for consideration. In *Durgamani Debya* v. *Ambica Charan Sarma* (4), at p. 369 Maclean, C. J., and Geidt, J., confirmed the judgment of Mookerjee, J., holding that to constitute an easement of necessity an absolute necessity must be established.

It is therefore necessary to bear in mind that in considering questions of easements of necessity convenience is not the test but absolute necessity. In some English cases the reason why an easement of necessity is presumed to have been granted is stated to be this: Public policy required that all available lands should be used and cultivated. It could not be done if there be no access to the same. We should bear this in mind, when we approach the consideration of the question that arises for decision in this case. It is admitted that the second brother had a right of way of necessity to pass from B 2 to B-3 through the land of the third brother C-3. It is also admitted that B-3 was purchased from the second brother's branch by the plaintiffs who belong to the first branch. After such purchase access to B-3 could be had through A-2. There was no necessity to have access through C-3 for passing from A-2 to B-3 after B-3 was purchased by the plaintiffs. What is

(1) [1910] 33 All. 467=9 I.C. 628.
(2) [1905] 28 Mad. 495=15 M.L.J. 255.
(3) [1895] 19 Bom. 797.
(4) [1906] 4 C. L. J. 367.

the effect of the plaintiffs' purchase of B-3 on the right of way of necessity that existed for access between B 2 and B-3 through C-3? The plaintiffs contended that the easement of necessity was in suspense, and they argued that after the plaintiffs' purchase of B-2 also some years later, the old easement right of way of necessity to pass from B-3 to B-2 through C-3, revived. I am unable to agree. Revival of easements is dealt with by S. 51, Easements Act, and the present case would not come under that section. Suspension of easements is dealt with by S. 49, and the present case would not come under that section either. C-3 the servient tenement has never passed hands from the third brother's branch to the defendants, since they have continued to be owners of the same all along. The defendants argued that as soon as the owner of the dominant tenement acquired an adjoining plot through which access to the several portions of the dominant tenement could be had, then, the old easement of necessity became extinguished. They relied on S. 41, Easements Act, which enacts that 'an easement of necessity is extinguished when the necessity comes to an end." Illustration to S. 41 was also relied upon by the respondents. The learned advocate for the appellants argued that a right vesting in the dominant owner, such as a way of necessity, is a valuable right, and he could not be said to have lost that right, simply because he spent his own money in purchasing some adjoining property. He argued that the servient owner could not take advantage of a purchase made by the dominant owner by using the dominant owner's moneys. He also submitted that the right really appertains to the two plots of lands B-2 and B-3, and as soon as the said plots became united in ownership under one person, the old right of way of necessity revived, and that the lower Courts were wrong in disposing of the question rather summarily without properly discussing the same

The learned advocate for the respondents urged that an easement of necessity is co-extensive with the necessity as it existed when the easement was imposed: S. 28, Easements Act, and that it became extinguished when the necessity came to an end: S. 41. He also relied on the decision in *Holmes* v. *Goring* (5). The Court there held that a way of necessity is limited by the necessity which created it, and ceases, if at any subsequent period the party entitled to it can approach the place to which it led, by passing over his own land. Best, C. J., at p. 236 observed as follows:

"But I had rather take the case on the broad ground on which it has been argued, than on this narrow ground. The plaintiff complains that the defendant has trespassed on his land; the defendant insists that he was entitled to pass over it in the enjoyment of a way of necessity; all the four closes, he says, were originally his, and he was then accustomed to pass from the first unto the fourth; he parted with the two in the middle and contends that it is still necessary for him to pass through them. On behalf of the plaintiff it is asserted that this necessity does not exist; that at the time of the trespass he might have passed from Close 4 into his own land, Close 6 and thence over his own land into high road; or that at all events, and at all times, he might have passed out of Close 3, into Close 5, and so have avoided Close 2, the locus in quo. My judgment will be on the latter course; if the defendant could have pursued that, and I am of opinion he could, he is entitled to no way of necessity. It has been contended that we are to look at the state of things at the time of the feoffment, and that at that time the defendant could not have passed into Close 5, because it was in the occupation of Mrs. Falconer; if so, the defendant ought to have shown in her an interest sufficient to exclude him; instead of that the case only states that she was in the occupation of Close 5, a statement consistent with a mere tenancy at will, which the defendant might at any time have determined. It is clear therefore that he ought to have passed from Close 3 into Close 5, and if so he could not claim a way of necessity over Close 2."

On the part of the plaintiff the case has been put on its right ground. If I have four fields, and grant away two of them, over which I have been accustomed to pass, the law will presume that I reserve a right of way to those which I retain; but what right?, the same as existed before? No. The old right is extinguished, and the new way arises out of the necessity of the thing. The passage which has been cited from Serjt William's note contains a complete answer to the argument on the part of the defendant:

"A way of necessity, when the nature of it is considered, will be found to be nothing else than a way by grant;"

but a grant of no more than the circumstances which raise the implication of necessity require should pass. If it were otherwise this inconvenience

(5) 2 Bing. 76=9 Moore 166.

might follow, that a party might retain a way over 1,000 yards of another's land when by a subsequent purchase he might reach his destination by passing over 100 yards of his own. A grant therefore arising out of the implication of necessity, cannot be carried farther than the necessity of the case requires, and this principle is consistent with all the cases which have been decided. It has been argued that the new grant operates as a prevention of the extinguishment of the old right of way, but there is not a single case which bears out that proposition, or which does not imply the contrary. By the grant a new way is created, and that way is limited by necessity. Searjt. William says:

"Where a man having a close surrounded with his own land grants the close to another, the grantee shall have a way to the close over the grantor's land, as incident to the grant; for without it he cannot derive any benefit from the grant. So it is where he grants the land, and reserves the close to himself."

What way is it the grantee shall have? Not the old, but a new way limited by the necessity. Park, J., observed:

"From all the authorities referred to, it is clear, that when a way is claimed of necessity, it is a good answer to show that there is another way which the party may use."

Burrough, J., added:

"Upon the former argument it was contended that the only necessity which could support the defendant's plea, must be a necessity continuing up to the time of the trespass justified under it. In this I entirely agree."

In Goddard on Easements, 7th Edn., at p. 559, it is stated as follows:

"It is on this principle that easements of necessity are extinguished when the necessity ceases. It has been thought sometimes that the termination of the necessity would not affect the extinction of the easement, but that opinion has not been supported. The question was raised and determined in the case of *Holmes* v. *Goring* (5), in which it was held that a way of necessity may be acquired at the time of the purchase of particular land, yet if the purchaser subsequently becomes possessed of other grounds over which he can pass, the necessity, and therefore the reason, for the existence of the right of way, is at an end, and the right itself also ceases; in support of this decision a passage from a note of Mr. Searjt Williams in the case of *Pomfret* v. *Ricroft*, was cited by Best, C. J., where it is said that a way of necessity, when the nature of it is considered, will be found to be nothing else than a way by grant; but added the Judge, a grant of no more than the circumstances which raise the implication of the grant require."

At p. 588, it is observed that:

"Ways of necessity are co-extensive, and cease, with the necessity; they arise by implied grant, and the right continues while the necessity lasts; the grant may in fact be regarded as conditional on the continuance of the necessity; if therefore the necessity comes to an end the right of way is extinguished."

It is true that during the argument in the case of *Proctor* v. *Hodgson*, Parke, B, observed:

"The extent of the authority of *Holmes* v. *Goring* (5) is that, admitting a grant in general terms it may be construed to be a grant of a right of way as from time to time may be necessary; I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at that time that the Court was wrong; but that is not the question now."

but this expression of opinion, coming even from Parke, B, cannot be taken to overrule the case of *Holmes* v. *Goring* (5), and the principles of law there established.

In Gale on Easements, Edn. 10 pp. 177 and 179, the question is discussed. The question of the duration of the right has been discussed in several cases, and it has been held to cease, when it is no longer, required in order to render the grant or, reservation effectual. Similarly in Halsbury's Laws of England, Vol. 11, pp. 241 and 291, the question is discussed. In S. 487, it is stated that:

"An easement of necessity is an easement which under particular circumstances the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement but one without which that tenement cannot be used at all. Such an easement lasts only so long as the necessity exists; for a grant arising out of the implication of the necessity cannnot be carried further than the necessity of the case requires. Quasi-easements are rights analogous to easements, but not in strictness easements, because some necessary element is wanting."

The question is discussed concisely in S. 569 at p 291. Both the branches of the appellant's arguments are answered by S. 569. By acquiring an adjacent land the easement of necessity is extinguished, and further the grantee cannot by his own act, by dealing with the acquired lands, subsequently revive the way of necessity. This is what is mentioned in S. 569:

"There can be no way of necessity unless the necessity existed at the time of the grant of the dominant tenement, and inasmuch as the exigency of the case alone calls it into existence, it continues only during the subsistence of the necessity; that is to say, the grant which arises by implication of law is a grant of a right of way until such time the grantee may acquire the power from some other source of

reaching the quasi-dominant tenement without using the quasi-servient tenement. If the grantee has once acquired such a power, he cannot by his own act in extinguishing the power revive the way of necessity."

No doubt, in Gale on Easements at p. 181, it is remarked that:

"*Holmes* v. *Goring* (5) therefore though never overruled, must be looked upon as of doubtful authority."

See also Halsbury's laws of England, Vol. 11, p. 291, foot-note F., where it is stated, that

"in 10 *Exchequer* 824, at p. 828, Parke, B, and Alderson, B., expressed the opinion that the decision in *Holmes* v. *Goring* (5) was probably wrong."

In addition to the case of *Holmes* v. *Goring* (5), already quoted reference may also be made to *Pearson* v. *Spencer* (6), *Pheysey* v. *Vicary* (7), *Proctor* v. *Hodgson* (8), *Reginolds* v. *Edwards Willies* (9). The law as to easements of necessity is the same in those parts of British India where the Easements Act is not in force: Mitchell on Easements p. 76. Having regard to the note of warning sounded in Gale on Easements and also in Halsbury's Laws of England, Vol. 11, as to the correctness of the decision in *Holmes* v. *Goring* (5), and not being aware of any subsequent English case where the English Courts have overruled that decision, I was anxious to ascertain whether there are any Indian decisions which have a direct bearing on the question now before me. My attention was drawn to the following remark made by the Bombay High Court in the case reported in *Municipality of City of Poona* v. *Vaman Rajaram of Gholap* (3), at p. 801, viz.

"the case of *Holmes* v. *Goring* (5), shows that a way of necessity does not last longer than the necessity."

But the Court had not to consider present question in that case, and the remark was only obiter. I am aware that the suggestion made in that case whether the Courts in this country might recognize a way of necessity in case of extreme inconvenience falling short of actual necessity has not been approved by the Madras High Court in the case already referred to: *Krishnamaraya* v. *Marraju* (2). But the observation of the learned Judges of the Bombay High Court in *Municipality of City of Poona* v. *Vaman Rajaram Gholap* (3), at p. 801 that

"the case of *Holmes* v. *Goring* (5), shows that a way of necessity does not last longer than the necessity"

so far as it goes is in favour of the defendant's contention in the present case. A decision of the Calcutta High Court of Sir Asutosh Mookerjee, Kt., Ag. C. J., and Sir Ernest Fletcher, Kt., J., reported in *Abhoya Chandra Ghosh* v. *Raj Kumar Ghosh* (10), was relied on by the learned advocate for the respondents. That seems to be a case more or less on the point. Their Lordships held that when the necessity for an easement of necessity terminates the easement also terminates:

"An easement of necessity is an easement which under particular circumstances the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all. Such an easement lasts only so long as the necessity exists, for a grant arising out of the implication of necessity cannot be carried further than the necessity of the case requires. Reference may in this connexion, be made to the decision of *Holmes* v. *Goring* (5) which is an authority for the proposition that an easement limited by the necessity which creates it, ceases if, at any subsequent period, the party entitled can approach the place to which it led by passing over his own land. The appellant, however, has argued that the correctness of this decision has been doubted in subsequent cases, and has invited us to hold that the view just mentioned is not well founded on principle. We are unable to accept this contention as well founded."

After referring to some other English cases their Lordships observed that *Holmes* v. *Goring* (5), had been doubted upon a point which does not touch the question in controversy, and that so far as the position contended for by the defendants was concerned the same was supported by the case of *Holmes* v. *Goring* (5), and that the said decision is correct law on this point even now. Justice Shamsul Huda had held that that was the law, and on Letters Patent appeal his decision was confirmed by Mookerjee and Fletcher, JJ. The arguments advanced by the learned advocate for the appellants in the present case were also the arguments advanced in the case reported in *Abhoya Chandra Ghose* v. *Raj Kumar Ghose* (10).

(6) [1863] 3 B. & S. 761=1 N.R. 373=8 L.T. 166=11 W.R. 471.
(7) 16 M. & W. 484.
(8) 10 Ex. 824=3 C.L.R. 755=24 L.J. Ex. 195.
(9) 125 E.R. 1173.
(10) [1921] 60 I.C. 504.

No other relevant decision of any of the Indian High Courts has been brought to my notice. In Indian text-books on the Law of Easements, also the same view has been adopted namely that the right of way of necessity only arises when there is no other possible legal mode of getting at the land, that the grant of a way of necessity which arises by implication of law is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the quasi dominant tenement. In Peacock on Easements (Tagore Law Lectures Edn. 3, p. 589), it is stated as follows:

"An easement of necessity is extinguished by the disappearance of the necessity. This is almost a self evident proposition and scarcely needs authority to support it. *Holmes* v. *Goring* (5) shows that a way of necessity is limited by the necessity which creates it and that if subsequently to the acquisition of the easement it becomes possible for the dominant owner to reach the same point by another way over his own land the way of necessity ceases. To the same effect is S. 41, Easement Act: see also Katiar on the Law of Easements, p. 87 where the law is stated in similar terms."

In Dr. Stokes' Anglo Indian Code, Vol. 1, p. 919, the case of *Holmes* v. *Goring* (5) is cited under S. 41 of the Act. Illustration to S. 41, also supports this view.

In a matter like this I was curious to know what the American law on this point is. On referring to American Cyclopedia of Law and Procedure, Vol. 16, p. 1193, I find the law in America is stated to be as follows:

"A way of necessity ceases as soon as the necessity to use it ceases. So if the owner of a way of necessity acquires other property of his own over which he may pass, or if a public way is laid out which affords access to his premises, his right to the way of necessity ceases. But a mere revocable permission to use a way over the land of another person will not extinguish the right. This rule that the right ceases with necessity has no application to way acquired by express grant or by prescription."

Again at p. 1223 the following statement occurs:

"Where a way is claimed as a way of necessity, evidence is admissible for defendant to show the purchase of other land by plaintiff over which access to the public highway might be had."

At p. 1172, the position is emphasized that "grant" is the basis of existence of a way of necessity.

"A way of necessity such as the law recognizes derives its origin from a grant or reservation and cannot exist where there was never any unity of ownership of the alleged dominant and servient estates, for no one can have a way of necessity over the land of a stranger. Necessity alone without reference to any relations between the respective owners of the land is not sufficient to create this right."

On the question of "Severance after Merger" the law is stated at p. 1190.

"The old easement is not revived by the severance, yet if the necessity continues a new easement will be granted by implication upon the same principle and under the same circumstances that easements are granted by implication upon the severance of an estate originally entire."

When an easement of necessity is extinguished when the necessity comes to an end by the dominant owner acquiring adjoining property through which he could pass and re-pass to the old dominant tenement without reference to the servient tenement, the same could not be revived by the dominant owner selling portions of his property including the newly acquired property. S. 13, Easements Act, would apply of its own force to such a case, if as a result of alienation or partition easements are found necessary. The case would then be creation of new easements under S. 13, and not revival of an easement of necessity once extinguished.

For the foregoing reasons it seems to me that the contention of the appellants is unsustainable both on principle and on authority. The apparent anomaly, which, the learned advocate for the appellant submitted would be the result if his contention be overruled is not really so if the correct principle underlying the law of easements of necessity be properly appreciated and kept in view. The law implies such an easement in an exceptional case, and when the reason for the rule disappears the rule itself ceases to be applicable. The result no doubt is that in some cases where the dominant owner purchases an adjacent property by paying for the same, he would unwittingly find that the easement of necessity which existed over another item of property is no longer avilable to him: see illustration to S. 41 of the Act. If it should work hardship in some cases, justice would probably be done in most other cases. In any event the law on the point seems to be reasonably clear. I am therefore of opinion that the decisions of the lower Courts were right and the second appeal is accordingly dismissed with costs.

P.R.S./S.N. *Appeal dismissed.*

A. I. R. 1930 Madras 795

CURGENVEN, J.

Arumugha Nadar—Petitioner.

v.

Vyyapuri Chetti—Respondent.

Civil Revn. Petns. Nos. 1766 and 1767 of 1929, Decided on 30th April 1930, from order of Dist. Munsif, Manamadura, D/- 14th December 1929.

(a) Madras Village Courts Act—Procedure—Litigants in village Courts need not adopt procedure laid down in Civil P. C.

The Civil P. C. does not apply to proceedings before village Courts and we cannot expect litigants in such Courts to adopt the procedure which it lays down. [P 795 C 1]

(b) Madras Village Courts Act, S. 13 — Suits for damages for breach of contract are not triable by village Court.

Suits for damages for breach of contract are not included in suits triable by village Courts. They are different from "claims for money due on contract." [P 795 C 2]

K. P. Panchapagesa Aiyar—for Petitioner.

A. Venkatarayaliah and *L. Venkatanarasiah*—for Respondent.

Judgment.—Two suits (C. S. Nos. 6 and 7 of 1929) for damages for breach of contract were filed in the panchayat Court of Tiruchuli against the petitioner in these two revision petitions. The plaintiff in Suit No. 6, corresponding here to C R. P. No. 1766 of 1929, appears as respondent. The respondent to the other petition is absent. The contention of the petitioner is that the panchayat Court had no jurisdiction to try these suits, and upon this ground he presented petitions for transfer to the District Munsif of Manamadura under S. 21, Village Courts Act. The learned District Munsif has dismissed the petitions and I am now asked to say that his decision on this question of jurisdiction is incorrect. The respondent in C. R. P. No. 1766 of 1929 raises the point that this objection to jurisdiction was not taken at the earliest possible moment, namely in the written statement, and I find that while the written statement to C. S. No. 7 does contain such a protest, there is no corresponding plea in that to C. S. No. 6. I do not think however that this is a very serious objection. The Civil Procedure Code does not apply to proceedings before village Courts and we cannot expect litigants in such Courts to adopt the procedure which it lays down. The objection was taken before the District Munsif as a ground for transfer, and must, I think, now be decided upon its merits.

The question depends upon the construction to be placed upon the words "claims for money due on contract" which under S. 13 of the Act is one of the classes of suits cognizable by village Courts. The learned District Munsif is of opinion apparently that because the Act applies to a village Court this phrase may be read in some vague or general manner. I am unable to follow him in this view or to agree that it is necessarily a nice distinction to distinguish between suits for money due on contract and suits for damages due for breach of contract. Nor do I understand how he gains assistance from the terms of the provisos to S. 13, because those clearly relate to the exclusion of special cases to which the body of the section would apply in their general aspect. I think that suits for money due on a contract are of a clearly definable nature, as for instance a suit for the price of goods sold or for wages for labour performed. These are ordinarily suits of a simple character and for ascertained sums. The word "due" I think of itself rather connotes that the sum sued for must be ascertained, but if we look to the nature of a suit for damages for breach of contract it appears to be of quite a different class from a suit to enforce the payment of money due under a contract, and moreover it becomes extremely doubtful whether the legislature can have intended to invest the village Courts with power to try suits of this latter class. Such cases are often very difficult. The principles upon which damages should be awarded are not easily grasped except by trained lawyers and the discretion as to the amount of damages to be awarded may vary within wide limits. I think therefore not only upon the grammatical construction of the section, but upon general considerations of this latter kind, it cannot have been the intention to include such suits as triable by a village Court.

I must accordingly allow those petitions, set aside the orders of the District Munsif and direct him to transfer the two suits, C. S. Nos. 6 and 7 of 1929, on the file of the Tiruchuli panchayat Court, to the file of his Court. The

petitioner will get his costs in both the petitions in the two Courts.

P.R.S./S.N. *Order set aside.*

A. I. R. 1930 Madras 796

ANANTAKRISHNA AYYAR, J.

Mariappa Goundan— Plaintiff — Appellant.

v.

Palaniappa Goundan and *others*—Defendants—Respondents.

Second Appeal No. 183 of 1926, Decided on 23rd August 1929, from decree of Sub-Judge, Dindigul, in Appeal Suit No. 40 of 1925.

(a) Limitation Act, S. 19 — Proper acknowledgment—Test laid down.

In considering whether a particular document amounts to a proper acknowledgment within the meaning of S. 19, all that one has to see is whether the document contains an acknowledgment of liability in respect of the debt now sued upon. The circumstance that the acknowledgment was contained in a sale-deed executed by the debtor which was not to take effect at all or was executed with an ulterior motive is not a relevant consideration in connexion with the question arising under the Act. [P 796 C 2; P 797 C 1]

(b) Evidence Act, S. 102 — General rule that where execution of document containing recitals is proved by plaintiff, he has made prima facie case, does not apply where defendant is neither executant himself nor person claiming under him.

The general rule that where no other suspicious circumstances appear, the plaintiff by merely proving the execution of the document containing recitals must be taken to have made out a prima facie case, and it is for the defendant to meet that case by adducing evidence, applies only to the case where the defendant is the executant or person claiming under him. It has no application where the executant mortgages joint family property and defendant is not his heir, but one to whom the family properties came by survivorship: *A. I. R.* 1930 *Mad.* 251, *Ref.*; 35 *I. C.* 455, *Expl.*; *A. I. R.* 1922 *P. C.* 56, *Rel. on.* [P 797 C 2]

(c) Evidence Act, S. 101 — Onus immaterial.

The question of onus does not matter when both parties have let in their evidence in the case. [P 798 C 2]

K. Periyaswami Goundan—for Appellant.

M. Panchanatha Iyer—for Respondents.

Judgment.—The plaintiff is the appellant in this second appeal. He sued to recover money due on a registered hypothecation bond, dated 23rd December 1910, Ex. A, executed by defendant 1's paternal grandfather, Karuppa Goundan. The plea of defendant 1 was that the document sued on was not supported by consideration and that it was executed to spite defendant 1, and the particular reason for spiting defendant 1 was mentioned in the written statement and I do not think it necessary to mention the reason in this judgment. Issue 1 raised in the case was whether the mortgage sued on was true and supported by consideration. It was admitted that the property which was mortgaged to the plaintiff was the ancestral property of Karuppa Goundan, the mortgagor, and that defendant 1, as a coparcener, was also interested in that property. It is also admitted that defendant 1 was a major at that time. During the trial in the first Court the question arose as to the onus of proof. The District Munsif held that the onus of proof was on defendant 1, because the execution of the mortgage was proved and because there was an admission by the paternal grandfather of defendant 1 that the consideration was received. In considering the evidence in the case the learned District Munsif observed in para. 7 of his judgment that apart from the ipse dixit of the plaintiff as P. W. 1 there was no clear proof that consideration passed for the mortgage. But holding that the onus was upon the defendant to prove want of consideration he decided issue 1 in favour of the plaintiff.

In the result however he dismissed the suit on the ground that the plaintiff's claim was barred by limitation, because in his view an acknowledgment by a mortgagor in a benami sale deed executed by him in favour of a third person of the existence and binding nature of the mortgage was not in law a proper acknowledgment of liability within the meaning of S. 19, Lim. Act. The plaintiff preferred an appeal, and on appeal the learned Subordinate Judge came to the conclusion that the District Munsif was wrong in his view on the question of limitation and I think he was right. In considering whether a particular document amounts to a proper acknowledgment within the meaning of S. 19, Lim. Act, all that one has to see is whether the document contains an acknowledgment of liability in respect of the debt now sued upon. The circumstance that the acknowledgment was contained in a sale deed executed by the debtor which was not to take effect at all or executed with an ulterior motive

is not a relevant consideration in connexion with the question arising under the Limitation Act I therefore agree with the learned Subordinate Judge that the District Munsif was wrong in his view about limitation.

The learned Subordinate Judge, however, confirmed the District Munsif's decree dismissing the suit on the ground that the mortgage-bond, Ex. A, was not supported by consideration. The learned advocate for the appellant urged that the lower appellate Court's view on the question of onus of proof was not correct, because in para. 3 of its judgment the lower appellate Court stated by saying :

"The burden is certainly upon the plaintiff to show that the document is supported by consideration."

My attention was also drawn to a very recent case decided by Ramesam, J., and Jackson, J., Appeal No. 95 of 1925 : *Raghavendra Rao* v. *Venkataswami Naicken* (1), where their Lordships disagreed with the view expressed by Spencer, J. in the case of *Kumarappan Chetti* v. *Narayana Chettiar* (2) where that learned Judge decided in similar circumstances that with reference to subsequent mortgagees the onus of proving consideration for a prior mortgage was on the prior mortgagee who instituted a suit to realize moneys due on his mortgage. It was urged accordingly that the lower appellate Court's view apparently based on the decision in *Kumarappan Chettiar* v. *Narayana Chettiar* (2), is not sustainable having regard to the recent decision in *Raghavendra Rao* v. *Venkataswami Naicken* (1) referred to. On reading the leading judgment delivered by Ramesam, J., in that appeal I find that the learned Judge disagreed with the reasoning of Spencer, J., in the case referred to above. The judgment contains a statement of the principles which have to be kept in view when considering the question of onus in particular cases. As I understand his Lordship's judgment it is stated that prima facie the onus of proof of want of consideration will be upon the executant of the document when once execution of the document is proved. Logically it will also be upon the heir of the executant in similar circumstances to prove that consideration did not pass, because when the execution is admitted and the document recites and acknowledges payment of consideration, then, if nothing else be known and no further evidence be let in, the mortgagee should succeed. Following the same line of reasoning his Lordship remarks that in the case of subsequent mortgagees also the same reasoning would ordinarily apply, but what exactly would be the stage in which the burden changes in any particular case, and what exact weight should be attached to other circumstances appearing either in the examination of the plaintiff himself, or other witnesses or otherwise, are not matters on which any invariable rule could be laid down applicable to all cases. His Lordship remarks :

"It seems to me that in general, by which I mean where no other suspicious circumstances appear, the plaintiff by merely proving the execution of the document containing recitals must be taken to have made out a prima facie case, and it is for the defendant to meet that case by adducing evidence."

Further in the course of the judgment his Lordship further remarks :

"Recitals in a document may lose their weight on account of other suspicious circumstances surrounding the execution of the document coming out in the evidence, but where there are no such suspicious circumstances I am unable to see how the weight can diminish because the defendant is other than the original executant."

Therefore, the decision in Appeal No. 95 of 1925, *Raghavendra Rao* v. *Venkataswami Naicken* (1), is no justification for my reversing the judgment of the lower appellate Court, unless I am satisfied that the other remarks contained in the judgment of Ramesam, J., do not apply to the case before me. In the first place the defendant is not the heir of the mortgagor (executant) ; the properties are not the self-acquired properties of Karuppa Goundan, the executant, but joint family properties which came to defendant 1, a coparcener by survivorship. It is only with reference to executants and persons claiming under them that the general rule enunciated in that judgment would apply. That is also, the provision of law contained in S. 102, Evidence Act. I may also refer to the remarks of their Lordships of the Privy Council in *Itishan Ali* v. *Jamna Prasad* (3). This is what their Lordships say :

(1) A.I.R. 1930 Mad. 251=124 I.C. 277.
(2) [1916] 35 I.C. 455.
(3) A.I.R. 1922 P.C. 56=64 I.C. 299=38 I.A. 365=24 O.C. 272 (P.C.).

"The burden is on him and on people claiming under him to prove that what apparently happened did not happen."

In addition to the fact that defendant 1 is not the heir of the executant we have also got some other circumstances appearing ir this case. The lower appellate Court, while discussing this question, though it starts with the statement that the burden is certainly on the plaintiff to show that the document is supported by consideration, in the course of the discussion also remarks as follows :

"Apart from the onus of proof there is no evidence at all to show the receipt of consideration for Ex. A."

The lower appellate Court first considers the recital in the document to the effect that the whole of the consideration was paid in cash at the time of the execution, whereas the plaintiff himself admitted that Rs. 200 was paid before execution and Rs. 200 after. Again the amount was borrowed for the purpose of paying Guruva Boyan according to the recital in the document. Guruva Boyan has not been examined, no voucher has been produced from him as regards the payment. No doubt, under the terms of the document, Ex. A the plaintiff is not bound to procure any voucher, but the examination of Guruva Boyan would be a circumstance in favour of consideration having passed with reference to Ex. A but he has not been examined. The plaintiff admits that he did not make any inquiry as to whether the mortgagor had any debts or as to the necessity for borrowing. The learned Subordinate Judge also remarks that there is an endorsement on the back of Ex. A dated 22nd October 1911, reciting a payment of Rs. 50. In the lower Court the plaintiff's pleader did not rely upon the said endorsement and it is not the case here that the amount was paid at the time.

Further, as the learned Subordinate Judge remarks, the circumstance that defendant 1's grandfather executed a sale deed, Ex. B, for Rs. 900 to defendant 2 in which certain recitals were made as regards the amount due under Ex. A (the amount being incorrectly given) also tends to show that Ex. A was without consideration. He mentions other circumstances also which throw suspicion on the transaction and there are circumstances which could legitimately be taken into account in finding whether the onus, even if it be on defendant 1, had been discharged in the circumstances of the case. It is a well-known principle of law that the question of onus does not matter when both parties have let in their evidence in the case. On the circumstances appearing in the judgment of the lower appellate Court I cannot say that relevant materials were not available to it to come to the conclusion that the mortgage was not supported by consideration but that the same was executed with a view to spite defendant 1. That is the other ground on which the lower appellate Court justified the dismissal of the suit; and as I think that finding is binding upon me in second appeal I dismiss the second appeal with costs.

P.R.S./S.N. *Appeal dismissed.*

A. I. R. 1930 Madras 798

VENKATASUBBA RAO, J.

Secy. of State and *others*—Defendants—Appellants.

v.

N. Gopala Aiyar and *others*—Plaintiffs—Respondents.

Second Appeal No. 55 of 1926, Decided on 25th March 1930, from decree of Sub Judge, Kumbakonam, in Appeal suit No. 154 of 1924.

(a) Land Acquisition Act (38 of 1923), S.4—Providing panchamas and other coolies of Tanjore with house sites is "public purpose."

Even if only a section of the public is benefited, still the purpose is a public one; the expression includes a purpose in which the general interests of the community, as opposed to the particular interests of the individuals, is directly and vitally concerned. The purpose of providing the panchamas and other coolies of Tanjore with house sites is therefore a "public purpose" within the meaning of S.4 If the effect of the Government order is to enable it to acquire a particular house site for a particular individual, it is only a matter of detail, which does not affect the general question of the purpose being a public one : *A. I. R.* 1914 *P. C.* 20, *Foll.* [P 799 C 2; P 800 C 1]

(b) Land Acquisition Act, S. 6 (1), Proviso—Only preliminary notification under S 4 published—Stage of final declaration not yet reached — It is premature to question Government's action on grounds that it offends against proviso to S. 6.

When only a preliminary notification has been published under S. 4, and the further stage of making declaration under S. 6 has not yet reached, it is premature to question the propriety of the Government's action, on the ground that it offends against the proviso to

S.6, because it is only the final declaration that can be called in question. [P 799 C 1, P 800 C 2]

(c) Land Acquisition Act, S.6 (1), Proviso—Only 20 per cent of cost of acquisition to be paid by future owners — Remaining 80 per cent Government agreeing to pay in first instance recovery of which was to be made subsequently by instalments — Conditions of proviso held fulfilled.

Where only 20 per cent of the cost of acquisition was furnished by the future owners, and the remaining 80 per cent the Government provided in the first instance, the recovery of which was to be made by instalments during the course of 20 years.

Held : that the conditions of the proviso were fulfilled because in construing the proviso what the Courts must have regard to is the state of things at the time of the declaration : *A. I. R.* 1930 *Mad.* 248, *Foll.* [P 800 C 2]

Government Pleader—for Appellants.

Advocate-General—for Respondents.

Judgment.—The first question that arises is whether the purpose in question is a "public purpose" within the meaning of S. 4, Land Acquisition Act 1 of 1894 as altered by the Amending Act 38 of 1923. So far, only a preliminary notification has been published under that section and the further stage of making the declaration under S. 6 has not yet reached. The plaintiff says that the purpose is not a public one and that is made a ground on which the suit for injunction is made to rest. The notification issued under S. 4, after referring to G. O. No. 3559, dated 10th November 1917, says, that whereas it is intended to acquire the plots belonging to the plaintiff for manaikats for panchamas and other coolies, he should intimate to the officer specified, his objection, if any within a certain stated time. The alleged public purpose stated in this notification, is the provision of house-sites for panchamas (persons of low castes), and other workmen. The subject of providing the panchamas of Tanjore with house-sites was examined by the Madras Government. An officer was placed on special duty to go into the question. He points out in his report, the urgent necessity that exists for the Government providing panchamas and other servants with houses. He describes the conditions in the district and shows that the houses in which the farm servants live are claimed by the landholders as their own, although the servants have been living in them for generations. He mentions that the disputes are carried to law Courts, where, after unequal contests the labourers are defeated. He further points out that the landholders contrive that the farm servants are for ever at their mercy and prevent their acquiring houses. These employees (says the report) sometimes adopt curious methods: they borrow petty sums of money from their own servants, on the security of the sites in which the latter live, thus making panchama mortgagees recognize the right of the landholders to the sites mortgaged This report was generally endorsed by the Collector, accepted by the Board of Revenue and ultimately by the Government. The Government thereupon passed the G. O. referred to above, which runs thus:

"The Government have considered the proposals of M. R. Ry. K. S. Srinivasa Achariar regarding the provision of house sites and land for the panchamas of the Tanjore District and accept his recommendation that an endeavour should be made to secure to them, as well as to other labourers, the ownership of the sites in which they live. They agree with the Deputy Collector that the most satisfactory method of attaining the object will be to acquire the sites under the Land Acquisition Act and to hand them over to the applicants on payment. The opportunity should also be taken, to provide pathways to "cheries" which may be surrounded by cultivation.

Paragraph 32 (6): The Government approve as a provisional measure the suggestion that applicants for sites should pay an initial deposit of 20 per cent of the cost of acquisition and that the payment of the balance of the cost price of the site may be spread over a period of 20 years, recovery being effected in half-yearly or yearly instalments according to the convenience of the grantees. The rate of interest should be 7 per cent."

The question then is: Is this a public purpose or not? The Government in order to remove the disabilities under which the depressed classes labour has undertaken to provide them with house sites. The condition of the panchamas calls for its intervention. The measures adopted, while directly benefiting the panchamas, indirectly benefit the public at large. Even if only a section of the public is benefited, still the purpose is a public one. The expression includes a purpose in which the general interests of the community, as opposed to the particular interests of the individuals, is directly and vitally concerned. : see *Hamebai Framji* v. *Secretary of State* (1). If the purpose in question is not a public purpose I

(1) A. I R. 1914 P C. 20=27 I. C. 26=42 I. A. 44=39 Bom. 279.

fail to see what can possibly answer that description.

On behalf of the plaintiff it is contended that the effect of the Government order is to enable it to acquire a particular house site for a particular individual. As the learned District Munsif has very clearly pointed out, this is a matter of detail which does not affect the general question of the purpose being a public one. What the Government proposes is to acquire the lands and once they are acquired, it may allot them in such manner as it pleases. But it is obviously the most sensible and convenient course to allot to each servant that particular house which he has been occupying. How this renders the purpose any the less a public one I am unable to follow. The view taken by the Subordinate Judge is untenable and must be rejected.

The next question that arises is whether the proviso to S. 6 (1) is fulfilled or not. It says that no declaration under that section shall be made unless inter alia the compensation to be awarded is to be paid wholly or partly out of public revenues. It seems to me in the first place that it is premature to raise this question. As I have said the proceedings have not gone further than the issue of the preliminary notification. The difference between S. 4 and S. 6 is that whereas the former section refers to land in a particular locality, the latter contemplates a particular land ; and again, whereas under S. 4, it must only appear to the Government that land is needed or likely to be needed for a public purpose under S. 6, it must be finally satisfied that it is so needed. It is only when the second stage referred to in S. 6 is reached that the Government is to make a declaration as provided in that section. That declaration when made, the section goes on to enact, shall be conclusive evidence that the land is needed for a public purpose. The section further prescribes that no such declaration shall be made unless inter alia the compensation to be awarded is to be paid wholly or partly out of public revenues. It is the final declaration that can be called in question if this condition is not fulfilled. What the Government has so far done is .to merely outline its present intention in this respect. There is nothing to prevent it from changing its mind, and the point of time that matters is the date of the declaration and not any earlier date. It has now notified that it proposes to advance out of public funds 80 per cent of the price to be recovered in instalments in a period of 20 years. Having regard to the design of the Act, this must be deemed to be but a tentative proposal, which may or may not be adhered to, at the time when the final declaration is made. The decisions have held that it is open to a party to question the propriety of such a declaration on the ground that the condition in question has not been satisfied. That right therefore a party may exercise after the declaration has actually been made. Thus, the suit is premature, in so far as it seems to question the propriety of the Government's action on the ground that it offends against the proviso to S. 6.

In any case I am prepared to hold that the facts of this case bring it within the proviso. Only 20 per cent of the cost is furnished by the future owners and the remaining 80 per cent the Government provides in the first instance. Sundaram Chetti, J., in a case bearing on this very notification, has held that the requirement of the proviso has been fulfilled : see *Secretary of State* v. *Murugesam Pillai A. I. R.* 1930 *Mad.* 248. My reason for agreeing with his view is this : The validity of the declaration under S. 6 cannot be made to depend upon some future contingent event. Supposing that at the time of the declaration the entire cost was met out of public funds, but ten years later, it was recovered from the party to whom the land was transferred, are the proceedings on that account to be held invalid ? Again let us suppose that initially the cost is wholly borne by the party himself, can it be held that the declaration is valid because, on a later date, the Government means to pay back the amount to the party ? In each case, the answer is obviously in the negative. These considerations dispose me to the view that what the Court in construing the proviso must have regard to is the state of things at the time of the declaration. A contrary view is bound to lead to inconvenient and absurd results. Though the wording of the proviso is unfortunately not explicit, the Courts

must construe it reasonably. It is suggested for the Government that there is the possibility of its not recovering the 80 per cent either wholly or in part. In my opinion this is a factor that does not count. The section says that some portion of the cost must be paid out of the public revenue. That condition is here literally complied with. That is all with which the Court is concerned. On this point also the view of the learned District Munsif is right and that of the lower Court wrong. In the result the second appeal is allowed and the suit is dismissed with costs throughout.

P.R.S./S.N. *Suit dismissed.*

** A. I. R. 1930 Madras 801
Full Bench

COUTTS-TROTTER, C. J., AND BEASLEY AND MADHAVAN NAIR, JJ.,

and then

BEASLEY, C. J., AND ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

S. M. S. Subramanian Chettiar and *another* — Plaintiff and Receiver—Appellants.

v.

Sinnammal and *others*—Respondents.

Letters Patent Appeal No. 72 of 1925, Decided on 17th April 1930, from judgment of Srinivasa Ayyangar, J., in Second Appeal No. 88 of 1922, reported in *A. I. R.* 1925 *Mad.* 266.

**** (a) Civil P. C. (1908), O. 41, R. 33—Illustration to R. 33 is only one type but does not exhaust class of cases in which powers under that rule may be invoked.**

The illustration to the rule is a type of one class of cases, which calls for the exercise of the powers conferred by R. 33, but it does not by any means exhaust the class of cases in which the powers of the appellate Court under this rule may be invoked. [P 804 C 1]

**** (b) Civil P. C. (1908), O. 41, R. 33—Plaintiff, dissatisfied with decree, appealing—In proper case appellate Court can dismiss plaintiff's suit in toto though respondent has not preferred cross-appeal or memorandum of objections.**

Where a plaintiff, being dissatisfied with a decree passed in his favour, prefers an appeal, the appellate Court, in a proper case, has jurisdiction to exercise its powers in favour of the respondent by dismissing the plaintiff's case in toto, though the respondent did not prefer a cross-appeal or memorandum of objections challenging the decree passed by the first Court : 34 *All.* 32 ; 24 *I. C.* 208 and 32 *I. C.* 494, *Expl.*; *A. I. R.* 1921 *All.* 367 ; 54 *I. C.* 686 ; 62 *I. C.* 623 ; *A. I. R.* 1927 *P. C.* 252 and *A. I. R.* 1923 *Mad.* 392, *Rel. on* ; *A. I. R.* 1927 *Mad.* 620, *Ref.* and *A. I. R.* 1925 *Mad.* 266, *Affirmad.* [P 806 C 1]

**** (c) Transfer of Property Act (1882), S. 91 (a) and (b)—It is only those persons who are interested in mortgage security or equity of redemption that are necessary parties in suit under Civil P. C., (1908), O. 34, R. 1.**

The cases contemplated by S. 91 (a) and (b) exhaust the class of cases contemplated by O. 34, R. 1, Civil P. C., and it is only persons interested in the mortgage security or in the equity of redemption that have necessarily to be made parties to a suit under O. 34, R. 1 ; *A. I. R.* 1921 *Mad.* 30 and 43 *Mad.* 696, *Appr.* [P 807 C 2]

**** (d) Transfer of Property Act (1882), S. 91 (f)—Money—Decree-holder attaching property subject to mortgage—Mortgagee suing for mortgage money but not making attaching decree-holder party — Property sold in execution of decree obtained by mortgagee—Attaching decree-holder's right to redeem is not available to him :** 37 *Mad.* 418=15 *I. C.* 334, *Overruled* and *A. I. R.* 1925 *Mad.* 266, *Reversed.*

An attaching decree-holder in execution of a money decree against the mortgagor is not a necessary party to a suit by the mortgagee for the recovery of the mortgage money. That being so the right to redeem which the attaching decree-holder has under S. 91 (f), is not available to him where the property is sold through Court in execution of the decree obtained by the mortgagee, although he was not made party to the suit by the mortgagee: **37 Mad. 418=15 I.C. 334, Overruled ; A. I. R. 1925 Mad. 266, Reversed ;** *A. I. R.* 1921 *Mad.* 30 and 43 *Mad.* 696, *Agreed*: 25 *Cal.* 179, *Rel. on.* [P 807 C 2]

T. L. Venkatarama Ayyar—for Appellants.

P. R. Srinivasan—for Respondents.

Order of Reference.

Anantakrishna Ayyar, J.—Plaintiff is the appellant in this appeal. In execution of a money decree obtained by the plaintiff against Subbiah Pillai in O. S. No. 650 of 1910 the plaintiff attached the suit properties in October 1913. Subsequently the plaintiff himself purchased the property in Court auction on 9th March 1914. The sale was confirmed on 9th April 1914, and the plaintiff got delivery of property in enforcement of the sale certificate on 2nd December 1914. The sale to the plaintiff was subject to a hypothecation in favour of Peria Ravutha Goundar for Rs. 200 over the said properties.

Peria Ravutha Goundar filed a suit (O. S. No. 597 of 1913) on 19th November 1913 to recover money due on his hypothecation bond, making Subbiah Pillai party defendant. The present plaintiff however was not made a party to that suit. The defendant, after obtaining the preliminary and final decree in Suit No. 537 of 1913, himself purchased

the properties in Court auction on 27th March 1916.

On the allegation that the defendant got into possession of the properties by trespass in May 1916 the plaintiff filed the present suit on 2nd February 1927 against Peria Ravutha Goundar for redemption of the defendant's mortgage for Rs. 200, dated 11th August 1905, mentioned above. The defendant pleaded that he was the owner of the properties and that the plaintiff was not entitled to redeem. The Court of first instance decreed redemption by the plaintiff on payment of Rupees 830-8-5 to the defendant.

The plaintiff preferred an appeal to the lower Court on the ground that the amount that he was directed to pay for redemption was too large and that he was entitled to redeem on payment of a smaller amount. At the hearing of the appeal, the learned Subordinate Judge came to the conclusion that the plaintiff was not entitled to any right of redemption at all, and consequently not only dismissed the plaintiff's appeal, but reversed the decree of the first Court in plaintiff's favour and dismissed the suit in toto.

Two questions of law have been raised in the appeal to the High Court, one relating to the plaintiff's right to redeem and the other that the lower appellate Court had jurisdiction in an appeal preferred by the plaintiff, not only to dismiss the plaintiff's appeal but further to reverse the decree passed in plaintiff's favour by the first Court, even though the respondent had not preferred any memorandum of objections or an independent appeal questioning the decree of the first Court.

To appreciate the first question it is necessary to state that the first Court relying on the decision reported in *Venkataseetharamayya* v. *Ventaramayya* (1) decided that a money decree-holder, who had attached the mortgaged properties ought to have been made a party to the suit subsequently filed by the mortgagee to recover money due on the mortgage and that such attaching decree-holder was entitled to redeem the mortgage. It would appear that a later decision of the High Court dissenting from the view taken in *Venkataseetharamayya* v. *Venkataramayya* (1) was reported in the Law Reports, *Chamiyappa Tharagan* v. *Ramayyar* (2), shortly before the appeal was heard by the lower appellate Court. Consequently, according to the later ruling of the High Court, the plaintiff could not claim any right of redemption and consequently the suit for redemption ought to have been dismissed.

But the defendant had not preferred any independent appeal nor filed any memorandum of objections in the plaintiff's appeal questioning that portion of the decree passed by the District Munsif upholding the plaintiff's right to redeem. The lower appellate Court however was of opinion that under O. 41, R. 33, Civil P. C., the appellate Court had jurisdiction to reverse even that portion of first Court's decree though it has not been appealed against; and having regard to the circumstances of the case, it held that a case was made out for the exercise by it of the jurisdiction conferred by O. 41, R. 33, Civil P. C. Accordingly the appellate Court not only dismissed the plaintiff's appeal but proceeded further and reversed the first Court's decree and dismissed the plaintiff's suit altogether.

It was argued before us that there is a conflict between the decision in *Venkataseetharamayya* v. *Venkataramayya* (1) and the decision in *Chamiyappa Tharagan* v. *Ramayyar* (2) on the question whether the right of redemption subsists in the plaintiff in such cases. On the question of the power of the appellate Court to interfere even with the portion of the decree not appealed against even if it thought that decision erroneous in the absence of an appeal or memorandum of objections, various cases were quoted before us. The question relates to a matter of practice as regards jurisdiction and powers of appellate Courts. It is essentially necessary and expedient that the law on such a point should be definitely and authoritatively laid down.

Having regard to the two questions of law aforesaid arising in this case, and for the reasons mentioned already, we think that this appeal should be decided by a Full Bench and we accordingly refer the whole case for the decision of a Full Bench.

(1) [1914] 37 Mad. 418=15 I. C. 334.

(2) A. I. R. 1921 Mad. 30=62 I. C. 121=44 Mad. 232.

(And this Letters Patent appeal coming on for hearing before Sir Murray Coutts-Trotter C. J., and Beasley, J., (as he then was) and Madhavan Nair, J., the Court delivered the following):

Madhavan Nair, J.—The plaintiff is the appellant in the Letters Patent appeal. He obtained a money decree against Subbiah Pillai and one of his sons in O. S. No. 850 of 1910 on the file of the District Munsif's Court of Madura. In execution of that decree he attached the suit property in October 1913. Subsequently he himself purchased it in Court auction on 9th March 1914. The plaintiff's purchase of the property was subject to a hypothecation in favour of the defendant for Rs. 200 dated 11th August 1905. The sale was confirmed on 9th April 1914 and in enforcement of the sale certificate he obtained delivery of the property on 2nd December 1914. In the meanwhile, the defendant filed a suit (O. S. No. 537 of 1913) on his hypothecation on 19th November 1913 and got a decree on 18th December 1913. To this suit the present plaintiff was not made a party. In execution of his decree, the defendant purchased the property on 27th March 1916. Alleging that the defendant is in unlawful possession of the land the plaintiff filed the present suit against him for the redemption of his mortgage for Rs. 200. The defendant pleaded that he was the owner of the property and that the plaintiff was not entitled to redeem. The first issue in the case was "whether the plaintiff has the right to redeem." When the case came on for trial, the defendant conceded this point in favour of the plaintiff as under the ruling in *Venkataseetharamayya* v. *Venkataramayya* (1) an attaching creditor has a right to redeem. The District Munsif passed a decree for redemption in favour of the plaintiff on payment of Rs. 830-8-5 by the defendant.

The plaintiff then preferred an appeal to the lower appellate Court on the ground that the sum he was ordered to pay was too large and that he should have been allowed to redeem on payment of a smaller amount. At the hearing of the appeal the defendant's vakil contended that the plaintiff's suit for redemption itself was not maintainable; and he represented that it was in view of the decision in *Venkataseetharamayya* v. *Venkataramayya* (1) that an attaching creditor has a right to redeem, that he conceded before the lower Court the plaintiff's right to redeem but that the decision in *Chamiyappa Tharagan* v. *Ramayyar* (2) has now negatived such a right on the part of the attaching creditor. In the circumstances, the learned Subordinate Judge allowed the defendant to raise the contention under O. 41, R. 33, Civil P. C.; and though there was no cross-appeal or memorandum of objections by him, he upheld his contention and not only dismissed the plaintiff's appeal but reversed the decree of the first Court in plaintiff's favour and dismissed his suit in toto.

Against the above decree of the lower appellate Court the plaintiff preferred S. A. No. 88 of 1922, and urged before Srinivasa Ayyangar, J., that the Subordinate Judge was wrong in holding that the plaintiff had no right to redeem and that he had no jurisdiction under O. 41, R. 33, Civil P. C., to allow the respondent to raise this new plea. The learned Judge overruled both arguments and dismissed the second appeal. The present Letters Patent appeal is against the judgment and decree of the learned Judge.

The same arguments have been addressed to us. It is first contended that the learned Judge erred in holding that the lower appellate Court had jurisdiction to dismiss the plaintiff's suit under O. 41, R. 33, Civil P. C., when the respondent had filed neither an appeal nor a memorandum of cross-objections challenging the decree for redemption passed by the District Munsif and that the provisions of this rule should be read as subject to R. 22 of the said order, the Court-fees Act and the Limitation Act, etc. In support of this contention reliance is placed upon the true scope and meaning of O. 41, R 33, as illustrated by the decisions in *Rangam Lal* v. *Jhandu* (3); *Gangadhar* v. *Banabashi* (4); *Abjal Majhi* v. *Intu Bepari* (5); *Ramalingam Chettiar* v. *Subramanya Chettiar* (6)

(3) [1912] 34 All. 32=11 I. C. 610.
(4) [1915] 24 I. C. 208.
(5) [1915] 32 I. C. 494.
(6) A. I. R. 1927 Mad. 620=103 I. C. 394=50 Mad. 614.

and *Chockalingam Chetty* v. *Seethai Achi* (7).

Order 41, R. 33, reads as follows:

"The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection . . . . . .

Illustration.

A claims a sum of money as due to him from *X* or *Y*, and in a suit against both obtains a decree against *X*. *X* appeals and *A* and *Y* are respondents. The appellate Court decides in favour of *X*. It has power to pass a decree against *Y*."

The rule has been newly introduced in the Code of 1908. Its object is clearly to enable the Court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the appellate Court ample discretion to pass any decree or make any order to prevent the ends of justice from being defeated. By the very terms of the order, involving as it does an exercise of judicial discretion, the question whether the appellate Court should exercise the powers conferred by them in a particular case would no doubt depend upon the special facts and circumstances of that case. The illustration to the rule is a type of one class of cases, which calls for the exercise of the powers conferred by R. 33; but it does not by any means exhaust the class of cases in which the powers of the appellate Court under this rule may be invoked. Having regard to the wide language of the rule it is inexpedient to lay down any hard and fast rule regarding the true scope of this provision. In a proper case the Courts should not hesitate to use the powers conferred upon it by this rule. The basis for the rule may be found in O. 58, R. 4, of the Rules of the Supreme Court in England. *Attorney-General* v. *Simpson* (8) is an instance of another class of cases justifying action under this rule. In that case an action was brought by the Attorney-General on behalf of the public for two reliefs: (1) for a declaration that the public were entitled to the right of passage along a river including the locks without the payment of tolls; and (2) that the defendant was under an obligation to maintain the locks in an efficient state by repair. In the first Court a decree was passed declaring that the public were entitled to use the locks without payment of tolls, but it was also declared that the defendant was under no obligation to repair the locks. The defendant preferred an appeal against this decree. The plaintiff did not file either a cross-appeal or a memorandum of objections. The Court of appeal found that the public were not entitled to use the locks without payment of tolls to the defendant; at the same time the Court expressed the opinion that the defendant was nnder an obligation to repair the locks, and passed a decree to that effect. The learned Judge pointed out that under O. 58, R. 4, they were entitled to make this declaration notwithstanding the fact that there was no appeal by the plaintiff

"against so much of the judgment which declared that the defendant was not bound to repair and maintain the works."

In none of the cases brought to our notice has it been laid down that in an appeal preferred by the plaintiff against a portion of the decree the appellate Court has no jurisdiction, in the absence of a cross-appeal or cross-objection to dismiss the whole suit and that the utmost that the appellate Court is competent to do is to dismiss the appeal. No doubt, the learned Judges have remarked that the provision embodied in this rule should be used with care and caution; but that does not mean that the appellate Court has no jurisdiction under it to dismiss the plaintiff's suit in toto. The Court is not bound to interfere in every case in which it has the power to do so; it is in this connexion that the question of judicial discretion comes in. There may no doubt be cases where no excuse or justification could be found for a party not having preferred an appeal or a memorandum of objections, in which cases justice may not require the exercise of powers under O. 41, R. 33, and the appellate Court will be well advised in not exercising such powers. The decision in *Rangam Lal* v. *Jhandu* (3) does not support the extreme contention urged

(7) A. I. R. 1927 P. C. 252=107 I. C. 237=55 I. A. 7=6 Rang. 29.

(8) [1901] 2 Ch. D. 671=70 L. J. Ch. 828=17 T. L. R. 768=85 L. T. 325.

by the appellant. In that case the plaintiff brought a suit against the defendant for rent of a holding and obtained a decree for a portion of his claim. The plaintiff then appealed with respect to the portion of his claim dismissed by the first Court. The defendant submitted to the order, in so far as it was against him and neither filed a cross-appeal nor took objections under O. 41, R. 22, Civil P. C. The District Judge remitted certain issues to the first Court and on return of the findings dismissed the entire suit of the plaintiff holding that he had power to do so under O. 41, R. 33, even though the defendant had not appealed against that part of the decree which was against him. On appeal by the plaintiff the learned Judges held that it was not competent to the appellate Court acting under O. 41, R. 33, to interfere with the decree obtained by the plaintiff in so far as it had not been challenged by the defendant. The true purport of that decision is explained in *Jawahar Bano* v. *Shujaat Husain Beg* (9) in these words :

"The Full Bench in that case held that, although the words of O. 41, R. 33 were very wide, and the Judge, strictly speaking, *had jurisdiction to pass the decree which he had made* (the italics are ours), still there was not a proper exercise of jurisdiction by him in that case. It was pointed out that in a case where there is no sufficient reason for a respondent neglecting either to appeal or to file objections the Court will hesitate before allowing him to object at the hearing of the appeal."

Distinguishing the case in *Rangam Lal* v. *Jhandu* (3), with these remarks, the learned Judges upheld in *Jawahar Bano* v. *Shujaat Husain Beg* (9) the exercise of power by the appellate Court under O. 41, R. 33, Civil P. C. In that case a decree was passed for varying amounts against three defendants of whom two only appealed, the third not being made a party to the appeal. It was held that it was competent to the appellate Court to modify the decree in favour of the defendant who had not appealed by decreeing the whole sum due to the plaintiffs against the defendants who had. The decisions in *Gangadhar* v. *Banabasi* (4) and *Abjal Majhi* v. *Intu Bepari* (5) also do not in our opinion support the extreme contention urged by the appellant. The learned Judges while pointing out that

"ordinarily the power contained in R. 33 should be limited to those cases where, as the result of the appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience"

do not deny the appellate Court's jurisdiction to interfere in a proper case. Jenkins C. J., says in *Ganjadhar* v. *Banabasi* (4):

"There is no doubt that the words of that rule are widely expressed, but they must be applied with discretion."

And later on, the learned Judge adds: "No hard and fast rule can be laid down." A similar opinion is expressed by Mookerjee, J., in *Abjal Majhi* v. *Intu Bepari* (5). It would thus appear that the statement of the learned Judges in *Ramalingam Chettiar* v. *Subramanya Chettiar* (6) that the two Calcutta decisions just now mentioned laid down that the exercise of the rule should be limited to cases where the Court has interfered in favour of the appellants and further interference is required to adjust the rights of parties is not, with all deference to the learned Judges, quite accurate. There is no warrant for limiting the very wide terms of the rule only to this class of cases, though ordinarily it may be that it is in those cases occasions arise for exercising powers under the rule. The decision in *Debendra Narain Sinha* v. *Narendra Narain Sinha* (10) recognizes the extensive jurisdiction of the Court under R. 33, O. 41, Civil P. C. The latest decision of the Calcutta High Court in *Jogendra Kishore Roy* v. *Nasimuddin Sardar* (11) shows unmistakably the view of that Court on this matter. The facts of that case are thus summarized in the head-note :

"In a suit for the rent of a holding the first Court passed a decree in favour of the plaintiff for a proportionate amount of the rent payable in respect of the land included in the plaint, on the ground that the holding covered more lands than were included in the plaint. There was no appeal or cross-objection by the defendant, but on an appeal by the plaintiff the appellate Court held that having regard to the manner in which the suit had been framed the plaintiff would be entitled to no relief and accordingly dismissed the entire suit of the plaintiff."

The High Court held :

(9) A. I. R. 1921 All. 367 = 58 I. C. 114 = 43 All. 85.

(10) [1920] 54 I. C. 636.
(11) [1921] 62 I. C. 623.

"That having regard to the very wide powers given to an appellate Court under O. 41, R. 33, Civil P. C., the decisions of the appellate Court dismissing the whole of the plaintiff's suit, in the absence of a cross appeal or cross-objection by the defendant, was not without jurisdiction."

The following observation appearing in the judgment gives a complete reply to the arguments urged by the appellant before us :

"There can be no doubt that the wording of R. 33 is very general and in this respect gives very wide powers to the Court of appeal. But the learned vakil for the appellant however urges in reply that R. 33 is controlled by R. 22 and that the wide powers given by R. 33 can only be exercised in case the whole matter is brought into controversy before the appellate Court by a cross-appeal or a cross-objection filed under R. 22. I am not satisfied that this is a correct view of the scope of R. 33."

Our own Court has not dealt with this question except in the decision reported in *Ramalingam Chettiar* v. *Subramanya Chettiar* (6) already referred to. In *Gopala Iyengar* v. *Mummachi Reddiar* (12) at p. 272 (*of* 17 *M. L. W.*) the learned Judges, "to be consistent" gave relief to a defendant though he had not appealed or joined in the memorandum of objections filed by some of the respondents. The Privy Council in *Chockalingam Chetty* v. *Seethai Achi* (7) observes that under O. 41, R. 33, Civil P. C., the appellate Court is empowered, in a proper case, to add a defendant as respondent to the appeal for the purpose of passing a decree against him though their Lordships

"saw no sufficient reason for interfering with the refusal of the appellate Court to do so"

in that instance. On the whole, we are satisfied that in a proper case the lower appellate Court has jurisdiction to exercise its powers in favour of the respondent by dismissing the plaintiff's case, in toto though the respondent did not prefor a cross-appeal or a memorandum of objections challenging the decree passed by the first Court.

As already stated, whether interference was justified or not would depend upon the particular circumstances of each case. In the case before us the Subordinate Judge came to the conclusion that at the time when the appeal was filed the law that prevailed in Madras with regard to the plaintiff's right to redeem was what was laid down in *Venkataseetharamayya* v. *Venkataramayya* (1) and that therefore the respondent could not take exception to the District Munsif's decree by preferring an appeal or cross-appeal. But by the time the appeal came on for hearing before him the report of a decision of this Court refusing to follow *Venkataseetharamayya* v. *Venkataramayya* (1) appeared in *Chamiyappa Tharagan* v. *Rama Ayyar* (2). Relying on this decision respondent raised the question before the lower appellate Court. In these circumstances the Subordinate Judge held that there was sufficient excuse or justification for the respondent not having preferred an appeal or a memorandum of objections. With this view Srinivasa Ayyangar, J., also agreed. If therefore the Subordinate Judge's decision that the case in *Chamiyappa Tharagan* v. *Ramayyar* (2) really has overruled the decision in *Venkataseetharamayya* v. *Venkataramayya* (1), is correct, then we cannot say that he was wrong in exercising his discretion under O. 41, R. 33, and dismissing the plaintiff's suit in toto, though the respondent had not filed an appeal or a memorandum of cross-objections. The question for decision in this Letters Patent appeal therefore reduces itself to this: Has the plaintiff-appellant in this case no right to redeem in view of the decision in *Chamiyappa Tharagan* v. *Rama Ayyar* (2) ? As already indicated this question was decided against him both by the lower appellate Court and by the learned Judge whose decision is now under appeal. The case will be posted for further hearing on this point.

Coutts-Trotter, C. J.—I agree.

Beasley, J.—I agree.

(This Letters Patent appeal again coming on for hearing, before Beasley, C. J., and Anantakrishna Ayyar and Curgenven, JJ. the Court delivered the following judgments).

Anantakrishna Ayyar, J. — This Letters Patent appeal raised two important questions of law, one turning on the construction to be placed upon O. 41, R. 33, Civil P. C., and the other on S. 91, T. P. Act, read with O. 34, R. 1, Civil P. C.

The first question has been answered in favour of the respondents and against the appellant by a Full Bench of this Court at an earlier stage of this Letters Patent appeal. The only other question that remains for decision is whether the

(12) A.I.R. 1923 Mad. 392=74 I.C. 416.

plaintiff, on the facts stated in the order of reference, is entitled to redeem defendant 1's mortgage. The plaintiff was a money decree-holder against the judgment-debtor the mortgagor and in execution of his money decree he attached the mortgaged properties. Pending the attachment, defendant 1, the mortgagee, filed a suit to recover the money due upon his mortgage but he failed to make the plaintiff who was then the attaching decree-holder a party to his suit on the mortgage. In course of time the plaintiff became purchaser in Court auction in execution of his money decree and obtained possession. The mortgagee, the plaintiff in the other suit, also became purchaser in execution of the decree passed on the foot of his mortgage. The question that arises in the present suit is whether the plaintiff, the attaching decree-holder, who subsequently became also the auction-purchaser in execution of the money decree, has got the right to redeem the mortgage on the ground that S. 91 (f), T. P. Act, gives him such a right to redeem since he was not made a party to the mortgage suit.

The first point that arises for consideration in this connexion is as to the exact scope of the expressions appearing in S. 91 (a) and (b), T. P. Act, namely :

" A person having any interest in or charge upon the property."

and

"Any person having any interest in or charge upon the right to redeem the property."

read along with O. 34, R. 1, Civil P. C. :

" all persons having an interest either in the mortgage security or in the right of redemption."

I am clear that the cases contemplated by S. 91 (a) and (b) exhaust the class of cases contemplated by O. 34, R. 1, Civil P. C., and that it is only persons interested in the mortgage security or in the equity of redemption that have necessarily to be made parties to a suit under O. 34, R. 1, Civil P. C. This is the view that has been taken in *Chamiyappa Tharagan* v. *Ramayyar* (2) and in *Veyindramuthu Pillai* v. *Maya Nadan* (13). It is also clear that attachment in execution of a money decree does not of itself create any interest in or a charge over the properties which are the subject-matter of the attachment. This has been decided by the Privy Council in *Motilal* v. *Karrabuddin* (14) and is not open to question. Having regard to the construction placed on S. 91 (a) and (b), T. P. Act, and to the view taken regarding the scope of O. 34, R. 1, Civil P. C., it seems to me that it could not be said that a person in the position of the plaintiff, namely an attaching decree-holder in execution of a money decree against the mortgagor, is a necessary party to a suit under O. 34, Civil P. C. The question then arises whether the plaintiff, simply because under Cl. (f), S. 91 he is given a right to redeem, as an attaching decree-holder, is entitled in the circumstances that have happened in this case to claim redemption. It has been held by Oldfield, J., in *Veyindramuthu Pillai* v. *Maya Nadan* (13), that any rights he might have qua attaching decree-holder are not available to him when the properties have been sold in execution through Court ; and that view has been accepted by two learned Judges of this Court, Sir John Wallis, C.J., and Seshagiri Ayyar, J., in *Chamiyappa Tharagan* v. *Ramayyar* (2). It was argued that, if under Cl. (f) an attaching decree-holder has been given a right to redeem, then, whatever might be the exact category under which the right could be placed, not having been a party to the mortgagee's suit, his rights could not vanish.

The answer to this is furnished in the judgment of Oldfield, J., and the other learned Judge in *Veyindramuthu Pillai* v. *Maya Nadan* (13). The legislature evidently saw the impropriety of retaining Cl. (f), S. 91, after the Privy Council made it clear that an attachment as such does not create any title to, or interest or charge on, the properties attached in favour of the attaching decree-holder, and has accordingly omitted Cls. (f) and (g) from the section in the Transfer of Property (Amendment) Act, 1929. The case is not consequently of any general importance and could not arise under the present law ; and I am not prepared in the circumstances to reconsider the point decided by the three learned Judges of this Court in *Veyindramuthu Pillai* v. *Maya Nadan* (13) and *Chamiyappa Taragan* v. *Rama Ayyar* (2), whose observations

(13) [1920] 43 Mad. 696=58 I. C. 501.

(14) [1898] 25 Cal. 179=24 I. A. 170=7 Sar. 222 (P.C.).

I have already referred to, and I respectfully follow their opinion on this point. It follows that this contention raised by the learned advocate for the appellant should fail. The Letters Patent appeal should for these reasons be dismissed.

But having regard to the fact that the lower appellate Court exercised the rather extraordinary jurisdiction that Courts have under O. 41, R. 33, Civil P. C., and granted a decree in favour of the respondents though the respondents had not preferred an appeal to it, and for that reason directed that they should have no costs of the litigation, I think that this Letters Patent appeal should in the circumstances be dismissed without costs.

Beasley, C. J.—I agree and have nothing further to add.

Curgenven, J.—I agree.

P.R.S./S.N. *Appeal dismissed.*

** A. I. R. 1930 Madras 808
Full Bench

BEASLEY, C. J., ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

Ramaswami Chettiar and *others* — Petitioners.

v.

Commissioner of Income-tax—Respondent.

Original Petition No. 275 of 1928, Decided on 1st May 1930.

**** Income-tax Act (11 of 1922), S. 10 (2)—(Per *Full Bench*)—Theft of money used for lending from business stronghold—Loss is not allowed for computing income-tax—** (*Anantakrishna Ayyar, J., Contra.*)

Per *Full Bench*—Loss incurred by theft of money used in the money-lending business and (from the stronghold) in the business premises (none of the thieves being then servant of the assessee), held not incidental to the business of the assessee, and not allowed for in computing income-tax (*Anantakrishna Ayyar, J.*, contra) : 2 *I. T. C.* 4, *Dist.*; (*other Tax Cases* and *other cases considered.*)

[P 808 C 2, P 809 C 1]

V. Rajagopala Iyer—for Petitioner.

M. Patanjali Sastri—for Respondent.

Beasley, C. J.—The facts in this case have been sufficiently set out in the answers to the question referred to us of my learned brothers Anantakrishna Ayyer and Curgenven, JJ., which I have had the advantage of seeing and I therefore do not propose to state them. The question seems to me to resolve itself into one as to whether the loss sustained by the assessee in this case was one which can be described as incidental to his business. If it was, then he is entitled to have his profits upon which he is liable to pay income-tax reduced by the amount of that loss. It was argued for the assessee: (1) that the robbery of the assessee's money was one which was incidental to his business of a money lender ; and (2) that the money stolen was his "stock-in-trade" because it was money which, had it not been stolen, was available to him for the purpose of lending to borrowers and making a profit thereby. There is no evidence in this case that this sum was "stock-in-trade" at all and the money would seem to me to be capital plus the profits collected by the assessee. If this money was capital, then the assessee would not be entitled to a deduction on account of its loss.. So far as the money stolen was the profit of the assessee, unless it can be shown that its loss was incidental to the business he carried on, he cannot claim a deduction in respect of it. If anyone is paid a sum due to him as profits and he puts that in his pocket and on his way home is robbed of it, it would be, I think, difficult to contend that such a loss was incidental to his business. Still more so when he has reached his home and put these profits in a strong-room or some other place regarded by him to be a place of safety.

I can well understand that in cases where the collection of profits or payment of debts due by, is entrusted to a gumastah or servant for collection and that person runs away with the money or otherwise improperly deals with it, the assessee should be allowed a deduction because such a loss as that would be incidental to his business. He has to employ servants for the purpose of collecting sums of money due to him and there is the risk that such servant may prove to be dishonest and instead of paying the profits over to him convert them to his own use. But I cannot distinguish the present case from the case of any professional man or trader who, having collected his profits, is subsequently robbed of them by a stranger to his business. In this case none of the thieves were the then servants of the assessee although one of them had formerly been his cook.

This is no doubt a very hard case and, whilst I have every sympathy with the assessee, I am unable to answer the question except in the negative. The question referred to us is rather too general, but upon the facts of this case which, in my opinion, are not at all adequately set out, that must be my answer. The result is that the answer of this Full Bench is in the negative and the assessee is directed to pay the costs of the Income-tax Commissioner which we fix at Rs. 250.

Anantakrishna Ayyar, J.—I have the misfortune in this case to differ from the opinion of my Lord the learned Chief Justice, and of my learned brother Curgenven, J. The question referred for our decision under S. 66, Income-tax Act is :

'Whether the loss incurred by theft of money used in the money-lending business, and in the business premises should be allowed for in computing the income-tax."

The question raised is one of very great importance, and the case is one of first impression, no case directly deciding the point having been brought to our attention.

One should have liked that more facts were available; the facts, as they appear in the records before us, are the following :

The petitioners are a registered firm of Nattukottai Chettis carrying on money-lending business at Karaikudi and other places in British India, and at Kualalampur in the Federated Malay States, the headquarters being at Karaikudi in the Ramnad District. On the night of 21st October 1926 certain persons broke into the strong room of the house at Moulmeingyum (Burma) occupied by the petitioners and by two other firms, and stole cash and currency notes of the value of Rs. 9,335 besides certain jewels which had been pledged with the firm as security by certain customers. On 5th August 1927, four persons were convicted of the said offence by the Magistrate. One of these persons had been employed as a cook at the above-mentioned premises. Though he was not so employed at the time of the offence he was convicted, in addition, under S. 328, I. P. C., of administering drugs to the inmates of the house to facilitate the commission of the theft.

The Commissioner of Income-tax stated that he had since the decision of the Income-tax Officer ascertained that the loss of the cash and the jewels was genuine. He however was of opinion that there was no provision of law under which the assessees would be entitled to deduction claimed in respect of the cash and currency notes, that the loss could neither be said to be a business loss nor expenditure incurred for earning profits ; and that the loss in question is loss of capital. The decision in 2 *I. T. C.* p. 4, was distinguished on the ground that the loss in the present case could not be said to have been incurred in the business at all, and that such a loss could not be said to have been incurred solely for the purpose of earning the profits and gains of the business. He therefore held that the loss due to theft committed by persons unconnected with the business is allowable as a deduction.

The learned counsel who appeared in support of the assessment argued that the allowance now claimed could not be brought under any of the clauses of S. 10 of the Act, which, he argued, exhausted the headings under which allowances could be claimed by assessees. I am unable to accede to that contention. Section 10 no doubt directs that the allowances mentioned in the section should be made in favour of the assessee ; but in my view it does not necessarily follow that the assessee is not entitled to the allowances now in question simply because it is not specifically mentioned in S. 10. Under Cl. 1, S. 10, tax is payable only in respect of the "profits or gains" of any business carried on by the assessee. The Court has to find out what the profits or gains of the business amounted to. In the absence of any specific provisions in the Act the profits or gains of a business have to be ascertained by the ordinary commercial methods. If the argument advanced on behalf of the Crown be accepted it would follow that no allowance could be claimed, for instance for bad debts actually written off during the year, since there is no specific provision in S. 10 for allowing such deduction. But it could not be, and in fact was not, contended that allowance should not be made for such "bad debts." The practice of making

allowance for such bad debts has become firmly established. As the Court has to find out the amount of profits or gains of the business during the period the question arises whether the loss by theft in question should be deducted when the profits are ascertained.

As pointed out in Konstam's book :

"The net profits of the trade or business should be computed by reasonable business methods, subject to any specific directions contained in the Income-tax Act."

Lord Herschell observed at p. 424 (of 12 *A. C.*) as follows:

"The profit of a trade or business is the surplus by which the receipts from trade or business exceeded the expenditure necessary for the purpose of earning those receipts . . . . . Unless and until you have ascertained that there is such a balance nothing exists to which the name of profits can properly be applied."

Similar observations were made by Lord Parker at p. 458 (of 1915 *A. C.*):

"Where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains it ought to be allowed . . . . . provided there is no prohibition against such an allowance."

It was argued for the assessee that the allowance claimed would come under S. 10 (2) (9) :

"Any expenditure not being in the nature of capital expenditure incurred solely for the purpose of earning such profits or gains."

It was also argued that in the case of money-lending business of Nattukottai Chettis the loss in question must be taken to be loss of "stock-in-trade." On the other side it was argued for the Crown that the loss in question could not be said to be an expenditure incurred, much less, solely for the purpose of earning such profits or gains, and that in any event it should be taken to be expenditure in the nature of "capital" expenditure. It was also argued that the moneys in question could not be said to be "stock-in-trade" in the ordinary sense of the expression. Having regard to the way in which such people carry on their money-lending business it would seem to be essential for the successful carrying on of their business to have cash with them even after "the usual banking hours." They carry on their business operations as is well known even after the offices of the European Banks are closed for business for the day. Keeping moneys with them for purposes of their trade after such office hours, could not, therefore, in my view, be said to be anything else than keeping moneys in the usual course of their business. The profits made by them by doing business after the usual office banking hours are surely liable to income-tax. The finding, as I understand it, is that in the usual course of business the remaining cash etc., on hand and the jewels received on pledge from the customers were kept in "the strong-room" of the business premises, and that thieves broke into the strong-room and stole the cash and currency notes and the jewels. The fact of theft having been found, I think that the loss in question should be taken to be a loss connected with or arising out of the money-lending trade or business of the assessees. With reference to the jewels thus lost, the income-tax authorities have, and, in my opinion, rightly, made allowance; but I think that allowance should be made also for the cash and currency notes amounting to Rs. 9,335 thus lost.

I am unable to agree with the contention of the Crown that the loss in question, should, if at all, be taken to be loss of "capital." It is true, as pointed out on behalf of the assessees, that the profits of the Moulmeingyum business for the period in question was computed by the income-tax authorites to be over Rs. 20,000. But that circumstance by itself is no ground for holding that the item in question should be taken as loss of profits, and not loss of capital. Whether a particular item is really capital expenditure or not has to be decided having regard to various considerations. Of course it is well established that when once profits have been earned during the period, it does not matter how the same is dealt with subsequently.

I am inclined to the view that in the case before us, the cash and currency notes, etc., lost should be taken to be "stock-in-trade" of the assessee's business. What should be considered as stock-in-trade of a business should be decided after having regard to the nature of the particular business, its requirements, and other circumstances essentially connected with the successful carrying out of the particular business.

In 2 *I. T. C.* 184, the question was raised whether allowance should be

made for depreciation in the case of certain Government securities held by a firm. The answer would depend on the question whether those securities were held by the firm (bank) with the object of dealing with them from day to day in the ordinary course of its business including that of buying and selling Government securities in the usual course, or whether such Government securities were purchased by the firm (bank) with the object of constituting the same as a sort of reserve, in lieu of cash. In the case of the former, allowance should be made for depreciation (the reason being that the Government securities should, in such a case, be treated as "stock-in-trade" of the bank); but not in the case of the latter. In the case of money-lending business such as the one before us, I think that the reasonable view to take as regards stock-in-trade is the one indicated by me before.

The decision in 2 *I. T. C.* 4, so far as it goes also supports this view. There, some money was entrusted to a gumasta of a firm in the usual course of business with instructions to pay the same to a creditor of the firm. The gumasta embezzled the moneys.. He was criminally prosecuted, but was acquitted, his defence being that he was robbed of the money. The case in 2 *I. T. C.* 4 however was comparatively a plainer case than the one before us, and the Court, if one may say so with respect, very properly held that the loss we connected with and arose out of the business, and was not prima facie a loss in the nature of capital expenditure.

On behalf of the assessees, the decision of Rowlett, J., in 9 *T. C.* 319, was referred to before us. At p. 330 the learned Judge observed as follows:

"I quite think, with Mr. Latter, that if you have a business, in the course of which you have to employ subordinates, and owing to the negligence or the dishonesty of the subordinates, some of the receipts of the business do not find their way into the till, or some of the bills are not collected at all, or something of that sort, that may be an expense connected with and arising out of the trade in the most complete sense of the word."

Stress was laid on the words "something of that sort" occurring in that judgment. But the words are too wide, and one cannot be certain that the learned Judge had a case like the present in his view. Too much importance should not, I think, be attached to the above observation in the circumstances. It was argued on behalf of the Crown that theft should not be taken to be anything connected with or arising out of the assessee's money-lending business. In my view that is stating the position rather too broadly. In the case of railway administrations and other common carriers, the practice seems to be to make allowance for losses sustained by them in compensating passengers for accidents in travelling over the railway etc. That the practice is to make such allowance in favour of common carriers is taken for granted in the judgment of Lord Loreburn, L. C., in *Strong & Co. Ltd.* v. *Woodfield* (1). At p. 452, the Lord Chancellor observed as follows:

"In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with, in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration: losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted."

If losses sustained by a railway company in compensating passengers for accidents in travelling over its line could be deducted, it would seem to follow that losses similarly sustained by a railway company in compensating owners and consignees of goods entrusted to them for carriage, but which were during transit, by theft, could also be deducted in proper cases. That would seem to resemble the present case, and the observations by the Lord Chancellor, I think, prima facie support the contention of the assessee before us.

No doubt the further observations made by the Lord Chancellor should also be kept in view. It was remarked later on, at p. 452:

"Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise."

The loss must be something in the nature of a commercial loss. Whether

(1) [1906] A. C. 448=75 L. J. K. B. 864=95 L. T. 241=5 Tax. Cas. 215=22 T. L. R. 754.

a particular loss is of that nature or not would have to be decided with reference to all the circumstances of a case. In 1897 *A. C.* 1, Lord Shand expressed the opinion that damages awarded to an employee for wrongful dismissal would be allowable as a deduction. Damages for libel against a newspaper proprietor would appear to be loss in the ordinary course of business of proprietors of newspapers: see Pratt and Redman's Income-tax Law, Edn. 10, p. 112.

To the argument urged on behalf of the Crown that it is no part of the assessee's business to deal with thefts, the following observations of Lord Buckmaster in *Green* v. *Gilkstein & Son Ltd.* (2) may be referred to. There the question was whether the amount received by a firm of timber merchants from "Fire Insurance Co." in respect of stock of timber destroyed by fire could be assesssed to income-tax. At p. 384 Lord Buckmaster observed as follows:

"If this results in a gain, as it has done, it appears to me to be an ordinary gain, a gain which has taken place in the course of their trade none the less because, as Mr. Macmillan put it, and as I think Sir John Simon before him appears to have put it, it is no part of a timber merchant's business to trade in fires."

If in the present case the stock-in-trade of the assessees before us including balance on hand each day and the jewels, etc., received on pledge from customers, had been insured at a particular figure against fire or theft, and the amount was accordingly received from the insurers on the occurrence of fire or theft, then the amount so received would, according to the decision in *Green* v. *Gliksten & Son Ltd.* (2) be prima facie taxable. The premia paid in respect of such insurance is allowed to the assessee [see S. 10 (2) (4)], and in return, the amount received by the assessee from the insurers would seem liable to be assessed to income-tax. If no insurance had been effected by the assessees no premium is paid and no allowance is made on account of premium; and in case of loss the assessee receives no amount from insurers, and therefore no such amount could be included in the assessment. The reasoning would seem to lead to the conclusion that the loss, even if uninsured should be deducted, as I have come to the conclusion that the loss is connected with the business and is really incidental to the trade itself having regard to the nature of the trade or business of the assessee.

Turning to English text-books on income-tax law, I find the following statements in Sander's Income-tax, Edn. 3. At p. 310, it is stated that

"a deduction is allowed in respect of employee's theft."

At p. 196, it is stated that "loss from embezzlement is deductible." Similarly at p. 163:

"a deduction is permitted in practice for fire insurance premiums;"

At p. 203, there are two passages which are rather important:

"deduction is allowed in practice for the loss arising from defalcations of employees,"

also,

"loss of stock through fire is deductible in so far as it is not recovered by insurance, but loss of building does not form an admissible deduction."

I also note that, "loss by flood or tempest" is allowed in case of assessments under Sch. A. The above statements, so far as they go, would seem to lend support to the assessee's contention in the present case.

Each case has to be decided with reference to the facts and circumstances relating thereto and having regard to the nature and methods of trade or business in question. Having regard to the circumstances of the present case, and the findings of fact arrived at by the Income-tax Commissioner, I think that the assessees are entitled to the deduction of Rs. 9,335 claimed by them, and I would answer the question in the affirmative.

Curgenven, J.—The question which the Commissioner refers is:

"Whether the loss incurred by theft of money used in the money-lending business and in the business premises should be allowed for in computing the income-tax."

The Commissioner rightly observes that a loss of this character is not included within any of the deductions permissible under S. 10 (2) of the Act. But that does not conclude the matter, because S. 10 provides for the taxation of the profits of a business, and we have, therefore, to consider whether, in computing profits, the amount of such a loss may be deducted from them. It is settled for instance, that a bad debt incurred by a money-lender may be so deducted, on the ground that it is a

(2) [1929] A. C. 381=14 Tax. cases 365.

loss incidental to his business, so that it is fair, in assessing his net profits, to take account of losses as well as gains. Such a loss, it appears to me, must satisfy two conditions : (1) it must be a loss of part of the stock-in-trade of the business; and (2) it must be a loss of such a kind as is incidental to the business.

As regards (1), the question describes the money lost as " money used in the money-lending business " and taking this to mean money actually in use in the carrying on of the business, I feel no difficulty in holding that it was part of the money-lender's stock-in-trade. It may have included profits earned in previous transactions, but if those profits were themselves to be applied to the business, and were kept in hand for that purpose, they would not I think be any the less part of the stock-in-trade.

Requirement No. (2) presents greater difficulties, because I think it is clear that not all kinds of losses of stock-in-trade can be said to be incidental to the business. A loss to be incidental must be such as in the ordinary course, and having due regard to the peculiar risks attendant upon the conduct of the business, is likely from time to time to occur. Cases of embezzlement by subordinates, such as formed the subject of 2 *I. T. C.* 4, would be losses of this nature, because the employment of clerks and servants is unavoidable, and the employer is likely sooner or later to be the victim of their dishonesty or negligence. That such a loss might be classed as a form of expense arising out of trade was recognized in 9 *I. T. C.* 319, although in the particular circumstances of that case, as I read it, the money lost no longer formed part of the stock-in-trade. The test whether the loss was, in the language of the English rule, " connected with or arising out of trade " was applied in two other English cases: *Strong & Co.* v. *Woodfield* (1) and 12 *Tax Cases* 227. The former related to damages claimed from an innkeeper in respect of injuries caused to a customer by the falling of a chimney ; the latter to a penalty incurred by a trading firm for negligently failing to observe certain conditons imposed during war-time on the export of goods to neutral countries.

The loss was held, in the language of the English rule, to be a loss " not connected with or arising out of trade." These cases do not help us further than to show what manner of test should be applied. Now in the present case it may be conceded that a money-lender's business requires that he should keep a considerable sum in cash on his premises. Even if a bank is accessible to him, it would unduly restrict his activities to transact his affairs only within banking hours. The practice is certainly otherwise, and it is only fair to have regard to custom in deciding what the exigencies of a business require. That means that cash must be kept in a safe or strong-room,—receptacle in the present case is described as a strong-room—and the question resolves itself into whether theft from a strong-room may form the foundation of a claim to remission of tax. I exclude cases of theft by a clerk or servant employed in the business and having access to the strong-room, because that is not in question here and special considerations might apply. In general, I am not prepared that theft by some external operator, with or without the complicity of domestic servants, ought to be recognized as the basis of a claim. To recognize it we must I think find, not only that the cash had to be kept on the premises, but that its loss by theft was a circumstance which was so far probable as to be an occurrence incidental to, if not inseparable from, the manner in which it had to be kept.

In my experience, the abstraction of money by theft from properly constructed safes or strong-rooms is not within the competence of the ordinary thief or house-breaker, and we have not yet in this country to reckon with gangs of safe breakers such as may be found elsewhere. Perhaps the circumstance that no decision upon a case of this nature is to be found suggests the infrequency of such claims. The only test to apply, in order to see whether a loss of this kind is one incidental to the business, is, I think, the comparative likelihood of its occurrence, the requirements of the business being what they are. For example, injury to life and limb, and probably theft too, must occur sooner or later in the running of a railway. Bad debts and embezzlement have al-

ready been adverted to. Very likely the theft of stock-in-trade which have to be kept exposed to the public would fall into the same category. But I doubt whether cash kept in a safe should, if it should happen to be stolen be allowed for.

We have not been furnished with any adequate narration of the facts of the present case, so that the question has had to be answered, as indeed it is put, in general terms. So considering it, I agree with my Lord in returning a reply in the negative.

P.R.S./S.N. *Reference answered in the negative.*

A. I. R. 1930 Madras 814

ANANTAKRISHNA AYYAR, J.

T. P. Vava Rowther—Plaintiff—Appellant.

v.

Sulaiman Rowther and *others*—Defendants—Respondents.

Second Appeal No. 258 of 1926, Decided on 19th September 1929, from decree of Sm. C.C. Judge, Kumbakonam, in Appeal Suit No. 41 of 1925.

Civil P. C., O. 6, R. 16—Defendant can raise in written statement inconsistent defences—Party aggrieved may move Court under R. 16—If Court is not moved under that rule at trial that party cannot contest in second appeal that trial was vitiated.

It is open to a defendant to raise by his written statement as many distinct and separate and therefore inconsistent defences as he may think proper, and the party aggrieved should move the Court to take action under O. 6, R. 16, in case the Court considers that the defence is embarrassing and thus direct one or more inconsistent defences to be struck out and the pleading amended accordingly. But where the Court is not moved under that rule at the trial the party is not for that reason alone entitled to contend in second appeal that the whole trial was vitiated and to claim retrial : 15 *Cal.* 684 (*P. C.*) ; 13 *Mad.* 549 and 14 *Mad.* 172, *Cons.* ; 18 *All.* 125 and *English Cases Discussed.* [P 816 C 2]

V. C. Seshachariar and *K. S. Desikan*—for Appellant.

S. Rangaswami—for Respondents.

Judgment.—Suit to recover money due on a hypothecation bond dated 29th November 1906, executed for Rs. 300 by defendant 1 (Hameeda Beevi Ammal). Defendants 2 to 9 were impleaded as legal representatives of defendant 1, who died shortly after the filing of the plaint. The plea urged by the contesting defendants was that the property belonged to their father (husband of defendant 1), that owing to pressure of creditors and to settle their claims easily the father made a colourable settlement in favour of defendant 1, and in order to lend colour, to the settlement the plaint hypothecation bond was executed in favour of the plaintiff who was the father-in-law of defendant 2 without any consideration ; and after the death of their father (defendant 1's husband) the plaintiff having insisted on payment of Rs. 250, defendant 2, the eldest of the children, paid the plaintiff Rs. 360 in 1907, which was accepted in full discharge of the mortgage, and that the present suit was the result of collusion between the plaintiff and his son-in-law, defendant 2. The trial Court framed five issues in the suit and found that defendant 1 was entitled to mortgage the plaint property, that the mortgage was true and supported by consideration, but that it must be deemed to have been discharged as alleged by the contesting defendants (defendant 3, etc.). It dismissed the suit, but without costs.

On plaintiff's appeal the lower appellate Court concurred with the Munsif's decision. It was however argued before the lower appellate Court that the defendants ought not to have been allowed to raise inconsistent pleas and that the trial in the first Court was vitiated by that circumstance. The lower appellate Court dealt with this matter in para. 16 of its judgment. It observed as follows :

" As regards the contention of the learned vakil for the appellant that the defendants had raised inconsistent and mutually antagonistic pleas in their written statement, viz, that the mortgage sued on is nominal and that it has also been discharged, I think on a close reading of the entire written statement it cannot be said that the defendants have raised any contentions which are mutually destructive. As pointed out on the respondent's side, the nominal nature of the transaction was set up only by way of probabilising the defendants' plea of discharge of the entire debt by payment of Rs. 250. In any case it is too late for the plaintiff to urge any such argument in the above appeal."

In the result the appeal was dismissed, but the lower appellate Court modified the decree of the 1st Court and allowed the contesting defendants' costs in both Courts. The plaintiff has preferred this second appeal. The

learned advocate for the appellant, seeing that the findings on issues of fact are against the appellant, pressed two questions before me : (1) that the defendants ought not to have been allowed to raise inconsistent and antagonistic pleas, viz.: (a) that defendant 1 had no title to the mortgage ; (b) that the mortgage was nominal ; and (c) that it had been discharged. He argued that such pleas were embarrassing to the plaintiff and that the lower Court's procedure in trying all the inconsistent issues had prejudiced the plaintiff ; and (2) that the lower appellate Court ought not to have interfered with the order as to costs passed by the trial Court.

The question was argued how far parties to a suit are entitled to raise inconsistent pleas and what procedure should be accepted by Courts in such cases. Before the Judicature Acts the rule of pleading in England would seem to be that a plaintiff could not (without leave of Court) plead inconsistent facts. After the Judicature Acts it has been held in England that there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative. It is said that since the Judicature Acts, inconsistent defences, such as (a) never indebted and, (b) payment, are daily pleaded. In *Berdan* v. *Greenwood* (1) (at p. 255), Thesiger, L. J., observed as follows :

"In this state of circumstances the Judicature Acts and Orders came into existence and swept away the old forms and practice of pleading, leaving it open to a defendant, as the general rules, to raise, by his statement of defence without leave, as many distinct and separate, and therefore inconsistent defences as he may think proper, subject only to the provisions contained in R. 1, O. 27, of the Rules of Supreme Court."

In *In re, Morgan Owen* v. *Morga* (2) the Court of appeal held that pleadings will not necessarily be struck out as embarrassing because they are inconsistent. At p. 499, Lindley, L. J., observed :

"Now a person may rely upon one set of facts, if he can succeed in proving the same and he may rely upon another set of facts, if he can suceeed in proving them and it appears to me to be far too strict a construction of this order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark. Let us take this particular case, an action by the executor of one person against the executor of another person, and let us assume, what may well happen, viz., that the defendant, who is the executor of the husband, really knows nothing at all. Now what is he to do ?"

Then his Lordship proceeded to state what possible defences may be raised by the defendant, and continued at p. 500 :

"I quite see that the power may be very much abused. It may be abused to such an extent as to be embarrassing and unfair and oppressive to the other side. To correct that, there is R. 27 of the same order which enables a Judge to strike out as embarrassing any pleading, whether it is an alternative pleading or whether it is not. But to go the length of saying that no inconsistent pleading can be pleaded, which is the view taken by the learned Judge in the Court below, appears to be not warranted by the rules and contrary to the established practice of the Courts."

The learned Judge added :

"There is no difference in this respect between the practice in the Chancery Division and the practice in the Queen's Bench Division, where, we know ever since the Judicature Acts have been passed, inconsistent defences, such as "never indebted" and "payment" are daily pleaded and they give rise to no trouble. They are not considered embarrassing . . ."

Under our Civil Procedure Code (Act 5 of 1908), O. 6, R. 16, enables

"the Court at any stage of the proceedings, to order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay a fair trial of the suit."

The plaintiff, the appellant before me, ought, if he felt himself aggrieved by the defendants' pleadings, to have applied to the trial Court to take action under O. 6, R. 16. Instead of doing that the parties went to trial and evidence on all the points was adduced by both parties. Because he (the plaintiff) has failed on the merits, I cannot say that he has been in the present case really prejudiced in the trial of the suit.

I find statements to the effect that there are differences between the position of a plaintiff and that of a defendant—that plaintiff has often a real knowledge of the facts which the defendant may not have and while it is open to a plaintiff under certain circumstances to reserve a ground of claim a defendant failing to urge a ground of defence in one action cannot generally raise it afterwards in an-

(1) (1887) 3 Ex. 251.
(2) (1879) 35 Ch. D 492.

other action against the same party. It is true that the defendants may be strangers to the transaction and that defences raised by them may have reference to matters not necessarily or probably within their own knowledge, as in the case of an executor defendant. It is also said that the decision of the Privy Council in the case reported in *Mahomed Buksh Khan* v. *Hussein Bibi* (3) is an authority in favour of such a distinction : see also *Iyyappa* v. *Ramalakshmamma* (4). The case before me is one where it is the defendant that is alleged to have put forward inconsistent pleas and even according to the distinction drawn in the case reported in *Narayanaswami* v. *Ramaswami* (5), the defendants are not precluded from putting forward inconsistent pleas. At p. 174, Shephard, J., observed :

"There is a material distinction between the present case and the one cited : *Mahomed Buksh Khan* v. *Hussein Bibi* (3) where both charges related to matters necessarily within the plaintiff's personal knowledge. Moreover the circumstance that in the case before the Judicial Committee it was the plaintiff who sought to raise inconsistent issues is material; for, while it is open to a plaintiff, under certain circumstances, to reserve a ground of claim a defendant failing to insist on a ground of defence in one action cannot afterwards raise it in another action at the suit of the same party."

Best, J., agreed with Shephard, J., that the case of a defendant was distinguishable from the case of a plaintiff : *Mahomed Buksh Kahan* v. *Hussein Bibi* (3). This case is therefore a direct authority in favour of the defendants.

I may, however, state that the headnote of the report of the case in *Mahomed Buksh Khan* v. *Hussein Bibi* (3) is too comprehensive and goes beyond the actual decision of the Privy Council which was to the effect that where a plaintiff sets up a forgery and undue influence both these questions could not be tried in the same suit. It is doubtful whether the Privy Council decision could be treated as an authority for the proposition that the inflexible rule of law is that inconsistent claims or defences could not be set up by the same party in the same litigation. In *Jino* v. *Manon* (6) a plaintiff was allowed to sue for the cancellation of a bond on the ground that it was a forgery or in the alternative that it was void as unsupported by consideration. I do not think it necessary in this case to go into the question whether the rule applies to a plaintiff or not and whether the only limitation is not that contained in O. 6, R. 16, Civil P. C. But the law seems to be clear that it is open to a defendant, to raise by his written statement as many distinct and separate and therefore inconsistent defences as he may think proper, and that the party aggrieved should be left to move the Court to take action under O. 6, R. 16, in case the Court considers that the defence is embarrassing and thus direct one or more inconsistent defences to be struck out and the pleading amended accordingly.

In the case before me it cannot however be said that the written statement raised really inconsistent pleas. As observed by the lower appellate Court, the gist of the plea would seem to be that though defendant 1 who died before filing any written statement, executed the plaint hypothecation bond, yet it was not supported by any consideration but was executed nominally and with an ulterior motive ; and that to purchase peace the defendants paid the plaintiff Rs. 250 in full satisfaction of all the claims under the hypothecation bond, and that the plaintiff accepted the same as such. I do not see how the plaintiff could have been prejudiced by such a defence ; and in any event, if the plaintiff really felt any emabrrassment in proceeding with the trial of the suit, he ought to have moved the Court under O. 6, R. 16, Civil P. C., which course however he did not take. He proceeded to have the suit tried on the merits. Both parties let in evidence, and simply because both the lower Courts have found the merits of the case against him (the plaintiff), he is not, for that reason alone entitled to contend in second appeal that the whole trial was vitiated, and claim retrial at this stage. I accordingly overrule the first contention raised by the learned advocate for the appellant. The second point raised may be summarily dealt with. The plea of the defendants was held to be proved. It was found that the plain-

(3) [1888] 15 Cal. 684=15 I. A. 81=5 Sar. 175 (P. C.).
(4) [1890] 13 Mad. 549.
(5) [1891] 14 Mad. 172=1 M. L. J. 39.
(6) [1896] 18 All. 125=(1896) A. W. N. 1.

tiff had accepted Rs. 250 in full discharge of his claim. This suit should never have been brought in the circumstances. The lower appellate Court was therefore right in directing that the plaintiff should pay the defendants' costs in both the lower Courts. I find myself unable to interfere with the decision of the lower appellate Court on the question of costs in the circumstances. The second appeal is accordingly dismissed with costs.

P.R.S./S.N. *Appeal dismissed.*

** A. I. R. 1930 Madras 817
Full Bench

BEASLEY, C. J. AND ANANTAKRISHNA AIYAR AND CURGENVEN, JJ.

Abdul Sac—Defendant—Appellant.

v.

Sundara Mudaliar and *another* —Plaintiff and Defendant—Respondents.

C. M. S. Appeal No. 102 of 1928, Decided on 24th April 1930, from order of Dist. Judge, Madura, D/- 20th March 1928, in Appeal Suit No. 208 of 1927.

**** (a) Civil P. C. (1908), S. 47—To determine whether particular defendant against whom suit has been dismissed is or is not party to suit within operation of S. 47 Court should always look into decree, judgment and pleadings as question does not entirely depend upon whether name has been struck off or retained on record.**

Whether a defendant against whom a suit is dismissed continues or ceases to be party within the meaning of S. 47 does not entirely depend upon whether his name has been struck off from or retained on the record, and consequently in order to determine whether a particular defendant against whom the suit is dismissed is or is not party to the suit within the meaning of S. 47, it is the duty of the Court not only to refer to the decree but also to judgment and pleadings. [P 818 C 2, P 820 C 1]

**** (b) Civil P C. (1908), S. 47—Suit dismissed as against defendant for mis-joinder —Proper order is to strike out name and such defendant does not come within S. 47 —It is otherwise where suit is dismissed on plaintiff abandoning claim against defendant—Civil P. C., O. 1, R. 10 (2).**

Where a suit is dismissed against a person on the ground that he was improperly impleaded as party having no concern with the suit, such a person does not remain a party to the suit for the purposes of S. 47, notwithstanding whether his name has or has not been removed from record. In such cases it is the duty of the Court to strike out the name of the party improperly impleaded; it is quite wrong procedure to dismiss the suit as against him. It is quite otherwise in the case where the plaintiff abandons his claim against the defendant and the suit is dismissed as against him. In the latter case the defendant is not a person to whom O. 1. R. 10 (2) applies: 40 *Mad.* 964, *Appr.*; *A. I. R*, 1926 *Mad.* 484; 23 *Mad.* 361 (*F. B.*) and 52 *I. C.* 671, *Diss. from.*; *A. I. R.* 1927 *Rang.* 137 and 41 *Mad.* 418, *Ref.*; 37 *I.C.* 673, *Doubted* and *Dist.*; *A. I. R.* 1926 *Mad.* 687, *Dist.* [P 820 C 2]

T. L. Venkatarama Aiyar—for Appellant.

S. T. Srinivasagopalachari—for Respondent.

Beasley, C. J.—This case has been referred to us by our brother Jackson, J., because the question for decision by us has been the subject of conflicting decisions in *Krishnappa* v. *Periaswami* (1) and *Sethu Konar* v. *Ramaswami Konar* (2). The question before us arises out of proceedings in execution. Defendant 2 in Original Suit No. 348 of 1917 on the file of the Second Additional District Munsif's Court of Madura is the appellant here. The facts of the case may be briefly stated as follows. One Kaliappa Pillai was the original owner of the properties, the subject-matter of the suit. He left a widow and an adopted son Ramaswami Pillai. In 1889 the latter released the suit properties in favour of his adoptive mother. She sold the property in 1894 and between that date and 1909 there were different purchasers. In 1909 the appellant became the purchaser of the property and created a usufructuary mortgage in 1910 in favour of defendant 6. In 1906 Ramaswami Pillai executed a mortgage of some of the properties which mortgage was assigned to the present respondent 1. In 1917 respondent 1 filed a suit to enforce the mortgage and bring the properties to sale. Ramaswami's son was defendant 1 and defendants 2 to 5 were impleaded in that suit and also defendant 6 the usufructuary mortgagee. In that suit defendant 1 was ex parte. Defendant 2 claimed a title paramount by purchase and pleaded that he was not a necessary party to the suit. The District Munsif dismissed the suit as against defendants 2 to 6 but gave a decree against defendant 1. In his judgment he states as follows:

"Defendant 2 claims an independent title. He has endorsed on the plaint that he does not derive his title from the mortgagor but quite independently of him. Therefore he is not a necessary party to the suit. The suit must be therefore dismissed with costs against defen-

(1) [1917] 40 Mad. 964=38 I. C. 297.
(2) A. I. R. 1926 Mad. 484=94 I. C. 526=49 Mad. 494.

dants 2 to 6. Plaintiffs will get a decree against the other defendants in the suit."

In the decree also the suit was dismissed as against defendants 2 to 6.

An execution petition was then presented by the plaintiff to bring the property to sale. No notice was given to the other defendants. He dispossessed defendant 6 who was then in possession of the property. The appellant then presented an application to put defendant 6 in possession of the property. Respondent 1 disputed the appellant's title on the merits and put him to proof of all the sales and purchases. The District Munsif held that the plaintiff (respondent 1) was not entitled to evict the defendants. In his order the District Munsif stated:

"The plaintiff is not entitled in execution of this decree to evict defendant 6 or defendants 2 to 5."

Respondent 1 appealed to the District Judge at Madura who held that the questions of title as between respondent 1 and defendants 2 to 6 should have been investigated and that since defendants 2 to 6 were parties to the suit, respondent 1 was barred by S. 47, C. P. C.; the proceeding could have been treated as a suit if the learned District Munsif considered it sufficiently complicated. The appellant's contention here is that the question of his title and defendant 6's title was not a matter which could be gone into in the execution proceedings.

The question is whether defendants 2 to 6 in the suit are, under the provisions of S. 47, Civil P. C., defendants against whom a suit has been dismissed and therefore parties to the suit. The contention of the appellant is that as the defendants were held not to have been properly impleaded in the suit and the suit on that ground was dismissed as against them, they are not defendants against whom a suit has been dismissed as is provided in S. 47, Civil P. C., and that there is a distinction between the dismissal of a suit on its merits and a dismissal through misjoinder of parties. Two views upon this matter have been taken. There is the broad view of the section taken in 40 *Mad.* and the narrow view of it in *Sethu Konar* v. *Ramaswami* (2). Before proceeding to deal with the cases upon this point, reference must be made to O. 1, R. 10 (2), Sch. 1, Civil P. C., which provides that the Court may at any stage of the proceedings order the name of any party improperly joined to be struck out. The District Munsif having found that defendants 2 to 6 had been improperly impleaded in the suit should have ordered their name to be struck out instead of dismissing the suit as against them. The broad view of S. 47, Civil P. C., is that it is proper for the Court in execution proceedings to consider not only the decree itself but the judgment and the pleadings and see whether upon the facts of the case the parties, although the suit was dismissed as against them, really remained parties to the suit. The narrow view of the section is that it is not appropriate to the executing Court to consider anything else but the fact that the *suit* was dismissed as against the defendants, no matter what the reasons were for such dismissal. That of course is placing the strictest and narrowest construction on S. 47. In *Krishnappa* v. *Periaswami* (1) Ayling and Kumaraswami Sastri, JJ., held that where a party to a mortgage suit, who sets up a title adverse to both the mortgagor and the mortgagee, has been exonerated from the suit on the ground of misjoinder and his claim has not been adjudicated upon in the suit, he does not remain a party to the suit for the purposes of S. 47, Civil P. C. The order of the Judge in the trial Court was an order exonerating the defendant, with costs as he was an unnecessary party to the suit. It was argued in the appeal that notwithstanding this exoneration he still continued to be a party to the suit and that the lower appellate Court should have gone into the question of his title. On p. 966 in the judgment of the High Court it is stated:

"The exoneration in the present case having been on the ground of misjoinder we are of opinion that the party whose claim was not adjudicated upon does not remain a party to the suit for the purpose of S. 47, Civil P. C. Exoneration from the suit may be due to various causes and the question whether a party remains on record for the purpose of S. 47 in spite of such exoneration will depend upon the nature and scope of the order having regard to the pleadings and the reason which led to such dismissal or exoneration. To hold that in cases of misjoinder (and consequent refusal of the Court to adjudicate upon the particular matters in contest) the party whose claim was not adjudicated upon and who was exonerated remains a party to the suit would lead to the anomaly that the Court would be bound in execution proceedings to decide the

very questions which it refused to determine in the suit."

And again at p. 968 :

"As pointed out in *Venkatapathi Naidu* v. *Subbaroya Mudali* (3) the mere fact that the name of the exonerated party is not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remains a party."

This case was referred to in *Sannamma* v. *Radhabhayi* (4), a decision of the Full Bench which held that where a person has been properly impleaded as one of the defendants in a suit, but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant, such a person is a "defendant against whom a suit has been dismissed" within S. 47, Civil P. C. On p. 424 Sir John Wallis, C. J. states :

"This case which came before the Court in *Krishnappa* v. *Periaswami* (1) of a misjoinder of causes of action and of the plaintiff being required to proceed with one cause of action only and the suit being dismissed as against the defendants who had been joined in respect of the other causes of action only, may possibly stand on a different footing, as to hold that the cause of action which the Court was prohibited from trying may be gone into in execution by virtue of S. 47, goes far to defeat the prohibition of joinder, and such a construction of S. 47 should therefore be avoided if it is possible to do so. As that question is not before us, I express no opinion upon it, and will only say that the proper course in these cases appears to be for the Court to exercise the power, which it now has under O. 1, R. 10 (2), of ordering at any stage of the proceedings, the name of a defendant improperly joined to be struck out, instead of dismissing the suit as against him. That will, as held by the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma* (5), have the effect of taking him out of the operation of S. 47 which ought not to apply to him seeing that he has no real concern with the suit."

Although Sir John Wallis does not definitely decide the point it is obvious that he approved of the spirit of *Krishnappa* v. *Periaswami* (1) and he certainly has given very strong reasons for holding that the Bench in that case took the correct view.

I will now turn to *Sethu Konar* v. *Ramaswami Konar* (2), where a Bench of this Court took the opposite view to that taken in *Krishnappa* v. *Periaswami* (1). That was a suit for sale on a mortgage and a person claimed the property by a title paramount to that of the mortgagor and he was joined as a defendant. But the final decree merely stated that he was exonerated without removing his name from the record and it was held that he should be considered as continuing to be a party to the suit. The reason for deciding this case in that way was that the Bench considered that the ground on which a party is exonerated from the suit can never determine whether he continues or ceases to be a party but will depend entirely upon whether his name has been struck off from or retained on the record. This of course is applying S. 47 in its strictest sense. Another case on this point is *Linga Aiyar* v. *Lakshmana Chettiar* (6), a decision of Odgers and Viswanatha Sastri, JJ. Defendant 2 in that suit had his name by consent struck off by the District Munsif, but his name was retained in the cause title in the decree which was finally drawn up and it was held that in spite of his name being struck off, he was a party to the suit within the meaning of S. 47 and the explanation thereto but it was stated that striking out is the proper procedure to be employed in the case of misjoinder, that in any other case the proper course is dismissal and that striking off of the name is not appropriate to the case of a party against whom the plaintiff does not wish to proceed further.

In that case there was no question of a misjoinder of parties as the defendant was properly impleaded in the suit. Another case directly in point is *U Kala* v. *Ma Hnin* (7), and there *Krishnappa* v. *Periaswami* (1) and *Sannamma* v. *Radhabayi* (4) were followed ; and it was held that where a suit is dismissed against a person on the ground that he was wrongly joined as a party having no real concern with the suit, such a person does not remain a party to the suit for the purpose of S. 47, Civil P. C., and that a more appropriate way, in case of misjoinder, is to strike out the name of the party under O. 1, R. 10 (2), of the Code, so as to take him out of the operation of S. 47. The contrary view was taken in *Abdul Kasim* v. *Thambusami Pillai* (8). There a defendant was exonerated by the decree in the suit with the result that the suit was dismissed as against him but his name was not

(3) [1907] 17 M. L. J. 416.
(4) [1918] 41 Mad. 418=43 I. C. 935 (F. B.).
(5) [1900] 23 Mad. 361=10 M.L.J. 126 (F.B.).
(6) A.I.R. 1926 Mad. 687=94 I.C. 123.
(7) A.I.R. 1927 Rang. 137=101 I.C. 794=5 Rang. 110.
(8) [1917] 37 I.C. 673.

actually removed from the record and it was held that he did not cease to be a party to the suit on that account. That was a decision of a Bench consisting of Oldfield and Krishnan, JJ. This case was referred to in *Krishnappa* v. *Periaswami* (1). No reason for the exoneration of the defendant is given either in the statement of the facts of the case or in the judgment which is a very short one. In *Venkatasamy* v. *Chidambaram* (9), it was held that a defendant whose name appears in the decree without having been struck off previously from the record is a party within the provisions of S. 47, Civil P. C. There defendant 4 set up a title adverse to both the mortgagor and the mortgagee and was held not to be a necessary party and ordered to be struck out of the suit. The order was:

"Defendant 4 is not a necessary party and is exonerated with costs."

The Bench consisting of Sadasiva Ayyar and Phillips, JJ., thought that S. 47 was perfectly plain in its terms. In *Ramaswami Sastrulu* v. *Kameswaramma* (5), it was held that a party defendant exonerated from the suit, the suit being dismissed against him, is a party to the suit. This case also was referred to in *Krishnappa* v. *Periaswami* (1), but was held distinguishable because it did not appear to be a case of exoneration of a party by reason of misjoinder of causes of action.

Mr. Srinivasagopalachari in the course of his argument on behalf of the respondent, contended that the construction placed upon S. 47, Civil P. C., in *Krishnappa* v. *Periaswami* (1), ought not to be placed upon it because of the inconvenience it would cause to the litigant public and those who have to advise them and because it would put an unreasonable burden upon the executing Court if that Court had to consider not only the decree but the judgment and the pleadings in the suit instead of merely taking the decree itself. I can see no force in this latter contention as it is the duty of a Court not only to refer to the decree but also the judgment and the pleadings. In the case before us no inconvenience could have been occasioned by this procedure because the judgment of the District Munsif upon this point is contained in a very few lines. He further contended that there can be no distinction between the case of a defendant against whom the plaintiff abandons his claim and the suit is accordingly dismissed as against him and a person who has the suit dismissed against him on account of misjoinder. In my view, the two cases are quite different. In the former case he may be a proper party to the suit but yet the plaintiff either does not wish to take a decree against him or feels that he is unable to prove his claim and he is not a person to whom O. 1, R. 10 (2), applies. In the latter case, on the other hand, he is a person who ought never to have been made a party to the suit at all and not having been properly impleaded, the plain duty of the Court is to strike his name out. If the respondent's contention is correct, then it means that, although the appellant ought not to have been made a party to the suit and the District Munsif held that he had been improperly impleaded and instead of striking his name out adopted the wrong procedure in dismissing the suit as against him, he is to be placed in a worse position than a party in respect of whom the Court does adopt the correct procedure. It seems to me to be a contradiction to say that a person who is held at the trial of the suit not to be a proper party to the suit remains still a party to the suit. I am clearly of the opinion that *Krishnappa* v. *Periaswami* (1), was correctly decided and the appeal to the lower appellate Court was incompetent. The appeal must accordingly be allowed with costs.

I cannot leave this case without pointing out that it is the duty of the trial Judge to strike out the name of a party improperly impleaded. It is quite wrong procedure to dismiss the suit as against him.

Anantakrishna Ayyar, J.—I agree.

Curgenven, J.—I agree.

P.R.S./B.V. *Appeal allowed.*

(9) [1919] 52 I. C. 671.

A. I. R. 1930 Madras 820

WALSH, J.

(*Mavili*) *Erochan Menoki*—Plaintiff—Petitioner.

v.

Punnasseri Elevana Tarwad Karnavan and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 1360 of 1927. Decided on 29th April 1929.

(a) Malabar Law— Karar— Karnavan appointing anandaravan his agent for management of tarwad—According to karar karnavan could not raise loan without anandaravan.

Karnavan executed a karar in favour of anandaravan as follows : Contracting of debts for accidental or extraordinary purposes was to be with consent of both of them. When the former could not participate, the latter could raise it independently of the former. Karnavan was not to interfere in the tarwad affairs without participating with anandaravan so long as power of attorney was in force.

Held : that karnavan can surrender his powers of management and according to the karar, he had no power to raise loan, without anandaravan, while latter alone could do so: *A. I. R.* 1921 *Mad.* 520, *Expl.* [P 821 C 2]

(b) Malabar Law—Debts.

Payment of kist does not of itself constitute a necessity to borrow. [P 821 C 2]

P. Govinda Menon—for Petitioner.

K. Kuttikrishna Menon—for Respondents.

Judgment.—Defendant 1 who is the karnavan of the tarwad executed a pronote to the plaintiff who brought a suit on it. The Sub-Judge found that defendant 1 was not the manager of the tarwad which was being managed by defendant 4 under karar from defendant 1. He found that the plaintiff was aware of the fact. He also found that the loan was not for family necessity and therefore gave plaintiff a personal decree against defendant but no decree against the tarwad property. A revision is filed against this order.

It is sought to get over the findings of fact with regard to management by arguing that the appointment of defendant as agent under the karar did not preclude the karnavan from acting himself and that the provisions of the karar must be strictly construed. That a power of attorney or karar must be strictly construed is not denied. *Krishna Menon* v. *Krishnan Nair* (1) is quoted for the position that a karar executed by the karnavan in favour of an anandaravan under which the latter was to carry on the management under virtue of a muktearnama does not deprive the karnavan of his right to grant a melcharth. The remark on p. 123 P. of R. Sundara Aiyar's Malabar and Aliyasantana Law that the appointment of a junior member as a muktear or agent cannot preclude the karnavan from acting himself, is also relied on. That remark must be read however in the light of *Krishna Menon* v. *Krishna Nair* which is quoted immediately afterwards. It does not mean that a karnavan cannot surrender his management: vide the opening remarks of Ch. 8, p. 117 of the same book. Now turning to the muktearnama in this case it is clear that in the matter of raising loans the karnavan has divested himself by it of his power to act alone and without defendant 4.

In para 5 it is stated :

"If any new debt is to be contracted either in any of the matters that may arise accidentally or extraordinarily or in the case where expenses have to be met beforehand such debts ought to be contracted by both of us jointly and it is only when I shall be unable to participate with you in the said matter for some reason or other that you can raise such debts independently and by yourself."

Para 7 says :

"As long as the power of attorney remains in force I shall not enter in the tarwad affairs without participating with you."

So it is clear that while loans should ordinarily be raised by defendant 4 with defendant 1 the former can in urgent circumstances raise them by himself but the latter has no such power.

The finding of the Court that defendant 1 had no power to raise the suit loan is obviously in accordance with the karar. As regards the question of necessity, that also is a finding of fact. The plaintiff admitted that defendant simply told him that there was necessity and that he made no independent enquiries. He now says that the amount was to pay kist but he seems to have put forward a different version before that; it was to repair a temple and his own witness, plaintiff's witness 4, stated that defendant 1 spent it for that purpose. The mere fact of payment of kist does not itself constitute a necessity to borrow. In the face of both the findings of fact there is no scope for a revision petition. The petition is dismissed with costs.

P.R.S./B.V. *Petition dismissed.*

(1) A. I. R. 1921 Mad. 520=62 I. C. 598.

A. I. R. 1930 Madras 821

VENKATASUBBA RAO, J.

Theleti Ramaliah—Appellants.

v.

Kenala Brahmiah—Appellants.

Second Appeal No. 1636 of 1926, Decided on 21st February 1930, from decree of Dist. Judge, West Godavari, in Appeal No. 117 of 1926.

Limitation Act, Art. 44—Minor's property alienated by mother acting as guardian—Minor dying before attaining majority—Mother succeeding him — After mother's death, and more than three years after minor's death, reversionary heirs suing to set aside alienation--Suit was time barred as period of three years is to be reckoned from minor's death when cause of action arose—Fact that minor's heir was female makes no difference.

A minor's property was alienated by his mother acting as his guardian. The minor died before attaining majority and was succeeded by his mother. After the mother's death the reversionary heirs instituted a suit to set aside the sale more than three years after the minor's death.

Held: that the suit was time barred.

Where the guardian of a minor alienates the minor's property, the cause of action arisss from the date of the alienation. S. 6 only makes minority a cause for suspending limitation. Art. 44 cannot therefore be construed so as to give a new cause of action from the time the minor attains majority. Hence when the minor dies before attaining majority, S. 6 (3) comes into play and the period of limitation is to be reckoned from the death of the minor and the fact that the heir of the minor is a female makes no difference: *A. I. R.* 1929 *Mad.* 668 and *A.I.R.*..1929 *Mad.* 313, *Ref.*; 38 *Mad.* 118, *Rel. on.* and 18 *Mad.* 193, *Appr.* [P 823 C 2]

K. Kameswara Rao—for Appellants.

G. Lakshmanna and *V. Govindrajachari*—for Respondents.

Judgment. — Mr. Lakshmanna has argued this case at great length, but I am afraid I cannot uphold his contention. The facts may be briefly stated. The property belonged to Ramiah who was the last full owner. During his minority, his mother, acting as his guardian, sold the property in 1873 to a person through whom the defendants claim. Ramiah died whilst still an infant in 1879 or 1880. After his death, his mother, as his heir, took possession of his other property and died in 1921. This suit was brought in 1922 by a reversionary heir for recovery of the suit item. Both the lower Courts have held that the suit is barred by limitation. Mr. Lakshmanna contends that this decision is wrong. Art. 44, Lim. Act runs thus:

By a ward who has attained majority, to set aside a transfer of property by his guardian.	Three years.	When the ward attains majority.

Mr. Lakshmanna's argument is, that as the ward died before he came of age, this article does not apply. He puts his case thus: The minor's right to recover the property would but for this article not be barred till the expiry of 12 years from his attaining his majority. The case would fall under Art. 144. The transaction being voidable and not void, the possession of the alienee does not become adverse till the ward, by coming of age, becomes competent either to ratify or repudiate: see *Shankerbhai* v. *Raisihji* (1) and *Churcher* v. *Martin* (2). The effect of Art. 44 is that the ward on attaining majority, must elect within three years either to be bound or not to be bound by the transaction. The period of limitation is thus curtailed in his case. But as Art. 44 applies in terms only to a ward who comes of age, his heir is not similarly restricted and can sue for possession without getting rid of the transaction. I think I have correctly set forth the somewhat ingenious contention of Mr. Lakshmanna. It amounts to this: that if the heir of the minor dying before attaining his majority, happens to be a male, he has, under Art. 144, 12 years from the minor's death within which he may bring the suit. The heir, unlike the ward, is not bound to remove the instrument from his path and is not trammelled by the three years rule.

Again, according to Mr. Lakshmanna's contention, when the heir of a ward dying an infant happens to be a female, the reversioner who succeeds her, has from her death, 12 years within which he can sue for possession. Can this contention be accepted? The minor on attaining full age cannot dislodge the alienee from the property without first clearing out of his way, the deed of transfer executed by his guardian: *Doraiswami* v. *Thengavelu*, *A. I. R.* 1929 *Mad.* 668. This rule applies also to the heir of the ward who dies after attaining his majority. It equally applies to an assignee who takes a transfer from such a ward: *Ramasami* v. *Govindammal* (3). Is there then any reason why an exception should be made in the case of the representative of a ward who dies while still an infant? According to Mr. Lakshmanna's contention, the heir of a minor dying an infant is in a better position than the minor himself.

(1) [1917] 42 I. C. 908.
(2) [1889] 42 Ch. D. 312=61 L. T. 113=37 W. R. 682=58 L. J. Ch. 536.
(3) A. I. R. 1929 Mad. 313=118 I. C. 481.

The present case shows to what startling results this position may lead. Though the suit would have long ago been barred had the minor attained full age and died, the law must treat the claim as being alive, for the benefit of his successor, at the lapse of 50 years. There is nothing, in my opinion, in the Limitation Act which compels me to uphold such a contention.

The question is: When does the cause of action arise to set aside the transfer? Does it arise on the date of the alienation or when the ward comes of age? Art. 44 no doubt fixes the starting point as the attaining by the infant of his majority. In my opinion, that article does no more than express the result of applying to the particular kind of case it contemplates, the general principles embodied in Ss. 6 and 8, Lim. Act. The statute begins to run from the date of the alienation but S. 6 makes minority a cause for suspending the operation of the statute. Now, let us suppose that Art. 44 ran thus:

By a ward who has attained majority, to set aside a transfer of property by his guardian.	Three years from the date of the transfer.

Let us apply to it the rules contained in Ss. 6 and 8. S. 6 says, where a person is at the time from which the period of limitation is to be reckoned a minor, he may institute the suit within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor, in column 3, Sch. 1. S. 8 enacts that nothing in S. 6 shall be deemed to extend for more than three years from the cessation of the disability, the period within which any suit must be instituted. The provision as given above in its altered shape, read in the light of these two sections, yields the rule in the exact form embodied in Art. 44 as it stands. The reason for drafting this article in this maner is obvious. The other articles of the limitation Act may apply to minors or to adults, but by its very nature the transaction referred to in Art. 44 concerns minors only. It was therefore unnecessary to frame a rule in general terms, leaving it to be governed by the principles contained in S. 6 and Art. 8. Art. 44 seems to be the result of an attempt to state the law compendiously in a self-contained provision. This is the view I am disposed to take, and it receives support from the observations of Sadasiva Aiyar in *Doraswami* v. *Nondisami* (4), a case decided by a Bench of three Judges. The learned Judge, after remarking that even before the ward attains his majority, a suit can be brought on his behalf by a next friend to set aside the transaction and that the ward is bound by the result of such a suit, if honestly brought and conducted, goes on to observe:

"This seems to indicate that the cause of action to set aside the alienation arises at once."

The learned Judge thus continues:

"It seems difficult to hold that there are two separate causes of action given to the ward to set aside an alienation of the ward's property by the guardian:

(a) One cause of action which arises at once to be enforced by a suit brought by anybody acting as, his next friend during the whole course of his minority, and (b) another distinct cause of action which arises as soon as he attains majority (and only on the date of his so attaining majority and not before) to be enforced by a suit brought by himself as a major. If there is only one cause of action which arises on the date of alienation, it seems to follow (as Abdur Rahim, J., has remarked) that Art. 44 is only an illustration of the principle embodied in S. 7 (corresponding to S. 6, of the present Act). If this be the correct view to take of Art. 44 (I entertain no doubt on the point), S. 6, Cl. 3 comes into play.

It runs thus:

"Where the disability continues up to the death of such person, his legal representative may institute the suit within the same period after the death as would otherwise have been allowed from the time so prescribed."

The limitation is therefore to be reckoned from the death of the ward. In that case the fact that on his death the estate is taken by a female heir makes no difference. As observed in *Sitaramaraju* v. *Subbaraju* (5), under the provisions of the Limitation Act, minority does not by itself prevent limitation from running against the minor although by reason of the disability an extended period is given. When the statute once begins to run, no subsequent event, not specially provided for, impedes its operation: (S. 9). The suit, therefore became barred on the lapse of three years after the death of the ward, notwithstanding the fact

(4) [1915] 38 Mad. 118=21 I. C. 410.
(5) A. I. R. 1922 Mad. 12=70 I. C. 678=45 Mad. 361.

that he was succeeded by a female heir.

In this view the question regarding the scope of Art. 141 does not arise. If time had commenced to run during the lifetime of the ward himself, Art. 141 is clearly inapplicable. I do not therefore propose to consider any cases bearing on that provision.

Mr. Lakshmanna has not been able to cite any authority for his contention. It is opposed to *Sundrammal* v. *Rangsami* (6), the facts of which are on all fours with those of the present case. The alienation in that case was made in 1861 by the adoptive mother acting as the guardian of her infant son. On his death, before attaining majority, the mother entered into possession and enjoyed his properties till she died in 1890. The suit was filed by the reversionary heir in 1891. It was held that the claim was barred. The following passage contains the reason:

"He finds as a fact that the alienation was made by Muttammal and her minor son and that what was conveyed was an absolute estate. As the last male owner was alive the alienation was not that of a widow's estate by a widow but that of an absolute estate by the guardian of the last male owner. It was open to any next friend of his to have stepped forward during his minority and set aside the alienation on the ground that it was an act done without adequate necessity or in excess of the limited authority of guardian. As the alienation took place in 1861 whilst the present suit was brought in 1891, a suit to set aside would be barred, if the minor were still alive and his reversioners cannot take a higher position. The plaintiff's claim must therefore be held to be time barred."

Mr. Lakshmanna says that the judgment is very brief and that the decision is wrong. Tha decision, is in my opinion, correct though the learned Judges did not discuss the point at any length. The second appeal fails and is dismissed with costs. Leave refused.

P.R.S./S.N. *Appeal dismissed.*

(6) [1895] 18 Mad. 193.=4 M. L. J. 275.

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* A. I. R. 1930 Madras 824

WALLACE AND ANANTAKRISHNA AYYAR. JJ.

(*Sathuluru,*) *Seetharamanujacharyulu* —Plaintiff—Appellant.

v.

(*Narra*) *Venkatasubbamma* and *another*—Defendants—Respondents.

Second Appeal No. 992 of 1925, Decided on 11th April 1930.

(a) Civil P.C. (1908), O. 41, R. 27—Admission of document in evidence in appeal—No application for its admission—No reason shown for failure to produce it in lower Court—Document should not be admitted.

The admission of a document in appellate Court in evidence is illegal where no reasons are recorded. When no application is made for the admission of the evidence nor any reasons are shown for failure to produce the document in the lower Court such evidence should not be admitted : 32 *I. C.* 826, *Rel. on.* [P 825 C 2]

***(b) Transfer of Property Act (1882), S. 52—Doctrine of lis pendens applies to suit for maintenance claiming to have maintenance charged on specific property.**

The doctrine of lis pendens applies to a suit for maintenance when the plaintiff claims to have maintenance specifically charged on specific items of immovable property, mentioned in the plaint and decree is passed creating a charge on such property as right to immovable property is directly and substantially in question in such a case: 29 *Mad.* 508; 27 *Cal.* 77 and 25 *I. C.* 759, *Rel. on.* [P 827 C 1]

*** (c) Transfer of Property Act (1882), S. 52—Lis pendens applies to involuntary sales.**

The doctrine of lis pendens applies to sales in invitum that take place during the pendency of a suit by widow claiming to have her maintenance charged on specific immovable property mentioned in the plaint. The decree obtained by the plaintiff in such a suit creating a specific charge on specific items of immovable property operates to give her charge as from the date of the plaint and not from the date of the decree only unless there is anything in the decree to the contrary. Transfer inter vivos or sale in invitum during the pendency of such suit cannot prevail over such charge claimed in the plaint and granted by the decree: 40 *Mad.* 955; 26 *I. C.* 879; and *A I.R* 1924 *Mad.* 307, *Rel. on*; 29 *Mad.* 508 and 27 *Mad.* 45, *Expl.* [P 832 C 1]

*** (d) Hindu Law—Debts—Maintenance of Hindu widow charged on specific property takes precedence over debts binding on family.**

A simple money creditor of a joint Hindu family has no priority over a charge for maintenance over specific items of property granted to a widow by decree in the absence of fraud or collusion. An auction-purchaser, during the pendency of such maintenance suit of an item of property over which a charge was claimed in the plaint and was granted by the decree, who purchases in the execution of a simple money decree binding on the family is not entitled to priority over another auction-purchaser of such property in the proceedings taken to execute the maintenance decree: 43 *Mad.* 800; 2 *Bom.* 494; 27 *Cal.* 194; 10 *Mad.* 283; *A. I. R.* 1928 *Mad.* 713; *A. I. R.* 1927 *Mad.* 502; *A. I. R.* 1927 *Mad.* 1032; *Rel. on*; 4 *All.* 296 and 5 *All.* 367 *Dist.* [P 830 C 1, 2]

G. Lakshmanna—for Appellant.

K. Kameswara Rao—for Respondents.

Odgers, J.—In this case an interesting question of law was opened, namely as to whether the maintenance decree-

holder with a charge (defendant 1) was to be held to have a superior claim to the plaintiff who purchased from a Court auction-purchaser. It is admitted by Mr. Lakshmanna for the appellant that if the debt for which the property was brought to sale in execution of Small Cause Suit No. 1906 of 1916 was not a debt binding on the family the claim of defendant 2 must prevail. The District Munsif held that the decree debt in S. C. S. No. 1906 of 1916 was not a binding debt which could prevail against the claim of the maintenance of defendant 1. He gives various reasons which have induced him to come to this conclusion and they are set out in para. 6 of his judgment. He observed inter alia that

"the extract from the suit register could have been produced to show the nature of the claim in S. C. S. No. 1906 of 1916".

There are however various other circumstances which induced him to come to the conclusion that it has not been proved that the debt is a debt binding on the family. The Subordinate Judge, on the other hand, mainly or exclusively from the fact of the extract from the suit register which he admitted and marked as Ex. 6 comes to the opposite conclusion. It is said that this Ex. H supplies the missing link because it shows that the promissory note which is referred to in the endorsement of Ex. B is the very note referred to in the suit register. The circumstances under which the admission of Ex. H was applied for and allowed seems to be somewhat extraordinary. The plaint was filed on 20th June 1922 and the decree in the first Court was not made until 23rd November 1923. On 29th January 1924 an appeal was filed in the lower appellate Court and on 4th December 1924 there was a petition to receive Ex. H, that is to say, over a year after the learned District Munsif had commented on its absence and nearly $2\frac{1}{2}$ years from the institution of the suit. No order was made on this petition which is extremely vague in its allegations, the affidavit in support saying :

"it is therefore very necessary that these two documents (of which Ex. H is one) should be received,"

without saying any reasons why this document could not have been filed in the District Munsif's Court. The matter is governed by O. 41, R. 27 (d). The appellate Court did not require the document to be produced so that the Court must be satisfied that there is some other substantial cause to allow such document to be produced. No substantial cause is alleged and further, with regard to the proviso in sub-S. 2, the Court has not recorded any reason for its admission. On 16th April 1925, two days before judgment in appeal was delivered, the Judge ordered this extract from the suit register to be received and marked Ex. H, cases having gone to the length of saying that such reception of additional evidence under those circumstances is totally without jurisdiction.

In *Kali Mutyau* v. *S. Raghavayya* (1) a Bench of this Court held that the admission of a document in evidence was illegal where no reasons were recorded. There was no application for the admission of the evidence and no reasons were shown for failure to produce the document in the Court of first instance. Apart from this irregularity or illegality in admitting Ex. H in evidence, the learned Judge has, to my mind, failed to deal with some of the aspects of this question of fact that presented themselves to the District Munsif. It is important to have this question of fact settled and I must therefore send the case down for a finding to the Subordinate Judge as to whether or not the debt in question i e., the decree debt in S. C. S. No. 1906 of 1916, is a binding debt of the family. The Subordinate Judge need not again enter into the question as to whether it takes precedence or not of the claim for maintenance of defendant 1. That is a question of law which if necessary can be argued later on.

As I have said it seems to me that on the authority of *Kali Mutyalu* v. *Kanigolla Siva Raghavayya* (1), the reception of Ex. H was illegal. If the appellant there can persuade the Subordinate Judge that substantial reasons did exist for his failure to produce the documents in evidence in the Court of the District Munsif, the Subordinate Judge may consider the same. Otherwise the finding is to be returned on the evidence on record. Six weeks for finding and seven days for objections.

(1) [1916] 32 I. C. 826.

[In compliance with the order contained in the above judgment the Court of the Subordinate Judge at Masulipatam submitted the following.

Finding.—This appeal has been remanded for a finding as to whether or not the decree debt in S. C. S. No. 1906 of 1916 was a debt binding on the family of defendant 1.

My finding is that the debt in S. C. S. No. 1906 of 1916 was a debt binding on the family of defendant 1. I may add that I have not taken Ex. H into consideration. A petition was filed before me for its admission, but it was rejected for the reasons given on it.

This appeal again coming on for hearing for final disposal before Wallace and Anantakrishna Ayyar, JJ., the Court delivered the following].

Judgment.—Defendant 1 (Venkatasubbamma) filed on 11th January 1916 O. S. No. 451 of 1916 on the file of the Temporary District Munsif's Court of Gannavaram against her deceased husband's brother Venkatappayya, and the alienees from Venkatappayya of certain joint family properties, for maintenance due to her from the joint family. She prayed that the maintenance that might be decreed to her should be made a charge upon nine specific items of immovable property mentioned in her plaint. She alleged that items 1 to 8 had been alienated by Venkatappayya to the other defendants in O. S. No. 451 of 1916, fraudulently and collusively with a view to defeat her right of maintenance. She also alleged that those alienations were not bona fide nor supported by consideration. She obtained a decree for maintenance on 27th April 1918, and the same was charged by the decree on all the nine items of immovable property mentioned in her plaint. Before the decree was passed in O. S. No. 451 of 1916 P. W. 1 (Narasayya) filed a plaint on 27th January 1916, and obtained a decree for money in Small Cause Suit No. 1906 of 1916 on the file of the same Court against Venkatappayya on a promissory note, and in execution of that decree P.W. 1 brought item 9, specified in O. S. No. 451 of 1916 as one of the properties charged for the widow's maintenance, to sale, and after purchasing the same himself on 8th April 1918 sold the same to the plaintiff on 2nd June 1919. In the meantime the widow Venkatasubbamma executed the maintenance decree obtained by her (O.S.451 of 1916) and brought item 9 mentioned in that decree to sale, and defendant 2, Veerayya, became the purchaser in Court auction on 5th April 1922. Defendant 2 attempted to obtain possession of the said property in pursuance of the sale certificate granted to him in O. S. No. 451 of 1916, and therefore the plaintiff instituted the original suit, out of which this second appeal has arisen, for a declaration that the Court sale of the property in suit (item 9 in O. S. 451 of 1916) in favour of defendant 2 is not valid and binding on him and for a permanent injunction restraining defendant 2 from taking possession of the property in pursuance of the Court sale to him.

Defendant 1, the widow Venkatasubbamma, did not appear in this suit. Defendant 2 pleaded that the purchase by the plaintiff's vendor P. W. 1 in execution of the small cause decree on 8th April 1918 was vitiated by the doctrine of lis pendens, since O. S. 451 of 1916, instituted by the widow to have the suit item also made a charge in respect of her maintenance, was pending at the time, and that consequently the purchase by P. W. 1 could not prevail over the widow's rights, that defendant 2 being the auction-purchaser in execution of the maintenance decree, his rights to the property should prevail over the rights of P. W. 1, the plaintiff's assignor.

Three main questions were discussed in the lower Courts: (a) whether the doctrine of lis pendens applies to suits for maintenance where a charge is claimed on specified immovable property; (b) whether the doctrine applies to involuntary sales; and (c) whether debts binding on the joint family have priority over claims of widows of the joint family for maintenance, and if so whether the Court sale to P. W. 1 would have precedence and priority over the Court sale to defendant 2 in the circumstances.

The trial Court found that the decree debt in Small Cause Suit 1906 of 1916 was not under the circumstances a binding debt which could have prevailed against the claim for maintenance of defendant 1; and on the other two points the trial Court held that the doctrine of lis pendens applied. The suit was accordingly dismissed. On appeal by the plaintiff, the lower appellate Court admitted a fresh document in evidence and

found that the decree debt in Small Cause Suit No. 1906 of 1916 was a debt binding on the joint family. The lower appellate Court further observed that the doctrine of lis pendens applied in the circumstances and therefore confirmed the trial Court's decree.

When the second appeal first came for hearing Odgers, J., being of opinion that the finding of the lower appellate Court on the question of the binding nature of the debt, which was the subject matter of the Small Cause Suit No.1906 of 1916, was not satisfactory, called for fresh findings and reserved the other questions of law arising in the case for further consideration. The finding submitted by the lower appellate Court (another Subordinate Judge) is to the effect that the debt which was the subject matter of the small cause suit was one binding on the joint family. This finding is one of fact and has to be accepted for the purpose of this second appeal.

Mr. Lakshmanna, the learned advocate for the appellant argued two questions: (1) that the doctrine of lis pendens does not apply to the case; (2) that the debts binding on the family have priority over the claims of a Hindu widow for maintenance; and that on the finding of the lower appellate Court that the debt which gave rise to the small cause decree was binding on the family, the purchase by P. W. 1 in Court sale should prevail over the purchase made by defendant 2.

On the question of lis pendens, we are clearly of opinion that the doctrine applies to a suit for maintenance where the plaintiff claims to have maintenance specifically charged on specific items of immovable properties mentioned in the plaint. In such a case, "right to immovable property is directly and substantially in question" within the meaning of S. 52, T. P. Act, and therefore

"the property cannot be transferred or otherwise dealt with by any party of the suit so as to affect the rights of any other party to the suit under any decree which may be made therein."

Dose Thimanna Bhutta v. *Krishna Tantri* (2), is a clear and direct decision on this point. There the learned Judges (Messrs. Benson and Sankaran Nair) held that

"a suit in which a widow claims to have her maintenance made a charge on specific immovable property is one in which a right to such immovable property is directly and specifically in question within the terms of S. 52, T. P. Act : see also *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (3) and *Krishna Patta* v. *Sinnapennu* (4)."

In fact the learned advocate for the appellant did not seriously dispute this point, and we think it is clear that the doctrine of lis pendens applies to a suit for maintenance in which the plaintiff claims to have her maintenance made a charge on specific immovable property mentioned in the plaint and a decree is passed creating a charge on such property.

Mr. Lakshmanna however argued that the doctrine of lis pendens has no application to cases of involuntary sales. It is however clear to us that the principle of the doctrine of lis pendens applies equally to involuntary sales and is not confined to transfers inter vivos if the other conditions are satisfied. In *Pethu Ayyar* v. *Sankaranarayana Pillai* (5), Napier, J., observed at p. 961 as follows :

"It is now beyond dispute that involuntary sales by decree are covered by the mischief of the doctrine,"

though having regard to the provisions of S. 2, proviso (d), S. 52 as such might not apply to such cases : see *Man Singh* v. *Amantaka Prasad* (6) and *Tinoodhan Chatterjee* v. *Trilokya Saran Sanyal* (7). In *Tinoodhan Chatterjee* v. *Trilokya Saran Sanyal* (7) the learned Judges held that

"the doctrine of lis pendens is applicable to a purchase at an execution sale, and that the question may now be considered as set at rest by decisions of the Privy Council : see p. 179."

In Ghose on Mortgages, Vol. 2, p. 706, the learned author remarks that

"the weight of authority is decidedly in favour of the extension of the doctrine to alienations in invitum" ;

and at p. 707 it is stated that in *Nilkant Banerji* v. *Suresh Chandra Mullick* (8) their Lordships of the Privy Council expressed strong doubts as to the correctness of confining the principle to voluntary alienations. And the question may now be taken to be practically concluded by their Lordships' judgment in *Radhamadhub Holdar* v.

(2) [1906] 29 Mad. 508=16 M. L. J. 413.

(3) [1900] 27 Cal. 77=4 C. W. N. 254.
(4) [1914] 25 I. C. 759.
(5) [1917] 40 Mad. 955=38 I. C. 778.
(6) [1915] 26 I. C. 879.
(7) [1913] 18 I. C. 177.
(8) [1886] 12 Cal. 414 =12 I. A. 171 = 4 Sar. 685 (P. C.).

Monohur Mukerji (9) and *Motilal Karrabuldin* (10). In *Vedachari* v. *Narasimha Mudali* (11), Krishnan and Odgers, JJ., held that the doctrine of lis pendens applies to Court sales also.

The question is discussed in Hukum Chand's Treatise on the Law of Res Judicata at pp. 713 and 714. The conclusion arrived at is that the weight of authority is in favour of the view that a purchaser at a sale in execution pending a suit is bound by the result in that suit. The inconvenience that would be caused by upholding the opposite view is forcibly pointed out in an elaborate judgment of Sir Richard Couch, C. J., in *Raj Kishen Mookerji* v. *Radhamadhub Holdar* (12): see also Bennett on Lis Pendens, p. 328, S. 284.

We accordingly overrule the contention raised by the learned advocate for the appellant, and hold that the principle of the doctrine of lis pendens applies to sales in Court auction also.

The last point raised by the learned advocate for the appellant is really the point that was strongly pressed by him in this second appeal. He argued that debts binding on a joint Hindu family have priority over maintenance of widows and as the finding of the lower appellate Court that the decree in the small cause suit was in respect of a debt binding on the joint family has to be accepted, he argued that the claims of the widow, defendant 1, and of defendant 2, who is the auction-purchaser in execution of the maintenance decree, could not prevail over the rights of the auction-purchaser in execution of the Small Cause Court's decree. He strongly relied on the following observations in *Dose Thimmanna Bhatta* v. *Krishna Tantri* (2) of the learned Judges, Messrs. Benson and Sankaran Nair, that

"it is alleged that, so far as the property in dispute before us is concerned, the mortgage debt due to him was contracted for the purpose of paying off any debt entitled to any priority over the widow's claim for maintenance or already due by the mortgagor."

He also relied on the observations of Benson and Bhashyam Ayyangar, JJ., in *Jayanti Subbiah* v. *Alamelu Mangammal* (13) to the effect that the debts of a husband take precedence over the widow's claims for maintenance. Some other decisions were also referred to to the same effect.

Turning to *Dose Thimmanna Bhatta* v. *Krishna Tantri* (2) it is clear that the observations relied on were only obiter. The Court as a matter of fact held in that case that the doctrine of lis pendens applied, and upheld the widow's claims. Further, it is not mentioned what debts are entitled to any priority over the widow's claim for maintenance and under what provisions of law. Mr. Lakshmanna admitted, and in our view very properly, that the case reported in *Dose Thimmanna* v. *Krishna Tantri* (2), is not a decision on this point, that the observations relied on at p. 509 are only obiter. The decision in *Jayanti Subbiah* v. *Alamelu Mangammal* (13), does not lay down anything inconsistent with the view we are inclined to adopt. In that case there was no decree obtained by the widow creating a charge in respect of any specific immovable property of the family; nor was her general claim for maintenance against the joint family estate reduced by any contract between the parties to the form of a specific charge on any specific immovable properties of the family. In those circumstances, the learned Judges held that an auction purchaser in execution of a money decree binding on the family was entitled to the properties purchased by him, and that the general rights of a Hindu widow under Hindu law could not be put forward to resist the claim of such auction-purchaser.

As observed by West, J., in *Lakshman Ramachandra Joshi* v. *Satya Bhama Bai* (14), at p. 515 :

"the widow's claim being strictly to maintenance only, without any defined share in the estate even on partition, and the kind of maintenance even that she can claim being dependent on the perhaps fluctuating circumstances of the joint family, it appears that although she may at her will get her claim recognized as chargeable on the estate in the hands of the coparceners reduced to certainty, and secured as a specific charge on the estate, yet if she could refrain from that course in the hope of sharing the improving circumstances of the family or through mere carelessness, she leaves to the coparceners an unlimited estate to deal

(9) [1889] 15 Cal. 756 = 15 I. A. 97 = 5 Sar. 211 (P. C.).
(10) [1898] 25 Cal. 179=24 I. A. 170=1 C.W.N. 639=7 Sar. 222 (P. C.).
(11) A. I. R. 1924 Mad. 307=76 I. C. 793.
(12) [1874] 21 W. R. 349.
(13) [1904] 27 Mad. 45.
(14) [1877] 2 Bom. 494.

with at their discretion, and must share their ill as well as their good fortune."

In the absence of fraud, the above passage describes the widow's rights in general, and before her rights are reduced to the form of a charge on any specified family property.

The other decisions cited do not take the case any further. In those cases also there was no specific charge created, either by act of parties or by the decree of Court, over specific items of immovable property belonging to the family for the maintenance due to the widow. Our attention was also drawn to Trevelyan's Hindu Law, 3rd Edn., p. 99, where it is stated as follows:

"A right of maintenance is not affected by a transfer made during the pendency of a suit for maintenance, unless such transfer be effected for the purpose of paying off a debt, which has priority over the claim for maintenance."

Mulla's Hindu Law, 6th Edn., S. 570 at pp. 570 and 578 was also relied on, where it is mentioned that

"debts contracted by a Hindu take precedence over the right of maintenance of his wife or infant child, or his widow after his death. The same is true of debts contracted by the manager of the joint family of which the husband was a member, provided the debts were incurred for the benefit of the family."

The only authority quoted by the learned author Sir E. J. Trevelyan is *Dose Thimmanna* v. *Krishna Tantri* (2), about which we have already made our remarks. The passage quoted from Mr. Mulla's book refers, as we understand it, only to cases where the right of maintenance has not been reduced to the form of a specific charge either by private contract or by proceedings taken in Court. That is made clear by the concluding sentence in the same paragraph at p. 579:

"But where maintenance has been made a charge upon the property, it takes precedence over the right of a subsequent purchaser of the same property in execution of a money decree, though the decree was in respect of debts binding on the family."

No doubt in para. 572, the learned author quotes the observations already referred to from *Dose Thimmanna* v. *Krishna Tantri* (2) to the effect that

"the transferee of immovable properties pending a suit by a Hindu widow to establish a charge on specific immovable property for her maintenance must hold the property subject to such charge, unless the transfer be effected for the purpose of paying off a debt which has priority over the widow's claim for maintenance."

In *Somasundaram Chetty* v. *Unnamalai Ammal* (15), it was held by Oldfield and Seshagiri Ayyar, JJ., that

"a charge on joint family properties created by a decree for maintenance payable to the widow of a member of a joint Hindu family takes precedence over the right of a subsequent purchaser of the same properties in execution of a money decree binding on the family."

No objection could be, nor in fact was taken by the learned advocate for the appellant to the decision in *Somasundaram* v. *Unnamalai* (15): see also *Lakshman Ramachandra* v. *Satya Bhama Bai* (14), at p. 515 per West, J., *Kulada Prosad* v. *Jageshar Koer* (16), *Muttia* v. *Virammal* (17) at p. 288; and *Jamna Bai Ammal* v. *Balakrishna Tawker* (18). In *Jamna Bai Ammal* v, *Balakrishna Tawker* (18). Venkatasubba Rao, J., observed that:

"(1) Under Hindu law a widow's claim to maintenance is not a charge upon the estate of her deceased husband until it is fixed and specifically charged upon that estate either by agreement or by decree of Court and does not take precedence over unsecured debts which are binding on the family of her deceased husband; (2) that if the widow's claim has ripened into a specific charge it has priority over the claims of creditors whose rights have not been secured by alienation of property."

The case in *Sham Lal* v. *Banna* (19) and *Gur Dayal* v. *Kanunsila* (20) were relied on by the learned advocate for the appellant. But in neither of them was there a specific charge created in respect of the maintenance claim. The observation that even if there is a charge it would be subordinated to the claims of the creditor is not (so far as we are aware), supported by any text of Hindu law and no such texts were cited to us. S. 2, T. P. Act was also relied on to show that nothing in Chap. 2, T. P. Act (and S. 52 forms part of Chap. 2) shall be deemed to affect any rule of Hindu law, but as no rule of Hindu law has been brought to our notice supporting the appellant's contention, we are of opinion that the statement that the debts of a Hindu family takes precedence over the claims of Hindu widows for maintenance would apply only so long as the claim for maintenance is not made a charge on any specific property.

(15) [1920] 43 Mad. 800=59 I.C. 398.
(16) [1900] 27 Cal. 194.
(17) [1887] 10 Mad. 283 (F.B.).
(18) A I.R. 1927 Mad. 1092=102 I.C. 101.
(19) [1882] 4 All. 296=(1882) A. W. N. 42 (F.B.).
(20) [1883] 5 All. 367=(1883) A. W. N. 65.

In these circumstances, the question arises whether any reason has been shown why the principle of the doctrine of lis pendens should not apply to such cases as the one before us. After a decree is passed charging specific items of immovable property of the joint Hindu family for the maintenance due to the widow, it is clear that the rights of a simple money creditor of the joint family do not take priority over the charge created by the decree, fraud and collusion apart. Does it make any difference when such money creditor seeks to proceed against the immovable property belonging to the family at a time when a suit by the widow claiming to charge that immovable property is pending in a Court if such a decree in her favour is ultimately passed. The very principle of the doctrine of lis pendens is to prevent creation of fresh rights with reference to immovable properties which are the subject of adjudication in suits pending before Courts. After decree, the decree operates, and would protect the decree-holder against any subsequent transferee. One object of the doctrine of lis pendens is to prevent the plaintiff's rights and claims to property being prejudiced by delay of Courts in disposing of the suit, and to prevent dealing of the property by or at the instance of the defendant to the prejudice of the plaintiff.

The purpose of the rule is to keep the subject-matter of the litigation within the power of the Court until the judgment or decree shall be entered, since otherwise, by successive alienations pending the suit, the judgment or decree could be rendered abortive and impossible of execution. To give effect to the doctrine of lis pendens, two things seem to be indispensable:

(1) that the litigation must be about some specific thing which must necessarily be affected by the termination of the suit; and (2) that the particular property involved in the suit must be so defined in the description that anyone reading it can learn thereby what property is intended to be made the subject of litigation.

If the conditions are fulfilled, the plea that the purchase was made bona fide and that the purchaser paid a full consideration for it will not avail against such judgment or decree, nor will the purchaser be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of proceedings of Courts of record : see Black on Judgments, Vol. 2, S. 550.

The principle of the doctrine of lis pendens is explained by the Privy Council in *Faiyaz Hussain Khan* v. *Prag Narain* (21). Lord Macnaughten, after referring to Lord Justice Turner's observations in *Bellamy* v. *Sabine* (22) to the effect that:

"it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail,"

observed that the correct mode of stating the doctrine, as Cranworth, *L. C.*, observed in the same case, is that:

"pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent."

It being clear, and in fact not disputed, that S. 52, T. P. Act applies to a suit for maintenance where a charge is claimed in respect of specific immovable property, we are not able to see how the principle of the doctrine of lis pendens ceases to be applicable during the period between the date of the plaint and the date of the decree. No specific rule of Hindu law to the contrary has been quoted to us, and the principle of the doctrine of lis pendens must be held to apply, it not being pretended that the rights created in favour of the plaintiff's assignor P. W. 1 during the pendency of the maintenance suit were under the authority of the Court in which that suit was pending. Where reckless plaints are filed claiming charges upon all immovable properties belonging to the defendants without any justification whatsoever, and with a view to embarrass the management by the kartha of the family, S. 52 empowers the Court to sanction that property which is the subject-matter of the suit might be transferred or otherwise dealt with by any party to the suit on such terms as the Court may impose. If the Court be satisfied that for paying off debts due by the family the defendant who is the manager of the family should be authorized to sell any of the properties mentioned in the maintenance plaint, then

(21) [1907] 29 All. 339=34 I.A. 102=4 A.L.J. 344 (P.C.).
(22) D. & I. 566.

it is open to the Court, if it thinks fit, to sanction the sale or transfer of any such property. Filing of such plaints in Courts should be taken to constitute notice to all persons concerned and unless the money creditor of the family took steps to get sanction of the Court under S. 52, T. P. Act, it would seem to logically follow that any transfer of the property mentioned in the maintenance plaint could not affect the plaintiff, in case she got a decree charging that very property.

Our attention was not drawn to any direct decision on the point we have to decide. There is however an observation of Phillips, J., in the case reported in *Rajah of Kalahasti* v. *Venkatappa Nayanim Bahadur Varu* (23). At p. 550 (*of* 27 *M. L. W.*) it is observed as follows :

"Under her husband's will the widow obtained no specific charge on the estate and could only claim the allowance as a legatee or as a Hindu widow, but from the date of her suit, namely 22nd March 1897, she became entitled to a charge for her allowance by virtue of the decree, dated 22nd August 1900, which must be deemed to refer back her right to the date of her plaint. As these appeals are concerned mainly with the relative priority of Lakshmikantamma's claim and the claim of the several appellants, it is important to remember that the widow's claim dates back to 22nd March 1897, and any mortgages or charges created after that would not affect her right."

No doubt the question is not discussed by the learned Judge, but the observation of the learned Judge is in accordance with the view we are inclined to take for the reasons already mentioned by us.

Our attention was drawn to the decision of a learned Judge of this Court in the case reported in *Rattamma* v. *Seshachalam Sarma* (24) where he held that a charge takes effect only from the date of the decree. If the learned Judge intended to lay down that even in cases where a plaint prays for specific charge on specific immovable properties mentioned in it, a charge could take effect only from the date of the decree, and not from the date of the suit, then, with all respect, we are unable to agree with him. No doubt in cases where no charge is claimed on any specific immovable property, but only a general claim is made against the defendant (manager), and the joint family property generally, without specifying in the plaint any property, then, in such cases, a decree creating a charge on any specific immovable property would take effect ordinarily only from the date of the decree; but the case would be different when the plaint claims a charge on specific immovable property and the decree also grants such prayer and charges such specific property. See in this connexion Mayne's Hindu law, S. 462, where the learned author states as follows :

"Where a widow had sued for maintenance and had named specific pieces of property in order to show the amount she was entitled to, but had made no claim for a charge on the property, but such a charge was in fact created by the decree, the charge was held not to be binding as against a mortgage made pending suit, by virtue of the doctrine of lis pendens. It would have been different if the suit had been to obtain a charge."

A somewhat similar question has arisen in England and America. The general principles of the doctrine of lis pendens being the same there as in India, we think, it is perhaps permissible to refer to analogous cases decided in those countries. It has there been held that

"if in a suit for alimony relief is sought in respect of specific property, either by making it chargeable with the payment of alimony, or setting it apart for the use of or as the property of one of the parties, or of partitioning or dividing it between them, the doctrine of lis pendens will apply : see p. 723, Hukumchand's Treatise on Res Judicata."

In *Ulrich* v. *Ulrich* (25) the suit was for maintenance, yet the Supreme Court held the rule of lis pendens to apply, as a certain lot was described in the bill, and it was alleged that the lot constituted the principal property of the defendant out of which the alimony should be decreed. In *Wilkinson* v. *Elliot* (26) the suit was for divorce and alimony from certain property specifically described, and it was contended that the doctrine had no application in such suits, but Johnston, J., held :

"if a divorce is asked on account of the fault of the husband, the wife may ask not only that all her own land may be restored to her that has not been disposed of, but may describe particular property belonging to the husband, and ask that the same may be set apart for her as permanent alimony. When this is done, the property is made the subject-matter of litigation and is brought within the jurisdiction of the Court, and any one who purchases

(23) A. I. R. 1928 Mad. 713=109 I. C. 872 (F. B.).
(24) A. I. R. 1927 Mad. 502=101 I. C. 806.
(25) 3 Mackey 290.
(26) 19 Am. St. Rep. 158.

the same should be bound by the judgment or decree thereafter rendered. If in such an action there was no specific property pointed out, but only a general prayer for alimony, the doctrine would not apply, for the reason that the alimony might be awarded out of either real or personal property; and as no particular property was described and made the subject-matter of the litigation, no one could have noticed that any particular property was involved."

Again, in *Powell* v. *Campell* (27) it was observed that

"in many cases where, in divorce proceedings the application is for alimony proper, that is an allowance to be paid at regular periods for the wife's support, it was held that the rule of lis pendens does not apply where the suit is in personam, and did not relate to any specific part of the personal or real estate of the husband. If however the wife in her complaint specifically describes property which she asks the Court to decree to her for her support, there seems to be no well founded reason why the rule of lis pendens should not apply,. . . . In such a case, a purchaser pendente lite, with notice of the suit and its objects, knows that the property described may be decreed to the wife, and that one of the objects of the suit is to obtain a decree awarding such property to her: see S. 284 of Hukam Chand's Law of Res Judicata, pp. 722 and 724, and Bennett on Lis Pendens, p. 267, S. 219.

The conclusion would seem to be that if the prayer in the bill be for alimony out of her husband's general estate, then the doctrine of lis pendens would not apply, but if the prayer be for alimony to be assigned to the wife out of any specific property of the husband mentioned in the bill or petition, then the rule of lis pendens would apply. The discussion is interesting, and throws light on the applicability of the doctrine of lis pendens to cases like the one before the Court.

For the above reasons, we hold that S. 52, T. P. Act, applies to suit by a Hindu widow in which she claims to have her maintenance charged on specific items of immovable property mentioned in the plaint; that the principle of the doctrine of lis pendens applies to sales in invitum that take place during the pendency of such suits, that a decree obtained by the plaintiff in such a suit creating a specific charge over specific items of immovable property mentioned in the plaint, operates to give her a charge as from the date of the plaint, and not as from the date of the decree only unless there be anything in the decree to the contrary that without the sanction of the Court, transfers inter vivos or sales in invitum during the pendency of such suit could not prevail over such charge claimed in the plaint and granted by the decree; that a simple money creditor of a joint Hindu family has no priority over such charge granted by the decree, in the absence of fraud or collusion and an auction-purchaser, during the pendency of such maintenance suit, of an item of property over which a charge was claimed in the plaint and was granted by the decree who purchased in execution of a simple money decree binding on the family, is not entitled to priority over another auction-purchaser of such property in proceedings taken to execute such maintenance decree.

We would accordingly dismiss the second appeal with costs.

P.R.S./R.M. *Appeal dismissed.*

(27) 19 Am. St. Rep. 350.

A. I. R. 1930 Madras 832

REILLY, J.

K. C. Kutty and *another*—Petitioners.

v.

Vydiarakath Kunhali Haji and *another*—Respondents.

Civil Revn. Petn. No. 1719 of 1929, Decided on 13th March 1930, from order of Sub-Judge, South Malabar, D/- 28th October 1929.

Madras Rules for the conduct of inquiries and the decision of disputes relating to elections, R. 1—District or Subordinate Judge having jurisdiction means "having jurisdiction over the place of the acts or omissions complained of."

Rule 1 does not say that the petition can be presented to the District or Subordinate Judge having jurisdiction over the election or over any place where any act included in the term "election" is done, but merely to the District or Subordinate Judge "having jurisdiction": that means having jurisdiction over the place of the acts or omissions complained of: *A. I. R.* 1929 *Mad.* 727, *Rel. on.* [P 833 C 1]

P. Govinda Menon—for Petitioners.

B. Pocker and *Kunhamad Kutti*—for Respondents.

Judgment.—The petition before the Subordinate Judge of Calicut relates to the election of the two respondents before him as members of the Calicut Taluk Board for the Payyoli Firka of the Kurumbarnad Taluk. The Subordinate Judge has no jurisdiction over the Kurumbarnad Taluk. The election was attacked by the petitioner before the Subordinate Judge on the ground

that votes given for him at the election were wrongly rejected by the President of the Taluk Board as invalid, and that the President refused to re-count the votes when requested to do so. These acts according to the petitioner's allegations took place at Payyoli. Respondent 1 before the Subordinate Judge, whose election was attacked, is the petitioner here, and he urges that the Subordinate Judge of Calicut had no jurisdiction to hear an election petition regarding these acts alleged to have taken place at Payyoli outside his local jurisdiction. Under R. 1 of the rules for the conduct of inquiries and the decision of disputes relating to elections, election petitions must be presented to the District or Subordinate Judge "having jurisdiction." Mr. Pocker for the petitioner before the Subordinate Judge urges that "election" in such cases includes nomination, as decided in *Selvaranga Raju* v. *Doraiswami Mudaliar* (1), and that the nomination of the candidates in this case was admittedly in Calicut, that the allegations of his client are really against the President of the Taluk Board, whose office is in Calicut, and that under the rules notice of such a petition must be served on the President of the Board. For these reasons he contends that the Subordinate Judge of Calicut had jurisdiction in this matter, though the votes were rejected and the re-count refused and both the respondents before the Subordinate Judge resided outside his jurisdiction. R. 1 does not say that the petition can be presented to the District or Subordinate Judge having jurisdiction over the election or over any place where any act included in the term "election" is done, but merely to the District or Subordinate Judge "having jurisdiction." In my opinion, though the matter is not very clear, that means having jurisdiction over the place of the acts or omissions complained of. In this case therefore the Subordinate Judge of Calicut had no jurisdiction to hear the petition in question. His order is set aside and the petition before him is dismissed.

P.R.S./S.N. *Order set aside.*

(1) A. I. R. 1929 Mad. 727=119 I. C. 597=52 Mad. 732 (F.B.).

* * A. I. R. 1930 Madras 833

Full Bench

BEASLEY, C.J., AND SUNDARAM CHETTY AND WALSH, JJ.

Parameswara Pattar—Plaintiff—Appellant.

Stamp Register No. 25997 of 1929, Decided on 4th August 1930 on reference by Taxing Officer as regards amount of court-fee payable in appeal.

** **Court-fees Act, S. 17—Suit for possession and mesne profits—Court-fee on aggregate value is to be given.**

In a suit for possession of immovable property and past mesne profits, court-fee is payable on the aggregate value of both the reliefs and not separately on value of each relief : 8 *Cal.* 593 (*F.B.*) and 16 *All.* 401, *Rel. on.*; 38 *Mad.* 829 (*F.B.*), *Expl.* and *Dist.* [P 834 C 2]

K. Kuttikrishna Menon—for Appellant.

Sundaram Chetty, J.—In this reference, the point arising for determination is whether in a suit for possession of immovable property and mesne profits, court-fee should be paid on the aggregate value of both the reliefs, or on the value of each of the reliefs separately; the question turns upon the applicability of S. 17, Court-fees Act, to this case. That section says that where a suit embraces two or more distinct subjects, court-fee has to be paid separately on the value of each subject, and not on the aggregate value of all the reliefs.

The word "subject" in this section is somewhat obscure in its meaning, and has been held in some decisions to be not capable of precise definition. Ordinarily the right or title to the land is the basis for the claim for possession of the land, as also for mesne profits, and it cannot therefore be deemed that the two claims are so disconnected without any inter-relation, as to form distinct subjects under S. 17 of the aforesaid Act.

The Full Bench decision of the Calcutta High Court in *Kishori Lal Roy* v. *Sharat Chunder Mozumdar* (1) is a clear authority for holding that the claim for possession and the claim for mesne profits should be taken as one entire claim, for the computation of the court-fee, and not as distinct subjects. The question has been viewed by Garth, C. J., in several aspects, and due importance has been attached to the uniform practice prevalent in the whole country,

(1) [1882] 8 Cal. 593=10 C. L. R. 359 (F.B.).

in respect of this matter, which a Court of justice ought to be slow in changing to the prejudice of the suitor, unless it sees clear and weighty reasons for so doing. With this view we are in agreement. This decision has been followed by the Allahabad High Court in the reference under the Court-fees Act, 1870, S. 5, reported in *Ref. under Court-fees Act, S.* 5 (2).

There seems to be no decision of this High Court directly hearing on the present point. In *Ponnammal* v. *Ramamirda Aiyar* (3) the Full Bench has held that the claim for possession and the claim for mesne profits are separate causes of action, though they may arise out of one act of dispossession. But that decision is for the purpose of O. 2, R. 2 and 4, Civil P. C. The question remains whether separate causes of action would invariably be the criterion for treating the claims based on them as distinct subjects under S. 17, Court-fees Act. In the Full Bench case in *Kishori Lal Roy* v. *Sharat Chunder Mozumdar* (1), this does not appear to have been taken as the deciding test. In a case dealt with by the Patna High Court, it is stated that two views are possible as to the meaning of the word "subject" in this section. One is that the word "subject" relates back to S. 7 where the various subjects of suits are put under different heads. The other view is that the word "subject" means cause of action : *Nauratam Lal* v. *Wilford Joseph, Stephenson* (4). But however, it was held on the strength of the Full Bench decision in *Kishori Lal Roy* v. *Sharat Chunder Mozumdar* (1), that the long continued practice should not be disturbed, and that court-fee may be paid on the aggregate value of the reliefs viz. the claim for possession and claim for mesne profits. The preponderance of authority is in favour of not treating these two claims as distinct subjects under S. 17, Court-fees Act.

There being no definition of the word "subject" in the Act, we think we need not attempt to define it in the present case, and should only be guided by the long course of practice.

We think that any doubt or obscurity as to the precise meaning of the word "subject" in this section, should be cleared by the legislature in due course.

We answer this reference by stating that in a suit for possession of immoveable property and past mesne profits, court-fee is payable on the aggregate value of both the reliefs.

P.R.S./R.K. *Reference answered.*

(2) [1894] 16 All 401=(1894) A. W. N. 124.
(3) [1915] 38 Mad. 829=27 I. C. 679 (F.B.).
(4) [1919] 4 Pat. L. J. 195=50 I. C. 470.

** A. I. R. 1930 Madras 834
Full Bench

BEASLEY, C. J., AND SUNDARAM CHETTY AND WALSH, JJ.

(*Taticherla*) *Pichamma*—Appellant.

v.

Official Receiver of Cuddappah and *others*—Respondents.

Civil Misc. Appeal No. 163 of 1928, Decided on 30th July 1930, from order of Dist. Judge, Cuddappah, D/- 3rd February 1928, in Original Petn. No. 73 of 1926.

**** Provincial Insolvency Act (1920), S. 53 (as amended by Act 10 of 1930)—Transfer within two years of application but beyond two years of actual order can be annulled.**

The amendment made by S. 6, Act 10 of 1930, has a retrospective effect and a transfer of property of the description given in S. 53 made by an insolvent more than two years before the date of the actual order of adjudication but within two years of the date of the presentation of the petition for adjudication, can be annulled by the Court under S. 53 at the instance of the Official Receiver. [P 836 C 1]

T. V. Muthukrishna Ayyar—for Appellants.

Kasturi Seshagiri Rao for *B. Somayya* and *G. N. Tirumalachariar*—for Respondents.

Order of Reference.

Anantakrishna Ayyar and Cornish, JJ.—Counter-petitioner 4 T. Venkayya was adjudicated insolvent on 13th March 1925 on a petition filed by a creditor on 4th February 1924. The insolvent executed on 20th March 1922 a sale-deed Ex. II and a mortgage deed Ex. III in favour of his wife, counter-petitioner 4. A petition was filed by the Official Receiver, Cuddappah, in the District Court on 7th August 1926, for an order that Exs. II and III be annulled and declared void as against the Official Receiver under S. 53, Provl. Insol. Act (Act 5 of 1920). The learned District Judge passed orders annulling Exs. II and III and declaring them void as against the Official Receiver. Counter-petitioner 1, the wife of the

insolvent, has preferred this appeal; and on her behalf it was argued that the learned District Judge had no jurisdiction to pass the order annulling the said transfers because under S. 53 he could do so only

"if the transferor is adjudged insolvent within two years after the date of the transfer."

The question is whether transfers made within two years prior to the presentation of the petition for adjudication as insolvent, but which are beyond two years from the date of the actual order of adjudication, could be annulled under S. 53 of the Act.

There has been difference of opinion on this question among the several High Courts in India. The Calcutta and the Madras High Courts have taken the view that such transfers could be annulled if they are within two years prior to the date of the presentation of the petition for adjudication; see *Bakhal Chandra* v. *Sudhindra Nath* (1), *Venkatanarayana* v. *Alagiri* (2), *Rangiah Appaji* (3) and *Venkatanarasayya* v. *Official Receiver, Godaveri* (4), whereas the High Courts of Bombay, Rangoon and Lahore have taken the opposite view see *Nagindas* v. *Gordhandas* (5), *Maung Pe* v. *Maung Po Htein* (6) and *Hem Raj* v. *Krishen Lal* (7). It was mentioned that the view of the Allahabad High Court is the same as that of the Madras High Court, *Sheonath Singh* v. *Munshi Ram* (8), but on referring to the report, we find that the question before the Court was not with reference to any transfer prior to the date of the petition for adjudication but in respect of a transfer made by the insolvent between the dates of the presentation of the petition and the order of adjudication. The decision in *Hem Raj* v. *Krishen Lal* (7) is that of a Full Bench of that High Court. The various arguments in support of the respective contentions have been set out in that decision and the Indian case-law on the point also is mentioned.

Under ordinary circumstances we should have felt bound to follow the three decisions of this High Court mentioned above, more especially as the learned Judges in *Venkatanarasayya* v. *Official Receiver, Godaveri* (4) "saw no reason for referring the question to a Full Bench:" see p. 431 [*of* (1927) *M. W. N.*] We ordinarily in the circumstances would have rest satisfied with throwing a strong suggestion that it is pre-eminently a case for the legislature to intervene and make matters clear on such an important point; but we have been pressed with the change of language used in Ss. 51 to 55 and also S. 73, Provl. Insol. Act. Though Ss. 53 and 55 deal with analogous matters the words used in S. 53 are:

"if the transferrer is adjudged insolvent within two years after the date of the transfer"

while the words used in the very next S. 54, are:

"if such person is adjudged insolvent on a petition presented within three months after the date thereof."

The wordings of the other Ss. 51, 52, 55 and 73, are also different. In a very recent case *Ramanandi Kuer* v. *Katwati Kuer* (9), the Privy Council point out that

"where there is a positive enactment of the Indian legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by consideration derived from previous state of the law or of the English law upon which it is founded."

The decisions of the Calcutta and the Madras High Court seem to carry out the policy of the legislature we are not clear whether the wording of S. 53, if interpreted according to the canon of construction enunciated by the Privy Council, supports that interpretation. We think that in the circumstances, the question should be decided by a Full Bench of this Court.

We accordingly frame the following question:

"Whether a transfer of property of the description given in S. 53, Act (Act 5 of 1920) made by an insolvent more than two years before the date of the Provl. Insol. adjudication, but within two years of the presentation of the petition for adjudication could be annulled by the final order of the date S. 53 of the Act, at the instance of the Official Receiver."

Opinion

Sundaram Chetty, J.—The question

(1) [1919] 46 Cal. 991=52 I. C. 747.
(2) [1918] 49 I. C. 283.
(3) A. I. R. 1927 Mad. 163=99 I. C. 241 = 50 Mad. 300.
(4) A. I. R. 1927 Mad. 826=104 I. C. 177.
(5) A. I. R. 1925 Bom. 480=88 I. C. 941 = 49 Bom. 730.
(6) A. I. R. 1928 Rang. 148=110 I. C. 361 =6 Rang. 193.
(7) A. I. R. 1928 Lah. 361=111 I. C. 8 (F.B.).
(8) [1920] 42 All. 433=55 I. C. 941.
(9) A. I. R. 1928 P. C. 2=107 I. C. 14=5 A. 18 =7 Pat. 221 (P. C.).

referred to us for decision runs as follows:

"Whether a transfer of property of the description given in S. 53, Provl. Insol. Act (Act 5 of 1920) made by an insolvent more than two years before the date of the actual order of adjudication, but within two years of the date of the presentation of the petition for adjudication could be annulled by the Court under S. 53 of the Act at the instance of the Official Receiver."

The decision of this question depends upon the correct interpretation of the wording in S. 53 of the Act. The portion of the section relevant for our purpose is where it says that the adjudication of the insolvent should have been made within two years after the date of the transfer. As to the meaning to be attached to the point at which limitation has to be computed, there has been a conflict of judicial opinion. This High Court, as also the Calcutta High Court, has been of one opinion, namely that a petition to annul an alienation can be filed if it is within two years before the presentation of the insolvency petition. The decisions of these High Courts proceeded on the view that the adjudication relates back to the presentation of the petition and following the view taken in the English decisions it has been so held. But a different view has been taken by the High Courts of Bombay, Rangoon and Lahore. The question of interpreting the section is of quite free from difficulty; but in view by the recent amendment of this section as Act 10 of 1930, which received 20th sent of the Governor-General matter March 1930, any doubt on that rest. must be taken to have been considered

The only point now to made by is whether the amend ctive effect, S. 6 of this Act has a re ing proceed- that is, will apply to estion. If by ing such as the one ent a new or means of this am itation is pres- altered period o for consideration cribed then it eration in the law whether such tive effect or not, but will have re r from the Statement of Ob " ould easons in connexion with Objects Act is that, in view of this ame erpretations having been differen ral High Courts which led to put by of view, the legislature wan- a con t that doubt at rest by declaring early what the real meaning of the expression in the section was. By the insertion of the words "on a petition presented" after the words "is adjudged insolvent" the meaning i made clear and that meaning is in accordance with the view taken by this High Court and the Calcutta High Cou . If the amendment in question has ot introduced a new period of limitation but has only classified the mean ng of the old section, there is no d bt that it must be taken to apply the present case. The recent Full nch decision of this Court in *Veerap Chettiar* v. *Subramania Ayyar* (10) supports the view which we are taking. The case was in respect o an amendment made to a certain sect in the Transfer of Property Act s to the meaning of the word "estation" and it was held that the mendment had retrospective effect. t is difficult to distinguish in pri ple the present case from the one t with by the Full Bench. That bei so, we think it unnecessary to canvas the decisions of the several High Courts which were given under S. 53 of the Act before the amendment. We therefore answer this question in the affirmative.

P.R.S./R.K. *Reference answered.*

(10) A. I. R. 1929 Mad. 1=116 I. C. 867=52 Mad. 123 (F. B.).

A. I. R. 1930 Madras 836

BEASLEY, C.J., AND CURGENVEN, J.

N. M. Venkatarama Iyer—Appellant.

v.

Collector of Tanjore—Respondent.

Appeal No. 361 of 1928, Decided on 5th February 1928, from order of Sub-Judge, Tiruvalur, D/- 19th December 1927.

(a) Land Acquisition Act (1 of 1894), Ss. 9 (2) and (3) and 25 (2)—Notice — Construction—Notice held to be one under S. 9 asking person served to claim compensation due to him for his interest in land to be acquired.

A notice was issued to *A* under Ss. 9 (2) and 10 as follows: "The Government are going to acquire lands mentioned in the list hereunder under Act (1) (India) of 1894. You shall appear either in person on 26th October 1925 before me at Nannilam Camp or by an authorized agent and inform the nature of the right you possess in these lands, the amount due to you out of the amount of compensation to be given for the said right, and objections if any in respect of the measurements made according to S.8. You should prepare a written statement and the same signed either by you or by your authorised agent should be presented." The notice

then called for particulars required under S. 10. It was contended that the notice did not call upon *A* to state his claim to compensation.

Held: that the notice was clearly in accordance with the provisions of S. 9. No other construction could be put upon the notice except that it was a notice calling upon *A* to claim an amount of compensation due to him for such interest as he possessed in the land under acquisition. [P 838 C 2]

(b) Land Acquisition Act (1 of 1894), Ss. 9 (2) and (3) and 25 (2)—In notice under S. 9 (3) occupier of land is entitled to fifteen days notice—Omission to give such notice amounts to sufficient cause within meaning of S. 25 (2)— Claimant can be said to have waived acquiescence of S. 9 only when he knew what his legal rights were.

The stringent provisions of S. 25 (2) can only be applied after a notice which is strictly in compliance with S. 9 (2) and (3) has been served upon the landowner. [P 840 C 2]

Under S. 9 (3) the occupier of the land, concerning which public notice has been given under Cl. (1), S. 9, is entitlad to such notice as will give him in the same manner as the person mentioned in S. 9 (2), fifteen days interval in which to state before the Collector the nature of his interest in the land and the particulars of his claim for compensation. [P 839 C 2]

Where the notification under S. 9 (3) does not give the claimant a fifteen days notice as required, it amounts to "sufficient cause" within the meaning of S. 25 (3) for the claimant's omitting to make a claim, and he thereby escapes the stringent provisions of S. 25 (2). [P 839 C 2]

The applicant can be said to have waived the requirements of S. 9 only if it is proved that he knew what his legal rights were and consented to forgo them; 39 *All.* 534; *A. I. R.* 1926 *Mad.* 732, *Foll.*; 34 *Cal.* 470, and *English cases referred.* *A. I. R.* 1927 *All.* 183, *Diss. from.* [P 840 C 2]

(c) Land Acquisition Act (1 of 1894)—Application—In case of error of procedure every presumption should be made in favour of party likely to be prejudiced by it—Practice.

Where an officer whose duty it is to apply the provisions of an Act, such as the Land Acquisition Act, commits an error of procedure every presumption should be made in favour of the party likely to have been prejudiced by the error; 39 *Cal.* 33, *Rel. on.* [P 843 C 2]

T. Rangachariar—for Appellant.

Government Pleader—for Respondent.

Beasley, C. J. — The petitioner's lands in Naduvacheri village were acquired to the extent of 47 cents in accordance with the scheme sanctioned in G.O. No. 3559, Revenue, dated 10th November 1917. The award of the Land Acquisition Officer is dated 17th November 1925. After the award was made the petitioner put in an application on 22nd December 1925, under S. 18, Land Acquisition Act (1 of 1894), requiring the matter to be referred to the Subordinate Court on the ground that there had been a gross undervaluation of the properties acquired. Under S. 25 (2) of the Act, when an applicant has omitted without sufficient reason to make a claim, the amount awarded by the Court, i. e., the Subordinate Court shall in no case exceed the amount awarded by the Collector. The learned Subordinate Judge held that the appellant had omitted to make a claim under the Act and that such omission was without sufficient reason. Upon that finding he could not under the Act award an amount in excess of the amount awarded by the Collector, but nevertheless he proceeded to deal with the case on its merits.

Two preliminary questions have to be decided here before the case can be considered on its merits. The first point is whether the notice issued by the Collector under S. 9 of that Act complies with the provisions of sub-Ss. (2) and (3) of that section, as it is contended on behalf of the appellant that the notice did not call upon him to make a claim for compensation. The second point is that the notice does not comply with the provisions of those subsections because the notice served upon the appellant was served upon him only on 17th October 1925, whereas he was called upon to appear before the Collector, in this case the Labour Officer, on 26th October and hence he was only given nine days' notice, and it is contended that he was entitled to not less than fifteen days notice after the date of the publication of the notice.

With regard to the first point, the personal notice to the appellant is Ex. N. It is a notice issued under Ss. 9 (3) and 10, Land Acquisition Act, and it states as follows

"The Government are going to acquire the lands mentioned in the list hereunder under Act (1) (India) of 1894. You shall appear either in person on 26th October 1925 before me at Nannilam Camp or by an authorized agent and inform the nature of the right you possess in these lands, the amount due to you out of the amount of compensation to be given for the said right, and objections if any in respect of the measurements made according to S. 8. You should prepare a written statement and the same signed either by you or by your authorized agent should be presented."

The notice then goes on to call for the particulars required under S. 10

of the Act. It is contended by Mr. Rangachariar that this notice does not call upon the appellant to put in his claim. S. 9 (2) of the Act says that:

"such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than 15 days after the date of publication of the notice, and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections (if any) to the measurements made under S. 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent."

Sub-S. 3 states that:

"The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorized to receive service on their behalf within the revenue district in which the land is situate."

The notice under sub-S. (2) is the public notice and under sub-S. (3) the personal notice. Ex. N is the personal notice and it is to be observed that it is to be to the same effect as the notice in sub-S. (2). The particulars of the land so needed were set out in the list sent with the notice and in it the applicant was told to appear either personally or by an authorized agent on a date mentioned, namely, 26th October and at a place mentioned namely the Nannilam Camp and to state the nature of the right he possessed in the land, the amount of compensation to be given for such right and objections, if any, to the measurements made under S. 8. He was further required to prepare a written statement and sign it and present it. Mr. Rangachariar contends that this notice does not call upon the appellant to state his claim to compensation because he is merely called upon to inform the nature of the right he possesses in the land and the amount due to him out of the amount of compensation to be given for the said right. He contends that this is not the same thing as calling upon him to state the amount and the particulars of his claim to compensation for his interests in the land. It seems to me that such an argument is wholly untenable. No other construction can be put upon Ex. N except that it is a notice calling upon the appellant to claim an amount of compensation due to him for such interest as he possesses in the land under acquisition. In my view, the notice in this respect clearly is in accordance with the provisions of S. 9 and I cannot for one moment credit the statement that it is ambiguous and likely to be misunderstood by the appellant. This contention therefore fails.

On the second point what has to be considered is whether it is necessary for the Collector to give at least 15 days notice from the service of the notice to the date of the appearance of an applicant before him, for admittedly Ex. N gave only nine days' notice and if 15 days' notice is requisite, then it is contended by Mr. Rangachariar on behalf of the appellant that the omission to give that notice must be held to be a sufficient raason for the omission of the appellant to make a claim. It is conceded by Mr. Rangachariar that he did not make the claim required by the Act. It is quite clear that the Act requires a claimant to state the amount of compensation he is claiming; and on p. 1 of the pleadings there is the statement of the appellant made to the Labour Officer on 26th October 1925, and there he said that he received a notice directing him to submit his objections, that no one had any right over his lands under acquisition by way of mortgage, that he had not got any sale-deed to show the price of land in the village and that he could not state the value of the land. This statement was made by him in answer to questions put to him by the Labour Officer. He therefore clearly did not make such a claim as is required by the Act. But Mr. Rangachariar contends that the personal notice under S. 9 (3) of the Act makes it requisite that an applicant should have at least 15 days' notice. The sub-section does not state that he must have such a notice but it is argued that as it is provided that the notice must be to the same effect as in S. 9 (2), all the conditions of the latter notice apply to the notice under sub-S. (3). On the other side, the learned Government Pleader argues that if 15 days' notice is not necessary in the case of the notice under S. 9 (3) of the Act, because the notice thereunder, is merely to be to the same effect as the notice under sub-S. (2) and that the notice under the

latter subsection, although it must give an interval of at least 15 days does not state in the body of it that the interval is one of at least that time. That of course is quite true because the notice merely states the date and the time of the appearance of the applicant. He argues that it is only necessary that there should be an interval of 15 days from the date of publication of the notice under S. 9, sub-Ss. (1) and (2); and if that notice has been given then it does not matter if the notice under sub-S. (3) gives a shorter time to the applicant. But if it is important for the applicant in the public notice to have 15 days' notice at least, it is difficult to see why he should have any shorter notice in the notice served upon him personally.

On the contrary it appears to be more important that he should have the requisite notice in the personal notice than in the public notice. The latter he may never see and, therefore, the former may be the only notice he received calling upon him to make his claim. For example there are cases which must by no means be uncommon where the applicant either lives in another place or has gone away on business to another place. If such a person has to rely merely on the public notice, he may receive no notice at all. On the other hand the personal notice does or ought to reach him wherever he may be and it seems to me obvious that in such cases he must have sufficient time in which to prepare his claim. S. 9 (2) by providing for a notice of at least 15 days makes that a reasonable notice and I cannot see why in the case of the personal notice the applicant should not be entitled to an equally reasonable notice. The learned Government Pleader argues that in the case of which I have given an example it might be a ground for holding that the applicant had sufficient reason for omitting to make a claim but the intention of the Act is to get persons to come forward with their claims and not to enable them to be absent and make no claim and thereafter be excused.

It seems to me that the spirit of the Act is that a person should have a reasonable notice served upon him in order to give him time to formulate his claim. The importance of the 15 days' notice was considered in *Krishna Sah* v. *Collector of Bareilly* (1), where it was held that under S. 9 (3) of the Act the occupier of land concerning which a public notice has been given under sub-S. (1) of the section is entitled to such notice as will give him, in the same manner as the person mentioned in sub-S. (2), 15 days' interval in which to state before the Collector the nature of his interest in the land and the particulars of his claim for compensation. In that case the publication of the notice was on 18th July and the date required for appearance before the Collector was 24th July clearly a much shorter period than that prescribed by the section. The personal notice, namely, that under sub-S. (3) was served on 16th July and that was also less than 15 days' notice. On p. 535 of that case in the judgment it is stated :

"There is no reason why the occupier should not have some time allowed him within which to make his objection as other persons. We think that the words " to the same effect " in Cl. (3) really mean that the second notice should have same matters mentioned in it, including the time, as the first notice."

It is not clear from this judgment whether the Court decided that the applicant in the personal notice should have at least 15 days from the date of the public notice or whether he should have at least 15 days from the date of the service of the personal notice upon him. But I think that it must follow that the 15 days must be from the date when the matter is brought to his attention because, as I have already stated, the public notice may escape the appellant's attention. This question was also considered by a Bench of this Court in *Collector of Chingleput* v. *Khadir Mohidin Sahib* (2) where it was held that where the notification under S. 9 does not give the claimant the 15 days' notice as required, it amounts to " sufficient cause " within the meaning of S. 25 (3) of the Act for the claimant's omitting to make a claim and he thereby escapes the application of the stringent provisions of S. 25 (2). Krishnan, J., in his judgment states :

"The objection based on S. 25 (2), Land Acquisition Act (1 of 1894) is clearly untenable. Cl. (1) says that the claim for compensation has to be made " pursuant to the notice given under S. 9 " and this makes a

(1) [1917] 39 All. 534=40 I. C. 76.
(2) A. I. R. 1926 Mad. 732=95 I. C. 883.

proper notice a pre-requisite. Now, as shown by the District Judge and my learned brother, such a notice was not given in this case the notices all being defective in one way or another. The claimant's omission, therefore, to make a claim before the Deputy Collector was not without "sufficient reason" and he escapes the application of the stringent provisions of Cl. (2) to his case."

It must be noted that in this case in addition to not giving the claimant 15 days' notice the property intended to be acquired was not clearly defined. But that does not affect this question. There is however a later decision of the Allahabad High Court, *Birbal* v. *Collector of Moradabad* (3), in which a view contrary to that taken by the same Court in *Krishna Sah* v. *Collector of Bareilly* (1) was taken. There it was held the rule requiring an interval of 15 days between the issue of the public notice provided for by Cl. (2) and the hearing of claims by the Collector does not apply to the personal notice issued under Cl. (3). *Krishna Sah* v. *Collector of Bareilly* (1) does not appear to have been brought to the notice of the Court and there is no reference to it whatever in the judgment, and I am not inclined to accept this case as accurately deciding this question. In *Rameswar Singh* v. *Secretary of State* (4) there are some very valuable observations. That was a case under the Land Acquisition Act and the notice under S. 9 of the Act did not contain the material facts which would enable the landowner to identify the land intended to be taken up and the notice fixed less than the prescribed time to prefer claims. It was held that these were irregularities and a suit for damages for permanent injury caused by the acquisition of the land was maintainable in the civil Court. In dealing with the irregularity of the notice in point of time in the judgment of the Court on p. 480 it is stated that

"where the statute requires that the notice should give the owner a prescribed time, after the expiry of which claims and objections might be preferred, a notice which fixes a shorter time is in contravention of the statute, and is consequently defective. The principle is that no man shall have his rights determined without the opportunity to be heard in his defence and where the statute prescribes the minimum period, which the person affected is to have, for submission of his defence such time cannot be allowed to be reduced. In order to give validity to the proceedings and finality to the award in which they terminate, the power of acquisition with all statutory limitations, and directions for its use, must be strictly pursued; every essential pre requisite to the jurisdiction called for by the statute must be strictly complied with."

In that case the judgment of the Privy Council in *North Shore Railway Co.* v. *Pion* (5), and of the House of Lords in *Herron* v. *Rathines* (6) were referred to. In the latter case Lord Macnaughten observed that where the promoters of the public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the appointment so far as it makes provision on his own behalf. I entirely agree with the views expressed by the Calcutta High Court and the Allahabad High Court in *Krishna Sah* v. *Collector of Bareilly* (1), and this High Court in *Collector of Chingleput* v. *Khadir Mohidin Sahib* (2). The stringent provisions of S. 25 (2) of the Act can only be applied after a notice which is strictly in compliance with S. 9 sub-Ss. (2) and (3) has been served upon the landowner.

A further point arises however and that is whether the appellant by appearing before the Labour Officer notwithstanding the fact that he had not received the requisite notice, must be held to have waived that requirement. The learned Government Pleader contends that he has done so and that this is merely a technical objection which ought, under the circumstances, to be brushed aside. In my view it lies upon the Government Pleader to show that the waiver has been clearly established. It is not sufficient to show that the appellant appeared before the Labour Officer and answered certain questions that were put to him. It has not been shown that the appellant knew that he was entitled to at least 15 days' notice, nor has it been shown that if he had known that he was he would not have asked for an adjournment and there is nothing to show that there has been any waiver by the appellant. The

(3) A. I. R. 1927 All. 183=98 I. C. 806=49 All. 145.
(4) [1907] 34 Cal. 470=11 C. W. N. 356=5 C. L. J. 669.
(5) 14 A. C. 612.
(6) [1892] A. C. 498=67 L. T. 658.

learned Government Pleader further argues that this objection is a mere afterthought and that it was never put forward until the argument was addressed to the lower Court at the close of the case. But, in my opinion, this cannot affect the value of the objection. It was argued by Government in the lower Court that the appellant was shut out from any enhancement of the Labour Officer's award by reason of his omission to make a claim. When that objection to the appellant's claim in the lower Court was urged, it was open in my opinion to the appellant to raise the point that the notice served upon him was defective in any respect even though that point had not been raised before. The appellant was therefore entitled to have the case considered on its merits.

On the merits the award gives Rs. 6 per cent for the land in the cheri, with the exception of one item where the rate allowed is Rs. 9 per cent and Rs. 9 per cent for the 17 cents in the Sudra quarters. It is worthy of note that the appellant claims Rs. 60 per cent. It seems to me to be impossible in this case to fix the actual value of the lands, and all we can do is to make a rough estimate which may indeed be very rough. But it seems to me that however long we may devote to this case and however much we may read through the evidence of the witnesses and the exhibits, we shall not be better off in arriving at a conclusion. Our difficulties are increased by reason of the fact that there have been no sales of house sites in this village at all since the year 1915, i. e., ten years before the date of the notification. On the other hand there is evidence in support of the appellant's case of certain sales in neighbouring hamlets none of them more than four furlongs away and some of them even less. Those sales are evidenced by Ex. J dated 13th July 1920 giving a rate of Rs. 47 per cent. Ex. K dated 24th August 1921 giving a rate of Rs. 12 per cent., Ex. L dated 11th December 1922 giving a rate of Rs. 28 per cent. Ex. M dated 29th November 1924 giving a rate of Rs. 37 per cent. and Ex. O dated 4th August 1927 giving a rate of Rs. 50 per cent. The latter sale can be ruled out of consideration altogether because it was two years after the date of the notification. The areas disposed of by these sales are in the case of Ex. J $4\frac{1}{2}$ cents, Ex. L $3\frac{1}{2}$ cents — in this case these were nanja lands converted into house sites and Ex. M, 8 cents. It will be seen that the rates realized are widely divergent the lowest being Rs.12 per cent. and the highest Rs. 47 per cent. In the case of Ex. K it was Rs. 12 per cent possibly because it was a sale by a woman who was living away from the property; so that may have been a sale at an under-value; on the other hand with regard to Ex. J it is said that the high rate secured, namely Rs. 47 per cent. was because the property abutted on a metal road and there were shops around it. That of course would very much increase the value of the land. In the case of Ex. L it is only a very small area, namely $3\frac{1}{2}$ cents. The learned Subordinate Judge has not taken into consideration these sale deeds prayed in aid by the appellant because the lands are not in the same village and the rates shown are so widely divergent, and I am not disposed to disagree with him there. On the other hand we have got two sale deeds put in by the Labour Officer, namely Exs. 2 and 12. Taking the latter, first it relates to a sale of land in 1908 and it produces a rate of Rs. 7 per cent. That is land in the village in the Sudra quarters but it was so long ago as 1908. Ex. 2 was ten years before the date of the notification, namely, 1915 and was a sale of house site in the Sudra quarters of the village and the rate works out at Rs. 9 per cent. It is quite obvious that in the interval of ten years land must have appreciated in value though it is very difficult to say how much it did but making the very best efforts that I can to arrive at a correct estimate I think that if I say that it would have doubled in value during that time, that possibly is as near being correct as it can be. That produced a rate of Rs. 18 per cent for the sites in the Sudra quarters, exactly double the rate given in the award. Then the rate for the sites in the cheri must be less. The rate fixed in the award for those sites is two-thirds of that for the sites in the Sudra quarters, and the appellant himself states their value is half the value of the sites in the Sudra quarters. I think that if we take the proportion given in the award, namely, two-thirds, that will

be about correct. Therefore in respect of the sites in the cheri a rate of Rs. 12 per cent is the correct rate. In the result the claimant will get compensation at the rate of Rs. 18 per cent for the sites in the Sudra quarters and Rs. 12 per cent for the sites in the cheri, besides the Rs. 15 per cent compensation due to him. With regard to damages I do not think that any case for awarding damages has been made out by the appellant and therefore he will get nothing in that respect. The claims for severance and for the value of trees were given up here in the course of the arguments. The appellant is ordered to pay half the costs of the respondent. Interest is allowed on the amount awarded at 6 per cent per annum from the date of possession, namely, 2nd December 1925 up to the date of payment.

Curgenven, J.—The first contention raised in this appeal is that the learned Subordinate Judge was wrong in deciding, with reference to the terms of S. 25 (2), Land Acquisition Act, that the applicant had omitted without sufficient reason to make a claim, with the result that the Court was precluded from awarding more to him than the sum fixed by the Collector. In support of this contention two reasons are given for the applicant's failure. The first has reference to the wording of notice, Ex.N issued under sub-S. 3, S. 9 and S. 10 of the Act. I agree that the notice clearly calls upon him to state the amount of compensation which he claims, although the language may not be a verbatim transcript from S. 9 (2) and that there is no substance in this objection. The second point taken is that whereas the latter provision prescribes an interval of 15 days, the applicant was given only nine days, from 17th October, when the notice was served upon him, to the 26th October when he was required to appear to make his claim. The learned Government Pleader takes up the position that whereas a 15 days' interval, reckoned from the date of publication, is prescribed for the public notice under sub-S. (2), S. 9, no such condition attaches to a notice issued under sub-S. (3) to the owner or occupier of the land. I think that this view must be rejected upon a right construction of the Act. Sub-Ss. (1) and (2), S. 9, enumerate the various particulars which a public notice must comprise; in particular it

"shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier the 15 days after the date of publication of than notice), and to state the nature of their respective interests in the land,"

etc. Sub-S. (3) says that the Collector shall also serve notice to the same effect on the occupier, etc. The learned Government Pleader would have us construe this as meaning that the latter notice must be in consonance with the public notice as regards the date of appearance, but that service of the notice is not thereby required to be not less than 15 days before the date of hearing. I do not think that such a notice would be "to the same effect" as the public notice because what the public notice in effect does, is to give claimants a minimum period of 15 days within which to present their claims. It is difficult to suppose that the intention of the Act is to deprive persons who are dependent for their information of the proceedings upon a personal notice, of this right while conceding it not only in the case of the public notice but also, as a reference to the section will show, in the case of requisitions under S. 10 (1). This is the view that was taken in *Krishna Sah* v. *Collector of Bareilly* (1) and although a later Allahabad case, *Birbal* v. *The Collector of Moradabad* (3), records a decision in the opposite sense it is noteworthy that no reference is made in it to the earlier decision of the same Court and, except for the observation that the provision in Cl. (2), S. 9, relating to the 15 days is not repeated in Cl. (3), the construction of the section is not further discussed. In *Collector of Chingleput* v. *Khadir Mohidin Sahib* (2) a Bench of this Court held that a claimant must be given at least 15 days in a notice issued to him, and adopting this view I conclude that in this respect the notice issued to the applicant was not in accordance with the terms of the Act.

It has then to be decided whether this defect furnished the applicant with sufficient reason to omit to make his claim. The notice was served on him, as I have said, on 17th October, and on the 26th he appeared before the Labour

Officer, who was the Collector appointed for this acquisition, and made a statement which admittedly did not comprise a "claim" as that word is used in S. 25. All that he said on the question of valuation was :

"I have not brought any sale deed to show the price of land in the said village. I cannot say the value of the land in my village."

In order to amount to a claim, the applicant should have assessed the value of the property in definite terms. In the two cases cited above, which held that a notice under Cl. (3) must give a minimum period of 15 days, the claimant failed to make any statement at all and it is not difficult to hold that such a failure is attributable to the insufficiency of time given, and therefore that he had sufficient reason for the omission. The learned Government Pleader argues that the present case is distinguishable because the claimant did appear and make a statement, and that it cannot be said that the inadequacy of this statement as a claim is traceable to any shortness in the notice. He draws attention also to the late stage at which exception was taken on the score of insufficiency of time and argues that the point was a mere afterthought and in no way affected the applicant's interests. It is no doubt true that the defectiveness of the statement given on the 26th is not clearly traceable to the cause pleaded, but I am not satisfied that this disposes of the applicant's objection.

If a person makes no claim at all and the notice issued to him is found to have offended against the 15 days' rule he may be deemed to have had sufficient reason for the omission, and it is difficult to see why another person, similarly handicapped, who does something more towards making a claim should be penalized, unless it be by an application of the doctrine of waiver. To apply this doctrine it must I think be found that the applicant knew what his legal rights were and consented to forgo them. In the present case I can find no sufficient reason to make this assumption, or to infer with certainty against the claimant that if he had had due notice he would not have presented a claim within the meaning of the Act. Where an officer whose duty it is to apply the provisions of an Act such as the Land Acquisition Act commits an error of procedure I think that every presumption should be made in favour of the party likely to have been prejudiced by the error. This principle, in its application to the Act, will be found set forth and supported by the citation of a number of English and American cases in *Kamini Debi* v. *Pramonath Nath Mookerji* (7) at p. 47, and although that case dealt with the matter from the point of view of jurisdiction, I think the observations are equally pertinent here where the application of S. 25 is in question. Expressed in general terms, the conclusion I would reach is therefore that although it may be doubtful whether the insufficiency in the notice and the defectiveness of the statement were related as cause and effect, the presumption that this must have been so has not been successfully rebutted.

Apart from the question of insufficiency of notice, it appears to me that the applicant may be said to have had another sufficient reason for not making a claim. When he appeared, the Labour Officer took an oral statement from him which, had it comprised the necessary particulars, would have amounted to making a claim. It may be taken, I presume, that the Labour Officer knew what those particulars should be, and in particular that they should have included the applicant's own valuation of his property. The officer must be taken to have known also the penalty to which the applicant subjected himself by not furnishing this information. Did he explain to the applicant that it was necessary that he should put a price on his land and the consequences to him of the failure to do so? If not, may it not be said that he allowed the applicant to go away in the belief that he had complied with the requirements of the Act, and that the adoption of such a course provided the applicant with sufficient reason for not having complied with them? On this ground too I think the applicant should not be precluded by the terms of S. 25 (2) from questioning the Labour Officer's valuation.

There is finally another consideration, not adverted to in the arguments but which seems to me a valid objection to the application of S. 25 (2). The claim contemplated in each of the three sub-

(7) [1912] 39 Cal. 33=10 I.C. 491.

sections of that section is to be "pursuant to any notice given under S. 9," and whereas here the notice issued is in some respect in contravention of the terms of S. 9, I think the only logical conclusion is that the penalty which S. 25 (2) imposes cannot be taken advantage of by the Government.

Turning to the merits, the great scarcity of recent sales in Naduvacheri renders anything like an estimate of the market value of the acquired plots, based upon adequate evidence, extremely difficult. It seems clear, however, that the award based on the two rates of Rs. 9 and Rs. 6 per cent is too low. After due consideration of the prices indicated by the applicant's documents, Exs. H-1, I, K, L and M, and by Exs. 12 and 2 filed on behalf of Government, I agree with my Lord for the reasons which he gives, that the rates should be raised to Rs.18 and Rs.12. The applicant's documents, no doubt would yield rather higher average figures than these; but inasmuch as the karnam's sale deed Ex. 12, relating to the Sudra quarters, gives a rate of about Rs. 7 per cent in 1908 and as Ex. 2 a sale deed of 1915, gives a rate of Rs. 9, it is improbable that a rate of Rs. 18 for the Sudra house sites allowing for the doubling of the value of the land in ten years is too low. On the other hand, the applicant's documents do not suggest that the figure should be reduced below this. And fixing the figure for the cheri sites at two-thirds of this, as has been done by the Land Acquisition Officer and accepted by the lower Court, we get a rate of Rs. 12 per cent these rates to include all claims, except of course the 15 per cent. allowance for compulsory acquisition.

I agree with the order as to costs.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Madras 844

MADHAVAN NAIR, J.

(*Sangali*) *Vasudeva Rao*—Plaintiff—Appellant.

v.

Municipal Council, Anantapur—Defendant—Respondent.

Second Appeal No. 266 of 1929, Decided on 9th April 1930, from decree of Dist. Judge, Anantapur, in Appeal Suit No. 110 of 1928.

(a) Civil P. C, (1908), Ss. 2 (17) (f) and (g) —Municipality constituted under District Municipalities Act is not public officer and so no notice is necessary under S. 80.

A Municipality constituted under District Municipalities Act cannot be described as a "public officer" under sub-Cl. (f) or (g), Cl. 17 S. 2, Civil P.C, and there is no need to give two month's notice to the Municipality under S. 80 before instituting suit against it: *A. I. R.* 1923 *Mad.* 689; 34 *Bom.* 583 and *Metropolitan Meet Industry Board* v. *Sheedy*, (1927) *A. C.* 899, *Ref.* [P 853 C 1; P 854 C 1]

(b) Madras District Municipalities Act (5 of 1920), Sch. 4, R. 7 (e) and (f)—List required is not mere technicality—Non-compliance invalidates revision.

The list required to be given under Sch. 4 R. 7, and specially under sub-Cl. (e) and (f) is, not mere technicality and the omission to give the necessary information is by itself sufficient to render the revision proceedings invalid: *A. I. R.* 1929 *Mad.* 746 *Rel. on.* [P 850 C 1]

(c) Madras District Municipalities Act (5 of 1920), Sch. 4, R. 9—Mention of specific date is necessary—Failure to mention it however whether necessarily vitiates assessment (*Queare*).

Although strictly speaking the mention of specific date would seem to be necessary, would the omission to mention necessarily vitiate the entire proceedings relating to revision? [P 850 C 2]

(d) Madras District Municipalities Act (5 of 1920), Art. 70—Work of revision delegated to Committee—Art. 70 must be strictly complied with.

Where the work of revising quinquennial assessment has been delegated to a committee, it is the writing of the amount of assessment as revised by the Chairman and his certificate of its correctness that are important; for these are the requirements, the fulfilment of which will presumably show that the Chairman has scrutinized and approved the lists and is satisfied with the revision. In the absence of the Chairman's statement in writing of the amount of assessment as revised and his certificate, the revision of the assessment can be considered only as a revision by the committee alone which is not authorized by the Act. [P 848 C 1]

B. Sitarama Rao—for Appellant.

B. Somayya—for Respondent.

Judgment.—This second appeal arises out of a suit instituted by the plaintiff against the Municipal Council of Anantapur and its Chairman for an injunction restraining them from collecting house-tax, education-tax and water-tax; and it raises the question of the validity of the quinquennial revision under the District Municipalities Act 5 of 1920, Sch. 4, R. 8 of the annual rental value of the lands and buildings within the municipal limits in the official year 1927-28 and of the increase of the rate of the tax which was changed from 6¼ to 7½ per cent under S. 80 of the

Act. The District Munsif dismissed the suit as against the Chairman and granted an injunction as against the Council. On appeal by the Municipal Council the decree of the lower Court was set aside except as regards the enhancement of the rate of water-tax. In this second appeal the plaintiff confines his relief only to the house-tax.

The facts are briefly these. The plaintiff owns three houses, No. 305 in ward No. 1 of the Municipality and Nos. 537 and 896 in Ward No. 2. Under R. 8, Sch. 4, District Municipalities Act which authorizes the Municipal Chairman once in every five years to completely revise the "assessment books" proceedings were started in the Municipality of Anantapur in the official year 1927-28 for a revision of the annual value of the lands and buildings. On 23rd July 1927 the Chairman proposed to the Council that a committee be appointed to carry out the revision: see Ex. N. A committee of three members of the Municipality was accordingly appointed by the Council for that purpose and the revised assessment lists were prepared by that committee: Afterwards two notifications were issued in the District Gazette, Ex. D in English and Ex. E in Telugu dated 5th January 1928. These were issued under the name of the Chairman and stated that the Municipal Council proposed to revise the assessments from 1st April 1928, that revision petitions would be considered if submitted by 6th February, and that revision lists could be seen in the Municipal Office from 11 a. m. to 5 p. m. daily. This notification was tom-tommed on 5th January 1928: see Ex. 5: no revision petitions were as a matter of fact received. On 28th January 1928, the Chairman proposed that the rate of property-tax now in force be raised to 7½ per cent of the rental value and this was passed by theCouncil: see Ex. 11-A, the minute book.On 5th February 1928 the notice, Ex. F, was issued in the District Gazette in the name of the Chairman that the Council proposed to levy house tax at 7½ per cent on the annual rental value of each building with effect from 1st April 1928 and that objections would be considered until 10th March 1928. This information was also tom-tommed: see Ex. 5-B. No objections were received and the Municipal Council confirmed this rate in its resolution, Ex.11-B, dated 17th March 1928. This was published in the immediately next issue of the District Gazette dated 5th April 1928: see Ex. H, under the signature of the Chairman dated 19th March 1928 and was tom-tommed on the same date: see Ex. V-d. The Gazette notification, Ex. H, states that the new rates of the house-tax, at 7½ per cent on the annual rental value, would come into effect from 1st April 1928.

On the above facts, it is argued that the revision proceedings are invalid, inasmuch as they were carried out not by the Chairman as required under the Act: see R. 8, Sch. 4, but by a committee, that even if the delegation of the Chairman's powers to the committee is valid the procedure adopted by the Chairman and the committee in carrying out the revision is vitiated by noncompliance with the statutory requirements, and that the notification calling for objections is invalid as it specified no date for hearing objections. These arguments relate to the validity of the quinquennial revision proceedings relating to the value of the lands and buildings. It is also argued that the enhanced rate of 7½ per cent is unenforceable as the notification, Ex. H, sought to give retrospective effect to the decision of the Municipality to enhance the rate. The respondent, besides contesting these points, argues that the plaintiff's suit is not maintainable for want of notice under S. 80, Civil P. C.

I shall first deal with the question of the validity of the quinquennial revision proceedings. What happened in this case has already been stated. On 23rd January 1927 the Chairman proposed to the Council that a committee be appointed to carry out the revision and a committee of three members was accordingly appointed to carry out the work. The actual assessment list for the two wards containing entries "relating" to the plaintiff's three houses, Exs. A, B and C, were prepared by this committee. R. 8, Sch. 4, .District Municipalities Act, states that "the assessment book shall be completely revised by the Chairman." Having regard to this rule it is argued that the Chairman should not have delegated the work of revision to anybody else and he having done so, the revision carried out by the

committee is not a revision in accordance with the Act and the whole proceedings are consequently invalid. I am not sure if this argument is correct. Pushed to its logical conclusion it may lead to absurd results. It is clear that the Chairman is not expected to do by himself all the work in connexion with the revision proceedings. Provided he checks and accepts the work done by his employees the final result will be his work for which he will be responsible. Section 18, Cls. (1) and (3) specially, of the District Municipalities Act, empower the Chairman to a certain extent to delegate his executive powers to others. The Municipal Account Code, 1926 (second edition corrected up to 5th September 1919), Art. 70, provides the following procedure for a general revision:

"Under S. 66 (2) of the Act, the assessment books are to be completely revised by the Chairman at least once in every five years. Such revision should be conducted by the Chairman himself or by one or more Councillors deputed by him to carry out the revision in wards other than their own. They may be assisted by assessors if required . . . As soon as the assessment list for a locality is completed it shall be submitted to the Chairman for scrutiny and approval unless the list has been prepared by the Chairman himself. The Chairman after being satisfied with the revision shall countersign the assessment lists, the total amount of the assessment as revised being written in words and certified to by him."

Section 66 (2) of the old Act under which the rule was framed corresponds to R. 8, Sch. 4, cf the present District Municipalities Act. In the Government edition of the Code, R. 8, Sch. 4 has not been substituted for S. 66 (2); but it is conceded the rule is still in force. Reliance is placed on this rule by the respondent in justification of the procedure adopted by the Chairman in the present case. In the view that no more delegation than is countenanced by this rule is sought to be justified, and having regard to my opinion, which I shall presently state as to whether this rule was complied with by the Chairman, it is not necessary in this case to consider the abstract question whether the duty of preparing the assessment list under R. 8, Sch. 4, can be delegated by the Chairman under the provisions of the District Municipalities Act. Assuming that the Chairman is entitled to carry out the work of revision through the committee appointed by him or by the Council, the questions arising for consideration are: (1) how far has he in doing so complied with the procedure prescribed in Art. 70 of the Municipal Account Code and (2) how far has the committee which is only an alias for the Chairman in carrying out the actual work of revision, complied with the statutory requirements. The two questions will be discussed separately. Under Art. 70 of the Municipal Account Code, (1) the assessment list shall be submitted to the Chairman for scrutiny and approval in case, as here, the assessment list has not been prepared by the Chairman himself; and (2) the Chairman shall write in words and certify the total amount of the assessment as revised and shall countersign the assessment list after being satisfied with the revision. On these questions generally considered, the learned District Judge has come to the conclusion that the Chairman has complied with this rule except in one particular, namely that he did not write in words the total amount of the assessment as revised and certify to it, and this omission, the learned Judge is apparently of opinion, is not a very material defect and does not vitiate the proceedings.

I am not satisfied that the provisions of the rule have been followed by the Chairman in this case. I shall not at present refer to what I consider to be the illegalities committed by the commissioners in the preparation of the lists. That question, as I have said, I shall discuss separately. The evidence in the case shows how casually and carelessly the work of revision was carried out in this Municipality. The assessment lists were prepared by the sub-committee in December 1927. When these were sent to the Chairman (i. e., "the Vice-Chairman in charge" during the proceedings is to be understood as "Chairman") it is admitted that many of the columns had not been filled up by the commissioners. How this omission on their part affects the validity of proceedings will be described later. What is important here to notice is that except the signature of the Chairman contained in these assessment lists, there is nothing in them to show that the Chairman scrutinized and approved their contents and

that he was satisfied with the work of revision. As already pointed out "the total amount of the assessment as revised" has not been "written in words" by him nor has its correctness been certified to by him as specifically required by Art. 70. We are asked to infer from the signature of the Chairman appearing in these lists and from the mere signature alone that every condition which is imposed upon him by this article has been complied with by him. The previous assessment in 1923 was also carried out by a committee. The present Chairman was a member of that revising committee, and that committee submitted a report along with the assessment: see Ex. 4. It is submitted that no such report has been submitted by the committee in the present case. The usefulness of such a report is obvious. It would naturally elucidate the procedure adopted by the committee, explain how the figures mentioned in the lists were arrived at, and state generally how the revision was carried out, so as to enable the Chairman, when the lists are submitted to him, to scrutinize and approve them, so that when the lists finally emerge out from the office with his signature and certificate it might be truly said that the revision has been carried out by him as required under R. 8, Sch. 4. I do not state that the absence of such a report would vitiate the proceedings: I am only pointing out how such a report would be useful to the Chairman, and also helpful to the Court when the available evidence is very meagre, in dealing with the question whether the Chairman would be presumed to have really scrutinized and approved the lists prepared by his deputies.

As I have said we are asked to draw all the necessary inferences in support of the validity of the assessment lists in this case so far as the Chairman's part in its production is concerned, from the mere signatures which appear in the lists. Can we do so, is the question. These signatures do not appear at the end of the lists. In the assessment list containing Ex. A the signature of the Chairman without any date appears at p. 14. There are two entries relating to two assessees at p. 15, the last page of that assessment book. There is no signature of the Chairman on that page. The omission is not accounted for. Even if it should be held that we should infer the approval of the Chairman from his signature alone, how can we say that the entire list is approved by him when his signature does not appear on the last page? In the second assessment book relating to entries, Exs. B and C also, the Chairman's signature appears on the last but one page and below it appears the date 20th October 1927. The last page contains the names of various people and entries in the columns as against those names. There is no signature of the Chairman on this page. The omission like the one in Ex. A is not accounted for. The date 20th October 1927 appearing under the signature in the second assessment book creates some difficulty. According to the evidence of the manager (D. W. 1) "the revision of taxes was begun and finished in December 1927." He distinctly says that Exs. B and C (i. e., the second book) were prepared in December 1927. He also says that the revision lists were completed in December 1927. How is it then that the Chairman's signature is dated 20th October 1927 and how can we say that he scrutinized and approved on 20th October 1927 the contents of the lists the preparation of which was completed only in December 1927? The date appearing under the signature is not stated to have been put there on account of any mistake. The Chairman's evidence on this point is not very illuminating. He says that the registers were completed by the 20th December last. This is mentioned probably to explain the 20th that appears in Exs. B and C. But it is in October and not in December. It is not stated in the evidence that October was written by mistake for December. Ex. A was completed by the 28th December. I have already pointed out that no date appears under the signature of the Chairman in Ex. A. I cannot say that from the single circumstance of the Chairman's signature appearing in these lists that the rule invoked by the respondent in support of the procedure adopted has been complied with. The signature alone unaccompanied by the

"writing of the amount of the assessment in words by the Chairman and his certificate of its correctness, means absolutely nothing."

It is the writing of the amount of assessment as revised by the Chairman and his certificate of its correctness that are important : for these are the requirements the fulfilment of which will presumptively show that the Chairman has " scrutinized " and " approved " the lists and is satisfied with the revision. In the absence of the Chairman's statement in writing of the amount of assessment as revised and his certificate, the revision of the assessment can be considered only as a revision by the committee alone which is not authorized by the Act. As is suggested by the rule itself, these conditions are insisted on by it, apparently only to minimize as far as possible the dangers that are inherent in delegation, for if the Chairman himself does the work of revision no such statement or certificate is required from him. In my opinion the learned Judge has altogether missed the importance of this provision in the rule. It is too much to ask the Court to infer from the mere signature of the Chairman in the absence of his " statement and certificate that he has brought his mind to bear upon the work of his deputies, tested it, and thus made their work in a sense his own by approving it. Assuming that the Chairman of the Municipality has every power to delegate his work of revision as he has done in this case, I am satisfied that the assessment lists in this case, in the absence of his statement in writing of the amount of assessment as revised and his certificate of its correctness, cannot be said to be " revised by the Chairman " within the meaning of R. 8, S. 4, as the procedure prescribed in the Municipal Account Code has not been complied with by him so far as it concerns him. This omission cannot be brushed aside simply as a mere irregularity. In my opinion Art. 70 has not been followed in substance or in fact by the Chairman. These defects which I have pointed out are by themselves enough, I think, to render invalid, under R. 8, Sch. 4, the revision of the assessment said to have been carried out by the Chairman in this case.

However I shall now proceed to consider the next question, namely, how far the committee in carrying out the proceedings relating to the revision and in preparing the revised assessment lists has complied with the necessary statutory requirements. At the outset I should point out that in the plaint this is not made a ground of attack against the revision proceedings, but as the point has been dealt with by the lower Courts and as the issue as pointed out by the learned District Judge is very vague, I shall deal with it. Under R. 7, Sch. 4, District Municipalities Act:

" the Chaiaman shall enter the annual value of all lands and buildings determined by him and the tax payable thereon in assessment books to be kept for the purpose at the Municipal Office,"

and the rule then proceeds to state that the assessment books shall record amongst other particulars " (e) the annual value of the area ....." and "(f) the amount of the tax payable." It will be observed that these two items (e) and (f) are very important as (e) forms the basis on which the tax is to be levied and (f) states the amount of tax that would be levied. R. 8, as already pointed out, authorizes the Chairman to completely revise the assessment books in every particular and if the annual value has been increased as a result of the revision then such increase and the consequent increase in the amount of the tax payable will have to be noted by the Chairman in the assessment books. R. 9 is as follows :

" When assessment books have been for the first time prepared, and whenever they have undergone a general revision, the Chairman shall, before the close of the year in which the said books have been prepared or revised, notify by beat of drum and by a notice published in the District Gazette that on a specified date, not being less than thirty days from the date of the latter of such notifications, he will be prepared to consider revision petitions presented to him within the said period of thirty days."

This rule calls upon the assessees to put forward their objections. It is clear that to prefer objections the parties should know whether the annual value of the land and the tax payable have been increased. It is argued that the revised assessment lists do not contain the necessary particulars in regard to these matters and that therefore the statute has not been complied with and the revision is necessarily invalid.

I shall examine how far the facts support this argument.

Now in these two assessment lists containing the entries A, B and C there are various columns for entering figures under different heads. As I have already stated these lists were completed and put up in the office for the information of the public by the end of December 1927. It is admitted that figures in Cols. 16, 17 and 18 were entered into the lists only in "March." All the columns should have been filled up in a completed and properly prepared list before its publication—at any rate before the issue of the notice calling for objections. The non-entry of the figures in these columns—I am referring to it only by the way—is another instance to show how unsatisfactorily the revision work was done in this Municipality. What is important to notice is that in the assessment book relating to House No. 305, Ex. A, Cols. 13 and 15, under "revised assessment" headed respectively "annual value" and "amount of half-yearly assessment" have not been filled up at all. In Col. 14 headed "annual rental, if rented" appears the figure 60 which figure appears in Col. 7 headed "annual value" under "past year's assessment." These figures appear as follows :

Past year's assessment.		*Revised assessment.*		
No. in assessment register.	Annual Value.	Annual Value	Annual Rental, if rented.	Amount of half yearly assessment.
6	7	13	14	15.
305	60	—	60	—

In Ex. A how the same amount under past year's assessment under "annual value" appears as "annual rental" has not been explained satisfactorily by Mr. Somayya. The vital defect in connexion with this assessment list is that the "annual value" and the "amount of half-yearly assessment," Cols. 13 and 15 have not been filled up at all. It is easy to say that if 10 per cent is deducted from the annual rental under S. 82 we would get the "annual value." Then the annual value under the revised assessment will be less than the annual rental under past year's assessment ; but it is not clear that this is the case of the respondent. Further, the work of finding out the annual value by making the necessary deduction should not be left to the assessee. However that may be the fact remains that "the annual value," Col. 13, has not been filled up and Col. 15, "the amount of half-yearly assessment," has also been left open. Now R. 7, Sch. 4 of the Act states in imperative language that the Chairman shall enter the annual value of all lands and buildings determined by him and the tax payable thereon in assessment books to be kept for the purpose at the Municipal Office. And it then states that the assessment books shall record the following particulars, namely the annual value of the area and description and the amount of tax payable (Cls. e and f). No explanation is forthcoming as to why these columns have not been filled up. The imperative provisions of the statute have not been complied with in this case. It is easy to see how this non-compliance with the provisions of the statute would necessarily prejudice the assessees. How can they under R. 9 take objections to the revised assessment when they are not in a position to know the most necessary things for taking the objection, viz. the amount of half-yearly assessment and the annual value of the land on which the assessment is based? Cols. 16, 17 and 18 were at least filled up in March sometime later. These Cols. 13 and 15 were never filled up at all. A violation of the express provision of the statute would necessarily render the proceedings invalid. Coming now to the second assessment book containing the entries, Exs. B and C relating to the other two houses of the appellant, the "annual value" Col. 15, is filled up with the figures of Rs. 100 and 60, written in pencil. The same figures appear in ink under Col. 13 headed "gross annual rental." It appears from the explanation written at p. 37 of this book and the evidence, that the figures under Col. 15 were copied in ink in Col. 13 to guard against possible alterations of the pencil entries in Col. 15. The commissioners filled up this column, namely, Col. 15, which is a very important one from the standpoint of the assessee in pencil and the Manager reproduced these figures in ink in Col. 13, The unsatisfactory way how the revision work was carried on by the commissioners is self-evident.

But there is no explanation why the important column which would show the proposed assessment was not filled up at the time of the publication of the list or before the issue of the notice. In the case of this assessment book, it is clear that one of the imperative provisions of the statute has not been complied with. In my opinion this omission to give the necessary information to the assessee in the assessment lists prepared by the committee is by itself sufficient to render the revision proceedings invalid. The foregoing examination of the assessment lists shows that in their preparation the committee members have not in some important particulars complied with the necessary statutory requirements. In *Baldwin* v. *Ellis* (1) it was held that the omission to state in the nomination paper the name of the parish for which the person nominated was qualified as a Local Government elector was a non-compliance with the requirements of R. 4, Rural District Councillors Election Order, 1898. The following observations appearing in the judgment of Swift, J., in that case may usefully be referred to in this connexion:

"Mr. Pratt referred to this omission to state the parish of which the person nominated is a Local Government elector as being a mere technicality. I do not agree. A statement of these particulars is required by the Local Government Board's order, and I cannot think that the omission to state these particulars on a nomination paper is a mere technicality, because unless the parish, for which the person nominated is qualified as a Local Government elector, is named, no one could test whether or not he is qualified."

As pointed out in *Municipal Council, Cuddappah* v. *M. & S. M. Ry. Co., Ltd.*, (2) (at p. 785 *of* 52 *Mad.*),

"taxing enactments should be strictly construed and the right to tax should be clearly established. Conditions precedent to the imposition of any tax should be strictly complied with."

In this case, as the condition precedent to the imposition of the revised assessment, i. e., the revision of assessment list, has not been carried out strictly in accordance with the Act, the revision proceedings as well as the subsequent levy of the tax based on the revised assessment are both invalid.

It is also argued that the revision of the assessment is invalid as the notification calling for objections specified no date for hearing the objections as required by the statute. R. 9, Sch. 4, makes it obligatory on the Chairman to notify a "specified date" for hearing objections, if any, to the revised assessment. In the notices in the present case it is true that a specific date for hearing objections has not been mentioned. What is mentioned is this:

"Any objection to the above revision or suggestion will be considered if submitted within 6th February 1928."

The notice is dated 5th January 1928. Strictly speaking, the mention of a specific date would seem to be necessary, as otherwise the objectors may not know on which date they have to be present to press their objections; but I am not quite sure if the omission to mention the specific date for hearing the objection is such a vital defect as will vitiate the entire proceedings relating to the revision of assessment. If objection had been presented—in this case no objections were filed—the Chairman might have rectified the initial error by intimating to the objectors the time when their objections would be heard. Various cases in support of the appellant's contention were brought to my notice *The Krishna Jute and Cotton Mills Co. Ltd., Ellore* v. *The Municipal Council, Vizianagaram* (3) and *Municipal Council, Rajahmundry* v. *Prasadarayudu* (4), *Municipal Council, Rajahmundry* v. *Ramakrishna Rao* (5) and *The Queen* v. *Chorlton Union* (6). But I do not think it is necessary to discuss these cases or to express a definite opinion on this question as I have already held that the revision proceedings are clearly invalid for other reasons.

The next point for consideration is whether the enhancement of the property-tax by the Municipality to seven and half per cent from 1st April 1928 is legal. It is argued that the rate is unenforceable as the notification levying the rate seeks to give retrospective effect to the decision of the Municipality to enhance the rate. It is not disputed that it is within the power of the Municipality to levy tax which it is competent to levy at a new rate, that is, that it has power to alter the existing rate by

(1) [1929] 1 K. B. 273.
(2) A. I. R. 1929 Mad. 746=121 I. C. 839=52 Mad. 779.
(3) A. I. R. 1926 Mad. 152=91 I. C. 297.
(4) A. I. R. 1926 Mad. 800=96 I. C. 690.
(5) [1928] 109 I. C. 92.
(6) [1851] 8 Q. B. 5=42 L. J. M. C. 34.

increasing it if it decides that such a step is necessary. In the present case, the Chairman proposed that the rate of property-tax then in force be raised to seven and half per cent. The annual value of the land having been increased by the quinquennial revision, this meant a collection of house-property-tax at seven and half per cent on the increased value. The objection to the quinquennial revision I have already dealt with. The present question relates solely to the enforceability of the decision of the Municipality increasing the rate so that if this decision is enforceable, the Municipality can collect house-property-tax at this new rate on the old annual value of the land, it having been now found that the quinquennial assessment proceedings are invalid. The proposal of the Chairman to increase the rate was accepted by the Council and the Municipality's decision to increase the house-tax from 1st April 1928 was notified on 5th February 1928 and was also tom-tommed in the village : see Ex. F. As no objections were received the Council confirmed the new rate in its resolution Ex. 11-b, dated 17th March 1928. This was published in the next issue of the District Gazette on 5th April 1928 : see Ex. H. This notification says that the new rate of house-tax of seven and half per cent would come into effect from 1st April 1928.

It is now argued that since the Gazette announcing the levy of the increased rate is dated 5th April 1928 and it makes the operation of the new rate to commence from 1st April, that is, from an anterior date, retrospective effect is sought to be given to the decision of the Municipality and therefore the new rate is unenforceable. This argument, in my opinion, is fallacious as it overlooks the significance of the proceedings prior to Ex. H. It is not Ex. H that levies the new rate. The levy of it was decided upon by the Municipality in its resolution Ex. 2-b dated 17th March 1928 as already mentioned, that is, before 1st April 1928 and before Ex. H. This resolution was preceded by Ex. F which states that subject to objections, the new rate will be enforced from 1st April 1928. It is not by the notification that the new rate was levied. The notification only serves to complete the decision of the Municipality by publishing it. In this connexion it is important to notice that the signature of the Chairman in Ex. H bears the date 19th March 1928, that is, a date prior to 1st April 1928. The decision arrived long time before 1st April 1928 could not be announced in the Gazette earlier as there was no Gazette before 5th April 1928, the date of Ex. H. In this view the argument of the appellant is clearly untenable. The appellant's argument also appears to be untenable having regard to the explanation of R. 15, Sch. 4. The explanation is as follows :

"A general enhancement in the rate at which the tax is leviable is no amendment or revision within the meaning of this rule, and shall have effect from the date fixed for the enhancement."

The date fixed for the enhancement according to the proceedings I have referred to is 1st April 1928. It could not therefore be said that retrospective effect has been given to the decision of the Municipality, to enhance the rate to seven and half per cent. For these reasons, I refuse to hold that the increased rate, that is, seven and half per cent of the house-property-tax cannot be enforced in this case. Of course, having regard to my decision that the revision proceedings are invalid, it follows that this rate can be levied only on the annual value of the land, according to the old assessment.

The last question is whether this suit instituted against the Municipality is bad for want of two months' notice under S. 80, Civil P. C. That section states :

"No suit shall be instituted against . . . . a public officer in respect of any act purporting to be done by such officer in his official capacity until the expiration of two months next after notice in writing has been. . . . delivered to him or left at his office, stating the cause of action. . ."

To justify the contention that "notice of two months" is necessary, it must be shown that the Municipality is a "public officer" within the meaning of the term as used in S. 80, Civil P. C. According to S. 2, Cl. 17 of the Code "public officer" means a person falling under any of the descriptions contained in sub-Cls. (a) to (h) of that clause. In support of his contention reliance is placed by the respondent's counsel alternatively on Cls. (f) and (g). Sub-Cl. (f) is as follows :

"Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice or to protect the public health, safety or convenience."

Having reference to this clause it is argued that the Municipality is (1) a "person," (2) who is an "officer of the Government," (3) whose duty it is, as such officer. ..... to protect the public health, safety or convenience. Under the General Clauses Act 10 of 1897 a person includes :

"any company or association or body of individuals, whether incorporated or not."

Section 6, Cls. 1 and 2, District Municipalities Act, constitute the Municipal Council by the name of the Municipality as a body corporate with various rights. A Municipal Council therefore constituted under the District Municipalities Act can well come within the meaning of the term "person." A Cantonment Committee according to the rules under the Contonment Act 13 of 1889 was held to be a "person" in *Cecil Gray* v. *Cantonment Committee of Poona* (7). The main question is whether the Municipality can be described to be "an officer of the Government " ; for it is conceded that if it can be held to be an "officer of the Government" the protection of the public health, safety and convenience, having regard to the provisions of part 4 of the Act, falls within its duties.

The Municipality is constituted by the Governor in Council : see S. 4. It can be abolished also by the Governor in Council. Its constitution is also determined by the Governor in Council and the same authority fixes the term of office of the Municipal Council : see S. 10. Under S. 33 the Municipality has to submit its administration report to the Governor in Council and the Governor in Council has power to suspend, generally stated, the action of the Municipality under S. 36 of the Act. It is argued that the Governor in Council means the Government, and that when the Governor in Council can appoint, abolish and control the activities of a Municipality, the Municipality can well be described as an officer of the Government. Having regard to the definitions of the terms "Government" and " Local Government " in the General Clauses Act : see Ss. 2, Cl. 21 and 29 of the General Clauses Act 10 of 1897 Ss. 46 and 134, Government of India Act, and S. 31, General Clauses Act 10 of 1897, the "Governor in Council" mentioned in S. 4 etc., District Municipalities Act, is the "Government" mentioned in Cl. (f), S. 2, Civil P. C. The point needs no elaboration as it is not disputed by the respondent. What is really disputed, and this I think is the substantial point for consideration, is whether the Municipality can be described as an officer of the Government within the meaning of Cl. (f), for it is only then the duties of a public officer as required by the definition being complied with, that it can be described as " a public officer " under S. 2, Cl. 17, Civil P. C. No decision under the Civil Procedure Code directly bearing on the point has been brought to my notice. But in my opinion the observations of the learned Judges in *President of the District Board of South Kanara* v. *Gopalakrishna Bhatta* (8) refute completely the contentions of the respondent on this point. That was not a decision under S. 2, Cl. 17, Civil P. C. In that case it was held that the President of a District Board is not an officer of the Government within the meaning of Cls. 1 and 3, Sch. 2, Provincial Small Cause Courts Act 9 of 1887. The question arose in this way : a suit was brought against the President of the District Board of South Kanara for damages for an amount under Rs. 500. To meet the argument that no second appeal lay against the decision of the lower appellate Court as the amount involved in the suit was below Rs. 500 reliance was placed by the appellant on Arts. 1 and 3, Provincial Small Cause Courts Act which excepted from the cognizance of the Small Cause Court, suits concerning acts or orders purporting to be done by the Governor-General in Council or by a Local Government or by a member of the Council and suits concerning acts or orders purporting to be done by any other officer of the Government in his official capacity. It was argued that the President of a District Board is an officer of the Government within the meaning of these articles and the suit, therefore, is exempted from the jurisdiction of the Small Cause Court. This argument was not

(7) [1910] 34 Bom. 583=7 I.C. 579.

(8) A. I. R. 1923 Mad. 689=74 I. C. 223=46 Mad. 808.

accepted by the learned Judges. This is how they disposed of the point:

"If the President of the District Board is an officer of the Government within the meaning of these articles his suit would be excepted. But in our judgment he is not. Local Boards and Coroporations are what may be called quasi governing bodies but by the very scheme of the Act under which they are created they are not servants of the Government. Their representatives in some cases are nominated but generally elected by the people and they have their official capacity as such and not as officials of the Government. It is true that they are under Government in the sense that under the statute they have to account to the Government, and are under certain disciplinary powers of the Government. The Government has a duty cast upon it to see that these ministerial bodies carry out their functions lawfully. But in our judgments none of the officials of these Municipalities and District Boards are officers of the Government coming within the Arts. 1 and 3."

These observations may well be applied to the present case. It is true that the Municipality is constituted by the Governor in Council and that it can be abolished by the same authority. It is also true that the Governor in Council can control the activities of the Municipality in various ways; but it does not necessarily follow from these considerations that the Municipality is an officer of the Government. The District Municipalities Act does not constitute the Municipality a servant of the Government. The Act confers on the Municipality wide powers which are given to it to be exercised at its own discretion and without consulting the Government. The Municipality can acquire, hold and transfer property moveable and immovable and enter into contracts. It can levy taxes to provide funds to carry on its own administration and the Municipal Fund raised remains its own till it is abolished. Subject to certain restrictions, the Municipality can appoint its own servants; these are not Government servants, but are Municipal servants, i. e., servants of the Municipality. Under these circumstances, I cannot agree with the contention that the Municipality constituted under the District Municipalities Act can be described as a "public officer" within the meaning of S. 80, Civil P. C. In this connexion attention may be drawn to the observations of their Lordships of the Privy Council in *Metropolitan Meat Industry Board* v. *Sheedy* (9), which dealt with the question whether a debt due to the Board constituted under the Meat Industry Act, 1915, No. 69 (N. S. W.), was a debt due to the Crown so as to enable the Board to claim priority in the liquidation of a debtor company. In deciding the point their Lordships had to consider the question whether the Board constituted under the Act of 1915 are:

"servants of the Crown to such an extent as to bring them within the principles of prerogative"

according to which the Crown is entitled to payment in priority to all other unsecured creditors of the debtor company. The facts of the case necessary for our purpose are thus stated in the headnote:

"The Meat Industry Act 1915 provided for the maintenance and control of slaughterhouses, cattle sale yards, and meat markets in Sydney and the adjoining district, and established the appellant Board to administer the Act. The members of the Board were to be appointed by the Governor, who had power to veto certain of its actions. The Board had wide powers, which it exercised at its discretion; any power of interference which a Minister of the Crown possessed was not such as to make the acts of administration his acts. Money received by the Board was not paid into the general funds of the State, but to its own fund."

In holding that the Board constituted under the Act of 1915 are not servants of the Crown, the learned Judges made the following observations:

"They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his, as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons and leasing its property. Nor does the Board pay its receipts into the general revenue of the State and the charges it levies go into its own fund."

Having regard to the powers given to the Municipality under the District Municipalities Act some of which I have referred to, I think similar observations may well be made in connexion with the Municipality constituted under the

(9) [1927] A. C. 899.

District Municipalities Act. As in that case, so in this also, all the provisions dealing with the powers of the Governor in Council already referred to, do not outweigh the fact that the District Municipalities Act confers on the Municipality wide powers which can be exercised at its own discretion and without consulting the Governor. For all these reasons, I would hold that the Municipality cannot be described as an officer of the Government under sub-Cl. (f), Cl. 17, S. 2, Civil P. C.

Sub-clause (g) also of S. 2, Cl. 17, which was somewhat faintly relied on by the respondent does not help his contention. Having regard to the powers and duties of the Municipality under the Act, it is obvious that it cannot be described as an officer doing the duties as mentioned in that sub-clause. Ss. 117 to 124 of the Act (i. e., general provisions relating to taxation and finance) do not show that the Municipality under the Act, takes, receives, keeps, or expends property on behalf of the Government. The point does not call for further consideration as it was not seriously elaborated by the respondent's learned counsel. It follows from what I have said that the argument that two months' notice should have been sent to the Municipality under S. 80, Civil P. C., by the appellant before instituting the suit is untenable and must be overruled. In the result the second appeal which is confined to the levy of enhanced rates on house-tax alone is allowed partially and an injunction will be issued in favour of the appellant restraining the Municipality from collecting from the appellant house-property-tax on his two houses in the second ward on the basis of the revised annual value. The injunction is directed to these two houses as the annual value of the house in ward 1 has not been increased under the revised assessment. The Municipality as a result of my decision will be entitled to collect from the appellant house-property-tax from these houses at the enhanced rate on the basis of the annual value under the old assessment. In other respects, the lower Court's decree will stand. Each party will pay and receive proportionate costs in this Court.

P.R.S./V.B. *Appeal allowed.*

A. I. R. 1930 Madras 854

BEASLEY, C. J., AND WALSH, J.

Konda Reddi and *others*—Accused—Petitioners.

v.

Mangala Babanna—Respondent.

Criminal Revns. Nos. 968 and 969 of 1929, and Criminal Revn. Petns. Nos. 872 and 873 of 1929, Decided on 14th July 1930, from judgment of Sess. Judge, Anantapur, in Criminal Appeal No. 5 of 1929.

Criminal P. C. (1898), S. 428—S. 428 does not enable appellate Court to substitute offence in respect of which there has been no conviction and then call for additional evidence supporting the offence.

Section 428 merely enables an appellate Court if it thinks it necessary to call for additional evidence which will explain or clear up or supplement within limitations the evidence for prosecution in support of a charge which has resulted in conviction and does not enable the appellate Court to substitute an offence in respect of which there has not been a conviction and then say that additional evidence must be called which may support such an offence. [P 855 C 2]

K. V. Sesha Ayyangar, T. Jagannadha Rao Naidu, K. S. Jayarama Ayyar for *Nugent Grant* and *D. R. Venkatesa Ayyar*—for Petitioners.

K. Venkataraghavachariar — for the Crown.

Order.—Four persons, including the appellants in Criminal Revision Case No. 968 of 1929 (accused 2 and 3) and the appellant in Criminal Revision Case No. 969 of 1929 (accused 5) were convicted by the Joint Magistrate of Penukonda for offences under Ss. 347 and 384, I. P. C., for wrongful confinement to extort property and extortion.

The facts can be dealt with quite shortly and they are that on 3rd December 1927 a document was registered by the District Registrar at Anantapur the material portions of which ran as follows:

"Deed of sale caused to be written and given to Nethi Narayanappa of Pamdurthi. To discharge debts due to others for the purchase of mango trees, I have received from you in cash this day Rs. 300. The land sold to you for this sum is S. No. 882, extent 0.71 acres, with the various fruit trees standing thereon. I have put you in possession this day. Henceforward you will have all my rights. My heirs and I will have nothing to do with it."

Then there is the mark of Mangala Babanna who admittedly was an illiterate person, and the two witnesses are accused 2 and 3. Upon this document

were founded the two charges against the accused, the prosecution case being that Mangala Babanna was by confinement and extortionate methods made to execute that document; that he, as a matter of fact, was not the owner of the property at all; and that it was a spurious document got for the purpose of defrauding others. In support of the prosecution case some evidence was given to show that; whereas in the body of the document Rs. 300 was stated to have been paid by way of consideration none in fact was paid. Though the question of consideration was quite an irrelevant one to the two charges then before the Court, because both the charges could be supported equally well whether there had been consideration passing or not, the Joint Magistrate considered it as of some importance as supporting the case for the prosecution and dealt with it. This resulted, as before stated, in the conviction of four of the accused three of whom are the appellants here. The case then came up before the learned Sessions Judge of Anantapur and he, after going very carefully into the facts in a very lengthy and elaborate judgment, came to the conclusion, to put it quite shortly, that the evidence certainly did not support the conviction of the accused of either offence. He then resorted to a procedure which is called in question here. Having come to the conclusion that no conviction under Ss. 347 and 384, I. P. C., could be supported upon the evidence, he dealt with the evidence given with regard to the consideration which passed for the document and decided for reasons which he has given in his judgment that a charge could be framed under S. 423, I. P. C., and that in order that such a charge might be framed there should be additional evidence before him; and he accordingly made an order that the Joint Magistrate should take evidence on the question as to whether or not the Rs. 300 consideration or any part of it passed on the date or at about the time of the execution of that document. The result of that enquiry was that he proceeded upon the additional evidence which came before him and found that no consideration for the sale did pass. He thereupon framed charges against the appellants under S. 423, I. P. C., acquitting the other accused who remained before him; and, having framed those charges, he proceeded at once, for the reasons which he has given in the earlier part of his judgment, to convict the appellants and ordered them to pay fines amounting, in the case of the accused 3, to Rs. 500, and in the case of accused 2 and 5 to Rs. 1,000 each, in default of which there was to be a term of imprisonment.

The matter reduces itself to this: Was the procedure adopted by the learned Sessions Judge a proper one or not? It is of course conceded that under S. 428, Criminal P. C., an appellate Court, in dealing with an appeal under the chapter in which the section appears, may, if it thinks it necessary, order additional evidence to be recorded after stating its reasons for so doing and either may take the evidence itself or direct it to be taken by a Magistrate, and it was purporting to act under this section that the additional evidence was ordered to be taken by the learned Sessions Judge. The strong criticism that is made here by Mr. Jayarama Ayyar is that the accused had been convicted under Ss. 347 and 384, I. P. C., and had appealed to the Sessions Court of Anantapur against their conviction for those offences and none other, and that there was no appeal against any conviction under S. 423 I. P. C., because there had not been any conviction or any trial even for an offence under that section. He contends that S. 428, Criminal P. C., merely deals with an appeal against a conviction and does not enable the appellate Court to substitute an offence in respect of which there has not been a conviction and then say that additional evidence must be called which may support such an offence. We think that that criticism is clearly correct and well founded and that S. 428, Criminal P. C., merely enables an appellate Court, if it thinks it necessary, to call for additional evidence which will explain or clear up or perhaps supplement within limitations the evidence for the prosecution in support of a charge which has resulted in a conviction and which conviction is the subject of an appeal, and that it does not enable an appellate Court to adopt the procedure adopted in this case by the learned Sessions Judge. He might—although we say nothing about its being proper in this case, it is

merely an indication of a possible procedure—have indicated that a charge under S. 423, I. P. C., might be framed and sent the case back again for retrial. But in this case he did not adopt that procedure and we are of the opinion that this petition must be allowed. The convictions will be set aside and the fines paid will be refunded to the appellants.

P.R.S./R.M. *Petition allowed.*

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* A. I. R. 1930 Madras 856

ANANTAKRISHNA AYYAR AND CORNISH, JJ.

Nagalinga Chettiar—Petitioner.

v.

Guruswami Ayyar and *others* — Respondents.

Civil Revn. Petn. No. 253 of 1926, Decided on 17th March 1930, from order of Sub-Judge, Negapatam, in Civil Misc. Appeal No. 2 of 1925.

*** Civil P. C. (1908), O. 21, R. 93—Auction-purchaser purchasing properties in one lot—To some of them judgment-debtor subsequently found to have no title — Auction-purchaser cannot claim refund of proportionate purchase money.**

Where the auction-purchaser purchases in one lot certain properties, to some of which the judgment-debtor is subsequently found to have no title, he is not entitled to have a refund of proportionate amount of purchase-money paid by him into Court, for R. 93, O. 21 would not apply to cases where a judgment-debtor has some interest in the property, however small the same may be. [P 856 C 2]

T. V. Muthukrishna Aiyar—for Petitioner.

K. S. Sankara Aiyar — for Respondent 1.

Judgment.—The applicant before us was the purchaser in Court auction of some immovable properties sold in execution of a money decree. He purchased in one lot two items of properties. In the sale proclamation it was mentioned that there was already a partition in the family of the judgment-debtor. In execution of the sale certificate the auction-purchaser was put into possession of both the items of properties included in the lot. Subsequently at the instance of the other defendants in the case, who were exonerated from liability under the decree, one of the items was found not to be the property of the judgment-debtor but to be the property of the other defendants. The Court accordingly directed that the auction-purchaser should deliver back to defendants 3 and 4 that item of property which was found to be their property. The auction-purchaser filed, under O. 21, R. 93, Civil P. C., an application in the District Munsif's Court praying that he may be allowed a proportionate refund of the price paid by him. Both the lower Courts have dismissed his application, and he has preferred the present petition.

The present is a case where the auction purchaser purchased certain properties which were sold in one lot. It is found that the judgment-debtor had title to some of the properties included in the lot. It is also found that the judgment-debtor had no title in respect of some of the properties included in the lot. In these circumstances, the question was argued whether the auction-purchaser is entitled either to have the sale set aside or to have a refund of proportionate amount of the purchase money paid by him into Court. The prayer of the auction-purchaser in the application that he filed before the District Munsif was to have a proportionate refund of the price paid by him. We are of opinion that he is not entitled to such relief. It is settled law that in Court sales there is no warranty of title in respect of properties sold. It is only the right, title and interest of the judgment-debtor in the properties included in the lot that pass to the auction-purchaser. O. 21, R. 93 would not apply to cases where a judgment-debtor has some interest in the property, however small the same may be. It would apply only to cases of entire absence of any interest in the judgment-debtor in respect of the properties sold. That position, we take it, is clearly established. Having regard to the facts of the present case, namely that the auction-purchaser does not complain of want of title in respect of some of the properties included in the lot, in fact he is in undisputed possession of some of the properties purchased by him, we think that the application for proportionate refund is unsustainable. In this view we confirm the orders of the lower Courts and dismiss the revision petition with costs.

P.R.S./S.N. *Revision dismissed.*

A. I. R. 1930 Madras 857

WALLACE AND JACKSON, JJ.

K. Ramaraju Tevan and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Referred Trial No. 155 of 1929, and Criminal Appeal No. 556 of 1929, Decided on 11th February 1930, from judgment of Sess. Judge, Ramnad Division, in Sessions Cases Nos. 42 and 49 of 1929.

(a) Criminal P. C., S. 233—Misjoinder of charges is cured by S. 537 when it does not result in injustice to accused—Criminal P. C., S. 537.

It cannot be assumed that if a mandatory provision of the Code has been infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. S. 537 affords no real grounds for any such assumption. The impugned procedure must be one that is not only prohibited by the Code but also works actual injustice to the accused : *A. I. R.* 1927 *P.C.* 44, *Foll.* [P 858 C 1]

(b) Penal Code, S. 149 — Preparation towards common object is prosecution.

After people have formed themselves into an unlawful assembly and decided upon their common object, preparation towards that common object is prosecution or following up, and if the preparation happens to be an offence then they are all equally liable. [P 859 C 1]

(c) Criminal P. C., S. 239 (4) — Common object is not necessary to validate joint trial of offences committed in the same transaction.

Where persons are accused of different offences committed in the course of the same transaction, it is not necessary that all such persons must have a common object in order to render their joint trial valid. [P 858 C 2]

Nugent Grant and *U. Somasundaram*—for Appellants.

Public Prosecutor—for the Crown.

Judgment.—The sixteen appellants do not dispute the lower Court's findings of fact.

On 11th April 1929 at Khansapuram twenty to thirty persons came from the north armed with guns and sticks with the common object of shooting Sangiah Tevan and looting his house. When they were fifty yards off the house one Sundara Tevan, P. W. 10, tried to dissuade them, and Krishna Tevan, P. W. 11, who belongs to Sangiah's faction abused them. Krishna Tevan was hit on the head by accused 13 and then two more of the opposite faction Alagu and Sangiah, ran up. Appellant 1 shot Alagu, and the third shot Sangiah. Then the fourth fired into seven persons who came to help them, after which there was a general stampede. Alagu was shot through his heart and died immediately. Sangiah had his leg broken and died of gangrene on the 14th.

The learned Judge has found that the shooting and the assault upon Krishna were the sudden outbreaks of individual members of the assembly, and therefore presumably were not in prosecution of its common object. Accordingly he has acquitted all the appellants of rioting. But he has found them all guilty of being members of an unlawful assembly under S. 143, I. P. C., and inasmuch as the men who fired (appellants 1, 3 and 4) undoubtedly had guns, he has found all guilty either directly or constructively by the provision of S. 149 of being armed with deadly weapons while being members of an unlawful assembly, the offence under S. 144, I. P. C.

Accused 1 and 3 are found guilty of murder, S. 302, I. P. C., and accused 4 guilty of attempted murder, S. 307, I. P. C.

Accused 13 is found guilty under S. 323. It is argued by Mr. Nugent Grant that none of those convictions can stand because the two murders, the attempted murder and the hurt were several and independent transactions which had no real connexion with the unlawful assembly. For every distinct offence of which any person is accused there must be a separate charge (S. 233) unless they are so connected together as to form the same transaction (S. 235), and the misjoinder of charges in this case has in fact occasioned a failure of justice.

To this plea there would seem to be three sound answers. In the first place it cannot be said that there has been failure of justice. Supposing that the murders and assaults were quite unconnected with the object of the unlawful assembly, a Court which had joined them all together in one trial might well have been led to attribute to the assembly force and violence of which it was entirely innocent, and so might have found it guilty of rioting ; and had this case terminated in a conviction of rioting it would be impossible to say that the irrelevant consideration of the extraneous offences had not influenced the mind of the Court. But the charge of rioting was dismissed, and it must be said that the

mind of the Court, though dangerously exposed to infection, proved absolutely immune.

No doubt ever since the pronouncement of the Judicial Committee in *N. A. Subramania Iyer* v. *Emperor* (1) it has been the general practice to assume that if a mandatory provision of the Code has been infringed in framing the charge the Court must of necessity be held to have failed in administering justice to the accused. S. 537 affords no real ground for any such assumption, and the Judicial Committee itself when it had occasion to refer to *Subramania Iyer* v. *Emperor* (1), in *Abdul Rahman* v. *Emperor* (2), clearly indicated that the impugned procedure must be one that is not only prohibited by the Code, but also works actual injustice to the accused. In the latter case the Code was clearly infringed, but the curative provision of S. 537 was considered a sufficient remedy.

In the second place, whatever conclusion was finally arrived at by the learned Judge, it is clear that, before evidence was heard, it must have been a very open question whether the shooting was or was not in prosecution of the common object. It is a question of degree. If the men who protested had been ranged on the doorstep of Sangiah's house it would be hard to say that shooting them was not in prosecution of the looting. What if they were five, ten, fifty yards away? It is a matter that could only be decided after most careful consideration of the evidence as a whole; and it cannot be said that to have accused these persons of shooting in prosecution of the common object was in any way frivolous. If the charge could be postponed till after the conviction a more perfect symmetry might be attained, but unfortunately that cannot be, and the charge of necessity must be founded upon the accusation: cf. *Abdul Salim* v. *Emperor* (3), at p. 596 (*of* 49 *Cal.*) It cannot be said therefore that there has been any misjoinder in contravention of S. 233, Criminal P. C.

In the third place, even supposing that the ultimate findings govern the charge, so that the Court was precluded from charging as though the shooting had been in prosecution of the common object, still it cannot be said that the whole affair was not in the course of the same transaction. The accused formed themselves into a body with the intention of looting and shooting Sangiah Tevan and frightening away anyone who tried to prevent them, otherwise there is no explanation for such a display of force. It has never been held that in a transaction all the persons engaged must have a common object. Taking the transaction to be the adventure of private war upon which the appellants embarked on 11th April a historian of that transaction would hardly omit all mention of the shooting as belonging to a totally different transaction. As Benson, J., observes in *Choragudi Venkatadri* v. *Emperor* (4):

> "It is neither necessary nor advisable to attempt to define the expression 'the same transaction' which the legislature has left undefined."

Each particular case must be tried by common sense and common knowledge of language, and if these tests be applied the whole affair from the formation to the disruption of this assembly seems obviously to be one transaction.

Therefore the plea of misjoinder is not sustainable. It is next argued that the appellants who are not found to have been armed cannot be constructively held guilty under S. 144 by the provision of S. 149. There can be no doubt that if a member of an unlawful assembly, liable under S. 143, I. P. C., to six months rigorous imprisonment is armed with a deadly weapon he is punishable with two year's rigorous imprisonment under S. 144. Therefore being so armed is a thing made punishable by the Penal Code and consequently, under S. 4), an offence.

Now, is the offence so committed by the member of the unlawful assembly in prosecution of the common object of that assembly. Prosecution in plain English is following up. They assembled and formed the common object of shooting a man. What did they do to follow it up? Some of them came to the assembly with guns, or stayed in

(1) [1902] 25 Mad. 61=28 I. A. 257 = 8 Sar. 160 (P.C.).
(2) A. I. R. 1927 P. C. 44=100 I. C. 227 = 28 Cr. L.J. 259=54 I.A. 96=5 Rang. 53 (PC).
(3) A. I. R. 1922 Cal. 107 = 69 I. C. 145 = 23 Cr. L. J. 657=49 Cal. 573.
(4) [1910] 33 Mad. 502 = 5 I. C. 847 = 11 Cr. L. J. 258.

the assembly with guns, and at any rate took care not to be parted from their guns. That seems to be clear following up. Mr. Grant would say that it was mere preparation, but after people have formed themselves into an unlawful assembly, and decided upon their common object preparation towards that common object is prosecution or following up, and if the preparation happens to be an offence then they are all equally liable. Suppose they burst in a door; that is not mere innocent preparation for the intended looting. It must be held therefore that this plea also fails.

There remain two pleas ad misericordian on behalf of the murderers sentenced to death. It is clear from the medical evidence that accused 1 shot Alagu Tevan with various pellets through the heart and thigh. He may be taken to have aimed at his stomach and it cannot be said that he did not intend his death. Accused 3 shot Sangiah five inches below the knee and shattered the bones. He had said: Why do you shoot him who was keeping quiet and for that innocent protest was shot. Mr. Nugent Grant says that the murderer only hoped to maim him; only hoped perhaps to cripple him for life. It was a murderous act, without the smallest justification and it resulted in murder. We see no reason to interfere. It cannot be said that any of the appellants has been treated with undue severity, and we dismiss their appeals.

P.R.S./K.N. *Appeals dismissed.*

A. I. R. 1930 Madras 859

PANDALAI, J.

Kalia Goundan and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 963 of 1929, and Criminal Revn. Petn. No. 867 of 1929, Decided on 21st March 1930, from judgment of Sess. Judge, Madura, in Criminal Appeal No. 49 of 1929.

(a) Criminal P. C., (1898) Ss. 107 and 112—Magistrate having territorial jurisdiction under S. 107 making order under S. 112—District Magistrate can transfer it to one competent to try it but without territorial jurisdiction.

Where a Magistrate having jurisdiction according to S. 107 has made an order under S. 112, the District Magistrate has power to transfer the case as initiated to another Magistrate competent to try the case though not qualified under S. 107 as regards territorial jurisdiction: 41 *Mad.* 246 and 31 *Cal.* 350, *Ref.* [P 860 C 2]

(b) Criminal P. C. (1898), Ss. 107 and 112—Preliminary order under S. 112 for proceedings under S. 107 must state facts of charge.

A preliminary order under S. 112 on which proceedings under S. 107 were initiated must state the facts upon which the Magistrate charges the person proceeded with: *A. I. R.* 1925 *Mad.* 189, *Ref.* [P 860 C 2]

V. L. Ethiraj and *Somasundaram*—for Petitioners.

Public Prosecutor—for the Crown.

Order.—This is a petition to revise an order under S. 118, Criminal P. C., made by the Joint Magistrate of Dindigul requiring the petitioners, 12 in number, to furnish security for keeping the peace for one year. The order was on appeal confirmed by the learned Sessions Judge of Madura.

Two objections are taken to the order complained against: (1) that the Joint Magistrate of Dindigul had no jurisdiction to make it; (2) that the preliminary order under S. 112, on which the proceedings were initiated was defective in that it did not contain the substance of the information received.

To understand the first objection the facts necessary are that the petitioners and the place where the alleged breach of the peace was apprehended are within the jurisdiction of the Sub-Divisional Magistrate of Usilampatti. The proceedings against the petitioners and others under S. 107 were instituted before that Magistrate, and he on 29th December 1928 made the preliminary order under S. 112 calling upon the petitioners and others complained against to show cause. The District Magistrate then transferred the case to the Joint Magistrate of Dindigul. The latter Magistrate for some reason drew up another preliminary order under S. 112 making formal changes in the order passed by the Usilampatti Magistrate but substantially in the same terms as that order. The petitioners showed cause, one of their objections being that the order under S. 112 was not definite enough as it did not contain any particulars. The Magistrate brushed this aside as a technical objection and stated that in his opinion the order does give particulars of the dispute and the

reasons for apprehending a breach of he peace, and he added that the further details appeared as the prosecution unfolded its case. To return to the objection as to the jurisdiction: it is argued that the Joint Magistrate of Dindigul had no jurisdiction to proceed with the enquiry against the petitioners because neither were the petitioners living within the jurisdiction of that Magistrate, nor was the place where the breach of the peace was apprehended within his jurisdiction.

It is contended that according to S. 107, Magistrates other than a Chief Presidency Magistrate or District Magistrate are not only incompetent to initiate proceedings against persons residing beyond their jurisdiction in respect of breach of the peace beyond such jurisdiction, but they are also incompetent to hear cases under S. 107 transferred to them by the District Magistrate where the persons and the places affected are not in their jurisdiction. For this contention no direct authority was forthcoming. But the decision in *Nagi Reddi Konda Reddi, In re* (1) was referred to. That case is not on all fours with this. There the Magistrate before whom the proceedings under S. 107 were initiated had not passed the preliminary order when the District Magistrate transferred the case to another Magistrate, and it was held that there having been not even an initiation or commencement of proceedings under S. 107 before the Magistrate competent according to the terms of that section, the order of transfer did not confer jurisdiction on the Magistrate to whom it was transferred and that therefore the proceedings before him were incompetent. That case did not decide, because the facts were not so, that where a Magistrate having jurisdiction according to S. 107 has made an order under S. 112 the District Magistrate is not empowered to transfer the case so initiated to another Magistrate competent according to his grade or class to try this class of cases, although not qualified by the requirements of S. 107 as regards territorial jurisdiction. On that limited proposition there appears to be no decision of this Court. But the point is covered by an authority, namely *Surjya Kanta v. Emperor* (2), which was referred to in *Nagi Reddi Kondi Reddi, In re* (1) with approbation. In the Calcutta case the precise point arose and it was decided in 1904

"that the intention of the legislature was to limit the jurisdiction in regard to the institution of proceedings to a Chief Presidency or District Magistrate; but that when such Magistrate has, in the exercise of his discretion, directed institution of proceedings, there is nothing in the law to prevent him from transferring the case to a Magistrate otherwise qualified to complete the proceedings."

This decision has stood the test of subsequent amendments of S. 107 and there is nothing in the amendment of 1923 to show that this view was not accepted as correct or that the legislature intended to alter it in any way. The result is that the Usilampatti Magistrate having first drawn up the preliminary order under S. 112 the subsequent transfer of the case to the Dindigul Magistrate by the District Magistrate was authorized and the proceedings before the Dindigul Magistrate were competent. The first objection therefore fails.

The second objection relates to the defect in the order under S. 112 and the objection is that that order does not, as it is required by S. 112 of the Code to do, set forth "the substance of the information received." Upon the decisions on this topic there is no reasonable doubt as to what the intention of these words is. It is to give in substance an abstract of the facts upon which the Magistrate charges the persons proceeded against with being likely to commit a breach of the peace so as to give them notice of what they have to meet and be prepared to meet it. There are many instances of the practical application of this general rule, of which a very good one is found in *Kutti Goundan, In re* (3). The general rule being as stated the question is whether in this particular case the order satisfies the requirements. Other decisions cannot be of much help on that point. The order upon which the Dindigul Magistrate proceeded was one drawn up by himself on 4th April 1929 after the case was transferred to him. In one sense this was not the order on which he ought to

(1) [1918] 41 Mad. 246=18 Cr. L. J. 878=41 I.C. 990.

(2) [1904] 31 Cal. 350.

(3) A. I. R. 1925 Mad. 189=86 I. C. 49=26 Cr. L. J. 673.

have proceeded because the proceedings having been already initiated he could not initiate them over again and the order which he should have started upon was the order passed by the Usilampatti Magistrate on 29th December 1928. If there had been any material difference between the two orders that might alone have been a sufficient irregularity to invalidate all that followed. But as it happens, the order drawn up by the Dindigul Magistrate, is, apart from formal changes, necessitated by the change of venue, substantially the same as the order passed by the Usilampatti Magistrate, and therefore no more need be said about it. The new order drawn up was merely superfluous. The substance of both orders is this:

"That you .... formed yourselves into a faction espousing the cause of counter-petitioner 1 against Kamatchi Goundan of the same village in regard to the possession and enjoyment of a tamarind tope situated in S. No. 1392 of Odaipatti village and by the inimical attitude of yours against the said Kamatchi Goundan's faction, you are likely to commit breaches of peace or disturb the public tranquility or do wrongful acts that may probably occasion breaches of peace or disturb the public tranquility."

It will be noticed that no other fact is mentioned here except that there are two factions in the village and a dispute between them about a tamarind tope and that the counter-petitioners are on one side. It gives absolutely no indication as to what the information was upon which the counter-petitioners were believed to be threatening breaches of the peace. It would have left the counter-petitioners just as well informed on that point as if they were told:

"You are wicked men. You have got enemies and therefore you are likely to commit breaches of peace."

In my opinion not only was there no attempt to state in substance the information received against the counter-petitioners, but the order contained nothing from which they could know the case that they would have to meet. The order therefore was clearly defective. This was not, as the Dindigul Magistrate thought, a merely technical defect that it did not give the particulars or the reasons for apprehending a breach of the peace. On that ground the order is liable to be set aside. But it has been argued for the Public Prosecutor that this defect does not vitiate the proceedings because it did not occasion a failure of justice. I do not question, at any rate I do not now want to question, whether a defect of this character is curable. But the question whether failure of justice has been occasioned in every case is one of fact. In this case the objection was taken before the Magistrate himself, and that according to S. 537, is always a circumstance from which failure of justice may be inferred. Whether it was in fact occasioned in this case cannot be disputed because the counter-petitioners did not have the information they were entitled to possess in the early stage of the proceedings, and if they had possessed it at that time they might have met it successfully. The order therefore must be set aside and the bonds given by the petitioners will be cancelled. I come with all the more confidence to this conclusion because this order passed in May 1929 will in any case expire in two months more.

P.R.S./V.B. *Order accordingly.*

A. I. R. 1930 Madras 861

PANDALAI, J.

Veeraragava Mudaliar and *another*—Accused—Petitioners.

Chairman, Municipal Council, Vaniyambadi—Complainant—Respondent.

Criminal Revn. No. 809 of 1929 and Criminal Revn. Petn. No. 725 of 1929, Decided on 7th March 1930, from order of Joint Magistrate, Tirupattur, D/- 9th August 1929, in Civil Appeal No. 35 of 1929.

Madras District Municipalities Act (5 of 1920), S. 362—"Other materials" include trees when cut.

Trees standing on the land vested in the Municipal Council when cut become "other materials" so as to constitute the removal of the same an offence under S. 362 [P 862 C 1]

G. Krishnaswami Iyer — for Petitioners.

A. Narasimha Iyer—for the Crown.

A. Suryanarayana—for Complainant.

Order.—The petitioners, the Mittadar of Devasthanam Mitta and his son, seek to revise the conviction recorded against them under S. 313 read with S. 362, District Municipalities Act, by the Sub-Magistrate, Vaniyambadi, which was confirmed by the Joint Magistrate, Tirupattur.

They were fined Re. 1 each. The offence charged against them was that they had cut and removed trees from four town survey numbers, namely 1166, 1227, 1225 and 1228. The Municipal Council claimed those properties as vested in it. Therefore the petitioners were charged with having violated S. 362, District Municipalities Act, by cutting and removing trees therefrom. Both the Magistrates found that the four survey numbers above mentioned were properties which vested in the Municipal Council of Vaniyambadi. The argument of the learned advocate for the petitioners in this Court is twofold: (1) that the acts charged do not amount to an offence under S. 362 (2); that the properties from which the trees were cut have not been shown to be properties vested in the Municipal Council.

Section 362 says:

"No person shall, without authority in that behalf, remove earth, sand or other materials ..... from any land vested in the Municipal Council, or river, estuary, canal, back water or water course (not being private property)....."

The argument is that trees do not come within the expression "other material" in this section. I am unable to see how trees growing upon land are to be excluded from the expression "other materials" which is quite general. To exclude trees growing upon the land vested in the Municipal Council from this section would enable anyone to cut and remove trees from Municipal land and plead that they had not contravened the section although, according to the words immediately preceding, to remove a basket of earth or a load of sand from the foot of such trees, would be an offence. I do not think that this is a reasonable construction. I must say that trees when cut are "other materials" which are upon land vested in the Municipal Council.

As to the question whether the survey numbers from which the trees were cut were or were not vested in the Municipal Council it was not disputed in either of the Courts below that Survey Nos. 1166 and 1227, which are registered respectively as "road margin" and Government river poramboke," belonged to and vested in the Municipal Council. I do not see how the petitioners can now be heard to re-open that question.

As regards the other two Survey Nos. 1225 and 1228 the survey register produced shows that they were classed as "river poramboke within devasthanam limits." The learned advocate for the petitioners argues that this shows that these properties are the private property of the Mittadar and that therefore S. 125, which was relied upon to show that the beds of watercourses and lands adjacent thereto belong to the Municipality, is not applicable.

But there is evidence that the classification of property as "river poramboke within devasthanam limits" means that such property is not within the mitta proper but outside, and this is made clear from the facts referred to by the Sub-Magistrate in para. 7 of his judgment. Certain other properties were wrongly classed as patta lands. On the application of the Municipality the Director of Survey classed them as "river poramboke within devasthanam limits." The predecessor-in-title of the present petitioners sued the Government and the Municipal Council to have this classification altered and those properties classified as patta lands. That dispute was settled by a compromise the result of which was that the lands the subject of dispute were declared according to the request of the Municipality as river poramboke, but the Mittadar was compensated by the peshkush being reduced proportionately and by the arrears which had been collected being refunded and by his being permitted to cut and remove the trees which were growing upon those properties before the floods of 1874. This shows that the classification of property as river poramboke, although within the devasthanam limits, indicates that it is not part of the mitta, and this answers the objection of the learned advocate for the petitioners founded upon the decision in *Venkata Lakshmi Narasamma* v. *Secy. of State* (1) that, in the absence of proof to the contrary, the presumption, which may be strong or weak, is that the soil of non-navigable rivers vests in the owners on either side. Here there was proof to the contrary. The river in question is the river Palar, an important river of considerable size although not navigable. Therefore the

(1) [1918] 41 Mad. 840=47 I. C. 606.

conclusion of the Magistrate was right that the properties in question are not the private properties, and the conviction was therefore right. The petition is dismissed.

P.R.S./V.B. *Petition dismissed.*

A. I. R. 1930 Madras 863

PANDALAI, J.

Kolapalli Narasimhamurti and *others* —Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 864 of 1929 and Criminal Revn. Petn. No. 775 of 1929, Decided on 14th March 1930, from judgment of Joint Magistrate, Rajahmundry in Criminal Appeal No. 73 of 1929.

Criminal P. C. (1898), S 421 –Provided pleader of appellant had reasonable opportunity of being heard at hearing of appeal, hearing appeal when presented is not improper.

In the great majority of cases when an appeal is presented, neither the appellant nor the pleader may be in a position to straightaway argue in support of the appeal and therefore it may be a wise rule in proceeding under S. 421 to give sufficient time to the appellant or his pleader and to inform him that he will be heard on a particular day in support of the appeal with a view to action being taken under S. 421, and consequently provided the pleader had a reasonable opportunity of being heard, hearing the appeal when presented is not improper: *A. I. R.* 1924 *Mad.* 895, *Expl.*

[P 864 C 1]

M. Appa Rao—for Petitioner.

A. Narasimha Iyer—for the Crown.

Order.—The petitioners five in number, were convicted by the Second Class Magistrate of Amalapuram under S. 323 I. P. C. and sentenced to a fine of Rs. 20 each or one month's rigorous imprisonment in default. Out of the fine P. W. 1 was awarded Rs. 30 as compensation. They appealed to the Joint Magistrate of Rajahmundry. The petition of appeal and a copy of the judgment of the Sub-Magistrate were presented to the Joint Magistrate on 5th August 1929, when he was on tour by a pleader on behalf of the petitioners. The Magistrate having heard, as he reports, the pleader in support of the appeal, dismissed it under S. 421, Criminal P. C. His judgment is brief. After stating that the judgment of the Sub-Magistrate sets out the evidence fully it goes on to say that the attack on the complainant took place in daylight in the open and that the defence of alibi was a tissue of falsehood and winds up with the remark that the appellant's pleader has shown no grounds for interference. For the petitioners it was represented at the time this petition came on for admission that according to the petitioner's pleader who presented the appeal, the Joint Magistrate personally perused the judgment and the grounds of appeal and asked him whether he conducted the case in the lower Court to which he said that he did not conduct it throughout, that then the Magistrate asked if he had anything to say in support of the appeal, that the pleader then asked for time to argue the case as he had not fully gone through the record, that no time was granted and the appeal was summarily dismissed under S. 421. This representation for the petitioner was communicated to the Joint Magistrate who has sent a report dated 6th December 1929 that the appeal was presented to him at the Amalapur Traveller's Bunglow in the morning, that on perusing the judgment of the lower Court he informed the pleader who presented it that it appeared to fall into the class of appeals which he usually dealt with under S. 421, Criminal P. C., that the pleader voluntarily launched into the merits of the appeal rather fully and was heard for at least half an hour, that no application for further opportunity to argue the case was made to him, that if such application had been made it would have been granted and that finally the Magistrate intimated his intention ,of dismissing the appeal summarily.

The question before me is whether the procedure adopted by the Joint Magistrate was in the circumstances substantially in accordance with the provisions of S. 421, in other words whether the petitioners or their pleader had a reasonable opportunity of being heard in support of the appeal.

On this point a decision of Ramesam, J., has been brought to my notice, namely *Turka Hussain Saheb, In re* (1). That decision seems to lay down as a rule of law that a criminal appeal should not be heard at the time of presenting the papers even for the purpose of dismissal under S. 421, Criminal P. C., and that there must be a special

(1) A. I. R. 1924 Mad. 895=48 Mad. 385.

posting of the appeal after a reasonable time for the purpose of hearing under S. 421. It also appears to lay down as a rule that an appeal raising questions of fact ought not to be disposed of under S. 421 without the original records being called for from the lower Court. If either of these two requirements was a necessary condition before action under S. 421 could be lawfully taken there would be no further question in this petition, because neither of these was done. The appeal was dismissed on the very day it was presented and it was not posted a week later for the purpose of hearing. Also the records were not sent for. Without entering into the matter more fully, because in the nature of the conclusion at which I have arrived in this petition it is not necessary to do so, I do not think that the learned Judge intended to do more than indicate that as a rule of caution and sound procedure it is better to post an appeal for being heard even under S. 421 and to send for the original papers. So far as the section itself is concerned, neither of those requisites would seem to be laid down by the words. The section says explicitly that:

"on receiving the petition and copy under Ss. 419 and 420 the appellate Court shall peruse the same and if it considers that there is no sufficient ground for interfering may dismiss the appeal"

summarily and then the proviso says that:

"an appeal presented under S. 419 should not be dismissed unless the appellant or his pleader had a reasonable opportunity of being heard in support of the appeal. In sub-Cl. 2 it is distinctly said that before dismissing an appeal under the section the Court may call for the record in the case but shall not be bound to do so."

In the face of this express declaration that the Court shall not be bound to send for the papers I do not think it was intended to be laid down in the decision cited by the petitioners that the Court was bound to send for the papers before taking action under S. 421. No distinction is made in the section between appeals relating to facts and appeals raising questions of law. The provision is perfectly general. Similarly as to posting the case to a subsequent date after the presentation for the purpose of being heard under S. 421, the words of sub-S. 1 seem to me to be plain that so long as a reasonable opportunity is given to the appellant or his pleader to be heard in support of the appeal there is no legal requirement as to any postponement of the hearing after the presentation of appeal. I quite appreciate that in the great majority of cases when an appeal is presented, neither the appellant nor the pleader may be in a position to straightaway argue in support of the appeal and therefore it may be a wise rule in proceeding under S. 421 to give sufficient time to the appellant or his pleader and to inform him that he will be heard on a particular day in support of the appeal with a view to action being taken under S. 421. More than that I do not think that the section really requires; nor do I think that Ramesam, J., intended to lay down.

In this case the question really is whether the petitioners' pleader had a reasonable opportunity of being heard in support of the appeal, although undoubtedly he was allowed to address some argument to the Joint Magistrate. On the whole I have come to the conclusion that the pleader had not the required opportunity for the simple reason that he had not got all the records with him and had not fully conducted the case himself. It is not necessary to go into the slight discrepancies as to what happened between the accounts respectively given by the pleader and the Joint Magistrate. One thing however is clear that, whatever the pleader said might be, the Joint Magistrate conceived the idea that the occurrence took place in open daylight, whereas in fact it took place after 8 p. m. Such a hearing could not have been well informed on the part of the pleader or anything but casual on the part of the Joint Magistrate. Holding that the petitioner's pleader had not the opportunity given to him to which he was entitled under the section the dismissal of the appeal will be set aside and the appeal will be sent back to the District Magistrate of East Godaveri to be heard by him or by some other competent Magistrate other than the one who disposed of it.

P.R.S./V.B. *Case sent back.*

A. I. R. 1930 Madras 865

PANDALAI, J.

(*Kanta*) *Venkanna*—Petitioner.

v.

(*Inuganti*) *Venkata Surya Neeladri Rao*—Respondent.

Criminal Revn. No. 739 of 1929, and Criminal Revn. Petn. No. 669 of 1929, Decided on 13th March 1930, from order of Sub-Divisional Magistrate, Peddapur, D/- 4th June 1929.

(a) Criminal P. C. (as amended in 1923). S. 147—As to the right of person to flow of water Magistrate need not find that easement strictly so called is established.

As to the right of the person to the flow of water down a channel, it is not necessary for the Magistrate to find that a right of easement strictly so called is established. All that he has to find is that the person has been for long time using the water flowing down the channel and has in fact used it during the last season. [P 865 C 2]

(b) Criminal P. C. (as amended in 1923), S. 147—Order prohibiting counter-petitioner from putting up bunds across channel in their field and from retaining any obstruction to petitioner's use of water flowing along the channel in their field is competent even under amended S. 147.

Where the Magistrate passes under S. 147 an order prohibiting the counter-petitioners from putting up any bunds across a channel in their field, and from interfering with the petitioner's removing the obstructions already put up, the order requires to be amended by omitting the words "from interfering with the petitioner's removing the obstructions already put up" and substituting therefor the words "from retaining any obstruction to the petitioner's use of the water flowing along the channel in their field," inasmuch as such an order is likely to cause a recurrence of breach of the peace, which such orders are intended to prevent, but the Magistrate is competent to pass an order in the amended form, even under S. 147 as amended in 1923: *A.I.R.* 1925 *Cal.* 991, *not Foll.*: 26 *I.C.* 730, *Appl.* [P 866 C 1; P 867 C 1]

V. Ramadoss and *K. Subba Rao*—for Petitioner.

Ramchandra Rao—for Respondent.

Order.—This is a petition by the first counter-petitioner in the lower Court to revise an order of the Sub-Divisional Magistrate of Peddapur passed under S. 147, Criminal P. C.,

"prohibiting the respondents from putting up any bunds across the channel in their field and from interfering with the petitioner's removing the obstructions already put up,"

namely

"the four small cross-bunds and that part of the bund higher up which is across the channel and no further."

Three objections are raised to this order:

(1) That there was no likelihood of a breach of the peace on which such an order could be justified; (2) that the Magistrate had not found, as he ought to have done, that the petitioner was entitled to the use of the water flowing down the channel in question; and (3) that the terms of the order passed by the Magistrate are in violation of S. 147 according to which an order in the nature of a mandatory injunction ought not to be passed.

As to the likelihood of a breach of the peace, the Magistrate has in my opinion given good reasons for thinking that there was such likelihood. Proceedings were started on 27th December 1928 by an application by the petitioner in the Magistrate's Court for action under S. 144. The counter-petitioners sought to defeat that petition by the plea that the apprehended obstruction to the water-course was already completed, but the petitioner represented that such was not the case. Thereupon on 19th February 1929, a preliminary order under S. 147 was passed, the previous order under S. 144 being vacated. In these circumstances the Magistrate was justified in thinking that the danger of a breach of the peace was not over.

As to the right of the petitioner to the flow of water down this channel, it was not necessary for the Magistrate to find that a right of easement strictly so called was established. S. 147 says, "whether such right be claimed as an easement or otherwise." All that he had to find, and which he has in fact found, is that the petitioner had been for a long time using the water flowing down this channel and had in fact used it during the last monsoon.

The last is perhaps the most important objection and arises upon the form of words, used by the Magistrate in framing the order, which I have already set forth at the beginning of this judgment. To the first portion no objection can be taken because it merely prohibits the counter-petitioners from putting up any bunds across the channel in their field. But objection is taken that the latter half of the order, where it prohibits interference with the petitioner's removing the obstructions already put up, amounts really to an order requiring the counter-petitioners to remove the bund which they have already put up

and this, it is contended, the Magistrate has no power to do. This portion of the order as it stands indicates that the Magistrate thought that the petitioner might lawfully remove any portion of the bund which was obstructing the flow of the water and that he intended to prevent the counter-petitioners from interfering with the petitioner in exercising such right of removing the obstruction. The order does not really require the counter-petitioners to do anything. All that it says is that if the petitioner removes the obstruction, the counter-petitioners are to do nothing. I think this form of order is unsuitable, if not objectionable, if for no other reason than that it is likely to produce a recurrence of breach of the peace which such orders are intended to prevent. It contemplates the petitioner going upon the counter-petitioner's land and removing the bund and it requires the counter- petitioners to let him do so without hindrance. Such a situation is easily capable of producing a breach of the peace. That portion of the order therefore requires amendment.

But I will first deal with the objection of the learned advocate for the petitioner here (counter-petitioner below) that an order in the nature of a mandatory injunction must not be passed under S. 147. For this reliance was placed upon a decision of a Bench of the Calcutta High Court in *Hari Mati Dasi* v. *Hari Dasi Dasi* (1). In that case the first party complained that the second party raised a wall on her own land blocking the windows of the house of the first party thereby shutting out light and air from the rooms of the house. The Magistrate having found that light and air was obstructed as alleged made an order upon the second party that she should demolish the new wall within a period of one month. The learned Judges said that sub-S. 2, S. 147, does not give the Magistrate any power of directing one of the parties to do a positive act by way of a mandatory injunction directing him to demolish the wall built by her, and they further said that the power given under S. 147 (2) is analogous to the power of a civil Court to grant a temporary injunction. Against that decision of the Calcutta High Court, there is the decision of a Bench of this Court in *Karuppanna Goundan* v. *Kandasami Goundan* (2). In that case a pathway had been obstructed and the Magistrate had ordered that the obstruction, which was a fence, should be removed by the party who had put it up. The point being raised that that order was incorrect on the same ground as that now urged for the petitioner here, this Court held, after referring to two earlier decisions of this Court that such an argument was not maintainable. Their Lordships said that they were not prepared to follow those decisions if it was intended to decide therein that the fact that S. 133, Criminal P. C., expressly provides for an order by the Magistrate directing the removal of obstruction to pathways necessarily implies that a similar order cannot be passed in proceedings taken under S. 147, Criminal P. C. This decision of a Bench of this High Court is binding upon me. But it is said that that decision was given under the old Criminal Procedure Code and that S. 147 as amended in 1923 makes such an order illegal though it may have been possible under the old Code. With that argument I cannot agree.

Section 147, Criminal P. C., before it was amended in 1923, dealt, like the present section, with disputes concerning the right of use of any land or water and it enabled the Magistrate, if such right was found to exist, to make an order permitting such a thing to be done or directing that such a thing should not be done. The corresponding provision of the section as it now stands is that if a dispute exists "regarding any alleged right of user of any land or water" the Magistrate is empowered on his being satisfied about the existence of such a right, whether it be claimed as an easement or otherwise, to "make an order prohibiting any interference with the exercise of such right." The order under the old section was directed to the person alleging that he was entitled to the right. The order under the new section is, where the right exists, directed to the person who is interfering with the right. Such an order is valid so long as it merely prohibits the interference with the exercise of the right. I do not see how from this difference

(1) A.I.R. 1925 Cal. 991=88 I.C. 1041=26 Cr.L.J. 1265.

(2) [1914] 15 Cr.L.J. 362=23 I.C. 730.

any inference is to be derived as to the propriety or otherwise of what may be generally called mandatory injunctions. Indeed Form No. 24, Sch. 5, Criminal P. C., seems rather to favour the argument that what might in effect amount to a mandatory injunction is permissible. In that form, in para. 2, the words of the order that the Magistrate may pass are :

"I do order . . . shall not take (or retain) possession of the said land (or water) to the exclusion of the enjoyment of the right of use aforesaid."

That form is applicable to the use of land or water and it contemplates an order against a person who has interfered with another man's use of land or water that he shall not retain possession of that land or water in violation of that user. In one sense it may be said that that is a mandatory injunction because it requires the person enjoined to give up possession to the other party. I do not see what objection can be raised to using the same form as against a person who has put up an obstruction to the flow of water to which another man is entitled, modified in the following way.

"I order that . . . shall not retain any obstruction to the flow of water along the said channel to the exclusion of the enjoyment of the right of user of . . ."

or words to that effect; or alternatively,

"I order that . . . shall not retain possession of the said water to the exclusion of the enjoyment of the right of user of . . ."

Either form would amount to the same thing in effect and involve upon the person enjoined the removal of any obstruction which he had put up. I am therefore unable to say that the amendment of S. 147 has had any effect in so far as making the decision in *Karuppanna Goundan* v. *Kandasami Goundan* (2) inapplicable.

As however the form of order used by the Magistrate is not suitable, that order will be amended by omitting the words

"from interfering with the petitioner's removing the obstructions already put up"

and substituting therefor the words

'from retaining any obstruction to the petitioner's use of the water flowing along the channel in their field."

With this amendment the petition is dismissed.

P.R.S./P.N. *Order accordingly.*

A. I. R. 1930 Madras 867

SUNDARAM CHETTY, J.

(*Velivalli*) *Brahmaiah* and *others* — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 990 of 1929 and Criminal Revn. Petn. No. 893 of 1929, Decided on 23rd July 1930, from order of First Class Bench Magistrate, Guntur.

(a) Criminal P. C. (1898), S. 265—Judgment of Bench of Magistrates must be signed, i. e. not merely initialled but full name of Magistrate must be written—If one of Magistrates of Bench merely initials, that irregularity cannot be cured by Criminal P. C., S. 537.

A judgment of a Bench of Magistrates has to be signed as required by law and the requirements of public policy necessitate the writing of the full name of the Magistrate who signs the judgment and the mere putting in of the initials is not a sufficient compliance with the mandatory provisions of S. 265 of the Code. Where one of the three Magistrates of a Bench merely initials instead of signing his name, the irregularity cannot be cured by S. 537 : 25 *Cal.* 911; 32 *I. C.* 393; 23 *Cal.* 896 and *A. I. R.* 1926 *Mad.* 827, *Rel. on.* [P 868 C 1,2]

(b) Criminal P. C. (1898), S. 265—Copies of judgments of Bench Magistrates—Signature of presiding Magistrate alone copied—Copies are incorrect—(*Obiter*).

If, when copies of the judgments of Bench Magistrates are taken, the signature of the presiding Magistrate alone is copied omitting the signatures of the other Magistrates, such copies are incorrect. (*Obiter*). [P 868 C 2]

V. Pattabirama Sastri—for Petitioners.

K. Venkataraghavachariar for *Public Prosecutor*—for the Crown.

Order.—This is a petition by accused 1 to 3 against the conviction and sentence of fine passed by the First Class Bench at Guntur. The charge against these accused was under Ss. 504 and 352, I. P. C. Apart from the merits of the case, one objection that is taken against the legality of the conviction is, in my opinion, sufficient to set it aside. It is clear from the register of summary trials, maintained by the aforesaid Bench, that the judgment has in fact been signed only by two of the three Magistrates who heard and decided the case, the other having only initialled it. The mandatory provision in S. 265, Criminal P. C., is to the effect, that

"a judgment shall be signed by each member of the Bench present taking part in the proceedings."

There is no definition of the word "sign" in the Criminal Procedure Code. The word "signing" has been inter-

preted in some judicial decisions and that meaning can be safely adopted for purposes of the present case. In the two decisions of the Calcutta High Court, namely *Nirmal Chunder Bandopadhaya* v. *Saratmoni Debya* (1) at p. 915 and *Mohatarsha Bankapore* v. *Secy. of State* (2), the word "signing" has been taken to mean the writing of the name of the person who is the signatory, so that it may convey a distinct idea to others that the writing indicates a particular individual whose signature it purports to be. This question was considered in the first case in respect of a will, and in the other case as regards a risk-note to be signed and delivered to the Railway Company. In another Calcutta case, namely *Abdul Gafur* v. *Queen-Empress* (3), the same question arose in connexion with a warrant of arrest issued by a criminal Court. That warrant was not signed by the Magistrate as required by S. 75, Criminal P. C., but it bore only his initials. The legality of the warrant so issued was questioned and it was held that the warrant was not signed as required by law. In view of this defect and some other defect pointed out in that judgment it was held that the person obstructing the execution of such a warrant could not be convicted under S. 186, I. P. C. In a decision of this Court reported in *Lakshmanacharyulu* v. *Venkataramanujacharyulu* (4) it was held that for purposes of a valid acknowledgment under S. 19, Lim. Act, initials are not equivalent to signature. Though there is no direct authority in respect of the word "signed" occurring in S. 265, Cl. 2, Criminal P. C., the meaning attached to that word in the aforesaid decisions can well nigh be applied to it. A judgment of a Bench of Magistrates has to be signed as required by law and the requirements of public policy necessitate the writing of the full name of the Magistrate that signs the judgment, and the mere putting in of the initials is not, in my opinion, a sufficient compliance with the mandatory provisions of S. 265 of the Code.

In this connexion it must be considered whether the initialing by one of the Magistrates in the judgment in question, instead of signing, is only an irregularity which can be cured under S. 537, Criminal P. C. In the old Code, an illustration was added to S. 537 as follows:

"The Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity and does not affect the validity of the proceedings."

But in the amended Code this illustration is omitted. The repeal of this illustration in the amended Code clearly indicates that the legislature no longer views the defect pointed out in the aforesaid illustration, as a mere irregularity not affecting the validity of the proceeding. The inference from the omission of this illustration is that the defect affects the validity of the proceeding and vitiates the conviction and sentence.

In the case of trials by a Bench of Magistrates, the practice of some of the Magistrates not signing the judgments or putting in merely their initials instead of the full signatures is to be deprecated. There seems to be also another practice, namely that when copies of such judgments are given, the signature of the presiding Magistrate alone is copied, omitting the signatures of the other Magistrates (as was done in this case). Such a copy is obviously an incorrect one and it is inconceivable why the copy should be defective in this important particular. It is hoped that in future the Benches of Magistrates would strictly follow the mandatory provisions of the Code in the matter of signing judgments.

For these reasons stated by me, the conviction and sentence are vitiated by non-compliance with the mandatory provisions of S. 265, Criminal P. C. The conviction and sentence have therefore to be set aside.

But in the circumstances of this case it seems to me that the ordering of a retrial is useless and not in furtherance of public interests. I may also point out that though the offences complained of in the present case fell under Ss. 504 and 352, I. P. C. (as shown by the register), the conviction was under S. 323. There is absolutely nothing in the judgment to show how the accused could be convicted for hurt under S. 323, while the finding seems to be that their guilt was under Ss. 504 and 352. In the re-

(1) [1898] 25 Cal. 911=2 C. W. N. 642.
(2) [1916] 32 I. C. 393.
(3) [1896] 23 Cal. 896.
(4) A. I. R. 1926 Mad. 827=96 I. C. 700.

sult the revision petition is allowed and the conviction and sentence are set aside. The fine, if levied, will be refunded to the petitioners.

P.R.S./S.N. *Conviction set aside.*

A. I. R. 1930 Madras 869

PANDALAI, J.

Thadi Subbi Reddi—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 59 of 1930, Decided on 27th February 1930.

(a) Criminal P. C (1898), S. 195 — Registrar, Co-operative Society, is a Court with regard to suits before him.

The Registrar, before whom a Co-operative Society files its suit, or its claim for enforcing a bond, is a "Court" within the meaning of S. 195 : 45 *Cal.* 585, *Rel. on.* [P 870 C 1]

(b) Criminal P. C. (1898), (as amended in 1923), S. 195 (c)—Use of forged document as genuine prior to proceedings before Court —Complaint of Court before whom document was filed is necessary.

Even where the use as genuine of a forged document under S. 471, I. P. C., is prior to the proceedings before the Court, the complaint of the Court before which that document was filed or used is necessary under S. 195 : 39 *Mad.* 677 ; *A. I. R.* 1925 *Bom.* 433 ; 1925 *Lah.* 266 and 1926 *All.* 30, *Rel. on.* [P 870 C 1]

(c) Practice—Precedents.

Where there are decisions of a High Court, it is the duty of Courts subordinate to that High Court to be guided by them rather than by the decisions of other High Courts. [P 870 C 1]

D. Suryaprakasa Rao—for Petitioner.

Parakot Govinda Menon for *Public Prosecutor*—for the Crown.

Order.—This is a reference under S. 215, Criminal P. C., by the Assistant Sessions Judge of East Godaveri requesting this Court to quash the committal under S. 213 to that Court of the respondent Thadi Subbi Reddi. The respondent was the President of a Co-operative Society. Another person who was committed along with him to the lower Court was the Secretary of the same Society. They and three other people were charged with having got up a bond for Rs. 750 purporting to be executed by one Karri Venkatareddi in favour of the Society, the respondent Subbi Reddi signing it as a surety. The respondent and the Secretary are alleged to have, after putting this upon the record of the Co-operative Society, handed it over to their successors when they left the office on 2nd November 1928. When the new President filed a suit on the bond before the Assistant Registrar against Karri Venkatareddi, the alleged maker, and the respondent as surety, Karri Venkatareddi brought a criminal complaint of forgery against the respondent, the Secretary, and three others. The respondent and the Secretary were also charged with having used the bond knowing it to be a forgery by handing it over to their successors in office. The Magistrate committed the five accused.

In the Sessions Court the charge of forgery was ordered to be dealt with separately from the charge of using a forged document as genuine, because the latter charge only affected the respondent and the Secretary, whereas the former affected all the five accused persons. But in the Sessions Court it was discovered that, the bond having been filed before the Assistant Registrar for the purpose of the suit, the case of forgery against the respondent, and of using the document as a genuine document against the respondent, could not proceed for want of the necessary complaint under S. 195, Criminal P. C. As the trial on the forgery section had begun the learned Sessions Judge discharged the respondent in that case relying upon certain decisions which show that that is the proper course when the defect is discovered after the trial has begun. But the trial under S. 471 against the respondent not having actually commenced he has reported the matter to this Court for the committal being quashed.

The two questions which arise are: (1) whether the Assistant Registrar before whom the Co-operative Society has filed its suits or its claim for enforcing the bond is a Court within the meaning of S. 195, Criminal P. C. ; and (2) if so, whether the fact of the alleged use of the document having been before the institution of that suit, S. 195 (c) applies to the case at all.

On the first question, Cl. (2), S. 195, as amended in 1923, states that in Cls. (b) and (c), sub-S. (1) of the same section the term "Court" includes a civil, revenue or criminal Court, etc. It has been held that the term "Court" in this section has a wider meaning than the expression "Court of Justice" in the Penal Code and includes a tribunal entitled to deal with a particular matter and authorized to receive evidence bearing thereon in order to enable it to arrive at a determination upon the question : vide

Nanda Lal Ganguli v. *Khetre Mohan Ghose* (1). According to R. 14 of the Rules made by the Local Government in pursuance of S. 43 (1), Co-operative Societies Act, the Registrar to whom a dispute touching a debt due to a society by a member is referred has power to administer oaths, to require the attendance of all parties concerned and of witnesses, and to require the production of all books and documents relating to the matter in dispute. By the same rule the Registrar is required to give a decision in writing, and when it is given the decision may be enforced on application to the civil Court having jurisdiction over the subject-matter of the decision as if it were a decree of Court. The Registrar acting under this R. 14 falls clearly within the description of 'Court' given in the decision cited and I therefore hold that the Assistant Registrar before whom the suit was filed was a Court. On the second question the learned Sessions Judge has referred to *In re Bhan Vyankatesh* (2), *Khairati Ram* v. *Malawa Ram* (3) and *Kanhaiya Lal* v. *Bagwan Lal* (4), to show that, even where the use as genuine of a forged document under S. 471 is prior to the proceedings before the Court, the complaint of the Court before which that document was filed or used is necessary under S. 195. But there is a decision of our own Court to the same effect; and where there are decisions of this Court it is the duty of subordinate Courts to be guided by them rather than by the decisions of other High Courts. In *in re, Perameswaram Nambudri* (5) with respect to a case which fell under S. 195(b) it was held that

"it [Cl. (b)] aims at doing so by providing that where, prior to the institution of the criminal prosecution, a properly constituted judicial tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the criminal Court should decline cognizance unless that tribunal has, in effect, certified that in its opinion the complaint is one worthy of investigation."

Cases under S. 195 (c) are as regards this matter on exactly the same footing as those which fall under Cl. (b). If anything, the matter has been put beyond controversy by the wording of Cl. (c) as amended which is:

"when such offence is alleged to have been committed by a party to any proceeding in any Court, etc."

The word "alleged" shows that the use complained of may be before the proceedings in Court commenced. It follows that a complaint by the Assistant Registrar was in this case necessary before any Court could take cognizance of the charge under S. 471 against the respondent. The whole of the proceedings therefore before the Magistrate were incompetent and the commitment by him must therefore be and hereby is quashed.

P.R.S./S.N. *Commitment quashed.*

(1) [1918] 45 Cal. 585=19 Cr. L. J. 315=44 I. C. 331.
(2) A. I. R. 1925 Bom. 433=91 I. C. 245=27 Cr. L. J. 69=49 Bom. 608.
(3) A. I. R. 1925 Lah. 266=85 I. C. 377=26 Cr. L. J. 537=5 Lah. 550.
(4) A. I. R. 1926 All. 30=89 I. C. 1053=26 Cr. L. J. 1485=48 All. 60.
(5) [1916] 39 Mad. 677=16 Cr. L. J. 721=31 I. C. 161.

A. I. R. 1930 Madras 870

WALLACE AND JACKSON, JJ.

Chinna Gangappa—Appellant,

v.

Emperor—Opposite Party.

Criminal Appeal No. 640 of 1929, Decided on 8th April 1930.

(a) Penal Code (1860), Ss. 201 and 203—Person not free from suspicion of actual murder, though acquitted, can none the less be convicted under Ss. 201 and 203.

There is no misjoinder in charging an accused in the alternative with the main offence and under Ss. 201 and 203, nor is there anything irregular or improper in a Judge holding that, while the accused, though acquitted, is himself not free from the suspicion of being the actual murderer, he can be nonetheless convicted under Ss. 201 and 203: (1908) *P. R. Judl. Crl. Jud.* 1, *Foll.*; 8 *Bom. H. C. R.* 126; 2 *All.* 713; 8 *All.* 252; 22 *Cal.* 638; 4 *Cr.L.J.* 89, *not Appr.*; 46 *Cal.* 427 and *A. I. R.* 1923 *Bom.* 262, *Rel. on.* [P 872 C 2]

(b) Penal Code (1860), S. 201—Factors.

For the purposes of calculating the punishment to be awarded under S. 201, it is necessary for the Court to decide, not so much what offence, the evidence of which has been concealed has been committed, as what offence the accused knew or had reason to believe had been committed. Where, therefore, a person himself charged but acquitted of the actual crime, is convicted under S. 201 the Court must treat him as a stranger to the crime, as one who had merely witnessed it, while calculating the sentence to be passed. [P 873 C 1]

V. L. Ethiraj and *M. C. Sridharan*—for Appellant.

Public Prosecutor—for the Crown.

Judgment.—The appellant has been convicted by the learned Sessions Judge of Bellary under S. 201, I. P. C., for giving false evidence about the murder

of his wife in order to screen the real offender, and also under S. 203 for giving false information about the murder. He was also himself charged with the actual murder of his wife, but was acquitted on that. The facts of the case briefly were: On 12-8-1929, at about 10 a. m., the deceased woman took food to her husband. P. W. 4 saw her there. He next saw her being carried in an unconscious state by the accused and his brother towards her house. P. W. 5 saw people in her house applying restoratives to her, while the accused and his brother were giving out that the woman had been stung by a scorpion or bitten by a snake. She died at 4 p. m., The accused himself made the report to the Village Munsif (P. W. 6), saying that he suspected that she had been stung. The woman's father (P. W. 8) was suspicious and reported to the police who sent the body for post-mortem. The Medical Officer, P. W. 1, found on the body four contusions, three of them on the skull, and on dissecting he found there had been cerebral haemorrhage. He was of opinion that that was the result of blows by sticks or stones on the head. He found no signs or symptons of poisonous bite or sting.

The charge of murder was not pressed against the accused in the trial Court and the learned Sessions Judge held that the evidence did not prove that it was the accused who inflicted the injuries on his wife. He held, however, that he must have known who inflicted them on his wife and that his story to the Village Munsif was a false one, intended to screen the real offender. He, therefore, convicted him under Ss. 201 and 203, I. P.C. The learned counsel for the defence raises a point of fact and a point of law. The point of fact is that as the injuries on the woman were hidden under her hair the accused did not genuinely know that she had been assaulted. But we do not think that there is any substance in this. For, the woman having been assaulted, the accused's story that she cried out she had been stung cannot be true. She must have cried out that she was being beaten and accused must have known that.

The point of law is that unless the Court is satisfied beyond reasonable doubt that accused was not himself the murderer, he cannot be convicted under Ss. 201 and 203. This rests upon a proposition, affirmed in several rulings of various High Courts, that Ss. 201 and 203, I. P. C., have no application to the person who actually committed the main offence mentioned in the sections, and that the person who committed the main offence cannot be himself found guilty of causing evidence of that offence to disappear or of giving false information about it. The earliest pronouncement on this point was in 1871 in a case, *Reg* v. *Kasinath Dinkar* (1), and this ruling has been followed, mostly without discussion or comment as if the proposition were self evident in various other cases: cf. *Empress of India* v. *Kishna* (2); *Queen-Empress* v. *Dungar* (3); *Torap Ali* v. *Queen-Empress* (4) and *Emperor* v. *Ghansham* (5). The only pronouncement of this High Court on this subject which has been traced, is in a parenthesis and obiter dictum at p. 277 of *Ramaswami Goundan* v. *Emperor* (6). Nowhere is the ratio decidendi of *Reg* v. *Kashnath Dinkar* (1) examined. It seems to us to rest on a petitio principii. The reason given is that:

"as there is no law now which obliges a criminal to give information which would convict himself, it is evident that Ss. 202 and 203 could not apply to a person who committed that offence, that is, the offence which he knew had been committed."

Obviously if there is no law to that effect then Ss. 202 and 203 will not apply. The question rather is whether Ss. 201 to 203 do not embody such a law. On the face of them there is nothing to show that they do not apply to the main offender himself. S. 44, Criminal P. C., which is the general section relating to the duty of persons to give information about grave offences including murder, and S. 45 (d) of that Code which lays on any owner or occupier of land the duty of giving information regarding the occurrence in his village of any sudden or unnatural death, do not in terms exclude the offender himself. These sections of the Criminal Procedure Code would be relevant in a case under S. 202, I. P. C. where it is necessary that the accused should be

(1) [1871] 8 B. H. C. R. 126.
(2) [1880] 2 All. 713.
(3) [1986] 8 All. 252=(1886) A. W. N. 71,
(4) [1895] 22 Cal. 638.
(5) [1906] 4 Cr. L. J. 89.
(6) [1904] 27 Mad. 271.

legally bound to give information regarding the offence but even this qualification does not appear under S. 201 or S. 203. What is required there is merely that there should have been an offence and that the accused has given false information about it, with the added intention in the case of S. 201, I. P. C. of screening the offender. We cannot therefore see wherefrom comes the proposition which is the foundation of *Reg* v. *Kashinath Dinkar* (1), that there is no law which obliges a criminal to give information which would convict himself. There is such a law in the case of grave offences and sudden deaths, and in theory the offender himself could be convicted for breach of that law under Ss. 201 to 203, I. P. C. In practice, no doubt, if he has been convicted of the offence itself, no Court will think it worth while to convict him also under Ss. 201 to 203, I. P. C. If the proposition laid down in *Reg.* v. *Kashinath Dinkar* (1) is carried to its logical conclusion it would appear that it is improper to try an accused person, as the present accused has been tried, in the same trial under both Ss. 202 and 201, I. P. C., because a perfect defence to S. 201 would be a plea and proof that he himself was the murderer, and an accused would be entitled to say that the plea he proposes to make to the charge under S. 201 will depend on whether he is acquitted or convicted of the principal offence; and that to call upon him to plead to the charge under S. 201 before and until he knows what the verdict of the murder charge is would be to deprive him of his legitimate defence. It would also in a case where the Court regards proof of his complicity in the actual offence is insufficient to establish his guilt, compel the Court to let him go free, even though it is satisfied that he gained his acquittal on the main offence by his own concealment of the traces of the crime. This was exactly what happened in the *Bombay H. C. R.* case, and it is hardly compatible with justice that the actual offender should escape conviction under Ss. 201 to 203 because he is the actual offender in the main crime, while those who merely witnessed it but gave false information about it are punishable under Ss. 201 and 203. This means that the more successful a criminal is in concealing his own offence the more the law will assist him in escaping justice altogether, and unless the Court holds without reasonable doubt that the accused did not take part in the murder the Court is bound to give him the benefit of doubt and acquit him of offences under Ss. 201 to 203. The case reported in *Torop Ali* v. *Queen-Empress* (4) is another practical example of how justice is defeated by such a theory of the law.

The true principle seems to be that there is no law preventing the main offender being convicted under Ss. 201 to 203, but in practice no Court will convict an accused both of the main offence and under these sections. But if the commission of the main offence is not brought home to him, then he can be convicted under Ss. 201 to 203. Therefore there is no misjoinder in charging an accused in the alternative with the main offence and under Ss. 201 and 203, I. P. C., nor is there anything irregular or improper in a Judge holding, as the learned Sessions Judge has done in this case, that, while the accused is himself not free from the suspicion of being the actual murderer, he can be nonetheless convicted under S. 201 or S. 203. This position is not without authority, though, as noted above, most of the reported cases have followed *Reg* v. *Kashinath Dinkar* (1). Most of these rulings have been considered in a judgment of the Punjab Chief Court in 1903. In *Buch* v. *Emperor* (7), wherein it was held that an accused acquitted of the charge of committing a crime can be convicted under S. 201 in respect of the offence "with the commission of which he is no longer charged or liable to be charged;" and the mere suspicion that an individual is the actual murderer, or the facts that he has even had his trial and been acquitted of the offence of murder will not prevent his conviction under S. 201. A mere suspect or an acquitted accused is not in the eyes of the law an offender within the meaning of S. 201. The reported ruling in *Taprinessa* v. *Emperor* (8) is practically to the same effect, and also the ruling of a Bench of the Bombay High Court in *Hanumanapa Rudrappa* v. *Emperor* (9). Therefore

(7) [1903] 39 P. R. Judl. Cr. Jud. 1.
(8) [1919] 46 Cal. 427=19 Cr. L. J. 909.
(9) A. I. R. 1923 Bom. 262=82 Cr. L. J. 1349.

there is no illegality in the conviction under Ss. 201 and 203.

This does not however conclude the case. It is clear that for the purpose of calculating the punishment to be awarded under S. 201, it is necessary for the Court to decide, not so much what offence the evidence of which has been concealed has been committed as what offence the accused knew or had reason to believe had been committed. So it was necessary to believe, on the assumption that the accused did not commit the main offence because he has not been convicted of that, what offence he believed or knew to have been committed. The Court must treat him as a stranger to the crime, as one who had merely witnessed it.

From that point of view we cannot on the evidence say that more is proved than that the accused knew that someone had hit his wife and that she had died in consequence. We are unable to conclude that he knew that the person who struck her had the criminal intention of killing her. It must have been clear however to the accused that his wife had died as a result of the blows given and that she at least suffered grievous hurt, and that is punishable under S. 325, I. P. C. with imprisonment for seven years. Under S. 201 the accused is then liable to be sentenced to a maximum of one-fourth of that seven years. The learned Sessions Judge has sentenced the accused to rigorous imprisonment for five years. At the most he can be sentenced to one year and three-fourths. We think that it will be sufficient if he undergoes rigorous imprisonment for one year and we reduce the sentence accordingly.

P.R.S./S.N. *Sentence reduced.*

A. I. R. 1930 Madras 873

PANDALAI, J.

In re Appasamy Mudali—Petitioner.

Criminal Revn. No. 472 of 1930 and Crim. Revn. Petn. No. 436 of 1930, Decided on 28th July 1930.

Criminal P. C., (1898), S. 117—Joint inquiries under S. 117 are not illegal even where part of inquiry is under Criminal P. C. (1898), S. 110, Cl. (f).

Joint inquiries under S. 117 are not illegal even where part of the inquiry is under Cl. (f), S. 110. The evidence of reputation admitted against the several persons should of course not be against each accused separately but against them all together : *A. I. R.* 1925 *Mad.* 189 and 27 *Cal.* 781, *not Foll.*; *A. I. R.* 1923 *Cal*, 35 *Rel. on.* [P 873 C 1]

P. Viswanatha Ayyar—for Petitioner.

Order.—It is urged that the joint trial of the petitioner with two other persons who did not appeal to the Sessions Judge and have not applied to this Court was illegal. The allegation against them was that all the three of them were together associated in a course of criminal conduct such as to bring them under Cls. (a). (d), (e) and (f), S. 110, Criminal P. C. In such cases S. 117 (5) clearly gave the Magistrate, if he thought it just, the power to deal with all the accused in the same inquiry. But it is said that joint inquiries under S. 117 are not legal where part of the inquiry is under Cl. (f), S. 110, and for this the decision *In re: Kutti Goundan* (1), which itself cites *In Hari Telang* v. *Queen-Empress* (2), is relied upon. There is a sentence in the latter decision which is incorporated into the former to the effect that there can be no connexion between them (the accused) in regard to their characters so as to make them dangerous persons. But this was not the ground of decision in those cases which were decided on the ground that where several accused are being jointly tried under S. 110 evidence of misdeeds against each of them singly should not be admitted against the others as this will naturally prejudice these orders. And Walsh, J., makes this clear in *Emperor* v. *Angu Singh* (3) (at p. 111 *of* 45 *All.*). More than this, I think none of the cases cited before me go to show and I find myself unable to agree to the general proposition that where proceedings are taken under S. 110 (f) several persons should not be dealt with together. The evidence of reputation admitted against them should of course not be against each accused separately but against them all together. In this case, as the judgment of the learned Sessions Judge shows, the evidence was clear that the petitioner along with the other two men were pursuing a course of extortion and terrorizing, for which they were all equally responsible and on which they had jointly earned the evil reputation

(1) A. I. R. 1925 Mad. 189=86 I. C. 49.
(2) [1900] 27 Cal. 781=4 C.W.N. 531.
(3) A. I. R. 1923 All. 35=45 All. 109.

to which several respectable witnesses spoke. I can see no error or irregularity in the trial. The petition is dismissed.

P.R.S./S.N. *Revision dismissed.*

✻ A. I. R. 1930 Madras 874

KUMARASWAMI SASTRI AND WALSH, JJ.

Imperial Bank of India—Appellant.

v.

V. P. Avanasi Chettiar—Respondent.

Appeal No. 87 of 1926, Decided on 29th October 1929.

(a) Negotiable Instruments Act (1881), S. 59—Promissory note for reducing liability.

A promissory note given for reducing liability only operates as a conditional discharge for the liability: 10 *I. C.* 118; 26 *Mad.* 526 and *A. I. R.* 1926 *Mad.* 792, *Ref* [P 878 C 1]

✻(b) Contract Act (1872), S. 61—Appropriation of particular amount without notice of such appropriation can be re-appropriated.

So long as notice had not been given as to the appropriation of any amount to any particular accouut, it is open to the creditor to alter it and make re-appropriation: *A. I. R.* 1929 *Mad.* 792 *Foll.* [P 878 C 2]

(c) Contract Act (1872), Ss. 142 and 143—Guarantee in favour of bank and fiduciary guarantee distinguished.

There is a difference between fiduciary guarantees and guarantees by persons in favour of banks and that though in the former case there may be a duty to disclose all material acts there is no such duty in the case of a bank which takes a guarantee from a person to disclose the indebtedness of the person guaranteed at the date of the guarantee; where, therefore a person stands surety for another as regards an advance to be made by a bank, the bank is under no obligation to disclose any post indebtedness existing at the date of the contract of suretyship and that it is a matter which the person standing as surety has to inform himself, If, of course, he wanted information and the bank gave wrong information it might vitiate contract of suretyship: 15 *Bom.* 585, *Ref.* (*English cases discussed*). [P 879 C 1; P 880 C 2]

✻(d) Provincial Insolvency Act (1920), S. 7—Filing of petition would not amount to proof or admission of debts due.

The mere filing of the insolvency petition would not amount to proof or admission of the amount due. That has to be proved in subsequent proceedings. [P 881 C 1]

Morseby & Co.—for Appellant.

K. P. M. Menon—for Respondent.

Judgment.—The plaintiff is the appellant. This appeal arises out of a suit filed by the plaintiff to recover Rs. 10,053-1-0 with further interest and costs claimed to be due in respect of a guarantee by the defendant guaranteeing payment of the sums that may be due by a firm which carried on business in the name of N. Nanchappa Chettiar. It is stated in the plaint that one N. Nanchappa Chettiar and two others N. Krishnappa Chettiar and T. N. Krishnappa Chettiar were carrying on business in partnership under the name and style of N. Nanchappa Chettiar at Olavakkod; that this firm required on overdraft to the extent of Rs. 10,000 and that this transaction was put through by the bank on the guarantee of the defendant

The form that the guarantee took was the execution of a promissory note in favour of the firm by the defendant for Rs. 10,000 on 15th March 1923, the endorsement of the note to the bank and the passing of a letter on the same date in which the terms of the guarantee are set out. The plaint sets out various transactions in paras. 5, 6, 7, 8 and 9. It says that Rs. 10,000 was given, that under a loan account in the name of the said firm a sum of Rs. 2,334-1-0 was due to the bank after giving credit for Rs. 2,935-14-0 the proceeds of three bills, that these bills were not honoured and the bank debited the amount in the current account of the said firm, that the current account of the said firm including the amount of the three bills showed a balance of Rs. 8,203-4-5, that the amount due by the defendant (firm) in respect of both the loan and current accounts was Rs. 10,537-5-5 at the date of the suit and that demand was made on the guarantor (defendant), but he did not pay the amount. The plaintiff filed an additional statement stating that Rs. 2,072-1-10 was received in respect of another guarantee by one Rengaswami Pillai and that the amount to be paid by the defendant was only Rs. 8,465-3-7, and praying that the amount claimed might be amended accordingly. According to the statement the plaintiff's claim was for Rs. 8,470-10-7 (Rs. 8,465-3-7 plus Rs. 5-7-0 costs of lawyer's notice to the defendant). The defendant filed a written statement admitting that the persons mentioned in para. 3 (1) of the plaint were trading as partners at Olavakkod, that on 15th March 1923 the defendant executed a promissory note in favour of Nanchappa Chettiar Krishnappa Chettiar payable on demand at the Imperial Bank, Calicut, and that the said pro-

missory note was endorsed over to the plaintiff bank. He however denies that the note was endorsed over as cover for the payee's liabilities to the bank to the extent of the promissory note amount, that he ever executed to the bank any letter of guarantee containing the agreements mentioned in the said paragraph and that he ever agreed to be a continuing security and guarantee to the extent of Rs. 10,000 which the firm may owe to the bank under any account. Then he says that even if he signed in any such document it is vitiated by fraud and misrepresentation and the bank cannot enforce the same, that he never put his signature to any agreement knowing that it contained the said terms and that even if he had executed any such guarantee it is invalid and it has not been acted upon. He further states that the plaintiff is estopped from relying on the guarantee or from enforcing it and the reason which he gives is that the liability of the defendant to the bank in respect of the indebtedness of Nanchappa Chettiar (to the bank) was the subject-matter of numerous letters between him (defendant) and the bank from 2nd April 1924 in none of which was the execution of any continuing guarantee by him mentioned by the bank, that in all those letters and the statements of accounts furnished to the defendant the dispute centred round the proceeds of bills credited on 28th January 1924 which the bank wanted him to pay once more and which he refused, that relying on those letters, he (defendant) took steps to realize the amount mentioned in them from Nanchappa Chettiar and that on no account could the bank hold him liable to any sum other than the amount shown in the (loan) account as the balance outstanding on that date. Then he says that the proceeds of the bills credited on 28th January 1924 could not be claimed from him (the defendant), and he puts the plaintiff to proof of the correctness of the amounts claimed.

The issues framed were:

(1) Did the defendant execute the letter of guarantee? If he did is it invalid?

(2) Was it accepted by the plaintiff bank?

(3) Is the Bank estopped from relying upon it in order to make the defendant liable?

(4) Are Nanchappa Chettiar and the Official Receiver necessary parties to the suit and is the suit not maintainable without their joinder?

The Subordinate Judge found all the issues except the last one in favour of the plaintiff. On Issue 1 his finding is that there is ample evidence that the guarantee form was purchased and duly executed; he finds that issue entirely against the defendant. His finding on Issue 2 is that the defendant duly executed Ex. A after knowing its contents. On Issue 3 he held that

"there is no estoppel in the case since the defendant has not been prejudicially affected by the letter of the bank except that he had to mention a low figure in his insolvency petition on which nothing appears to have been done yet."

On Issue 4 his finding is that neither the Official Receiver nor Nanchappa Chettiar is a necessary party to the suit. Issue 5 is what the Subordinate Judge speaks of as the main issue in the case. On that issue he finds that the bank is only entitled to recover from the defendant the sum of Rs. 2,334-1-0, the amount due under the loan account and he holds, for reasons given by him, that the amount due under the current account could not be recovered from him. Against the portion of the decree disallowing the claim in respect of the current account the present appeal is filed by the plaintiff.

The first question is as to whether Nanchappa Chettiar, in whose name the current account stands is the name of the firm or is a different entity from N. Nanchappa Chettiar Krishnappa Chettiar, in whose favour the promissory note was executed and endorsed over to the bank. On this point the evidence is all one way. In the plaint a distinct statement is made that the firm carried on business in the name of N. Nanchappa Chettiar and that the partners were N. Nanchappa Chettiar, Krishnappa Chettiar and T. N. Krishnappa Chettiar. This is not denied in the written statement. In para. 6 of the written statement the defendant says:

"This defendant begs to state that the liability of the defendant to the bank in respect of the indebtedness to the bank of the said Nanchappa Chettiar was the subject matter of numerous letters. . . . . ."

Even there he admits the indebtedness of Nanchappa Chettiar to the bank and the latter's claim in respect thereof. The evidence on the side of the

bank on this point is not contradicted by the evidence of the defendant. In fact the defendant in his evidence does not deny any of the statements made as regards the partners constituting the firm or the name of the firm under which it was carried on. Under these circumstances it seems to be clear that "Nanchappa Chettiar" is the name of the firm and that the guarantee letter extends to any account standing in the name of Nanchappa Chettiar.

The next question is whether the guarantee letter extends to past liability under the account which admittedly the bank had at the date of the guarantee headed "N. Nanchappa Chettiar in account with the Imperial Bank of India, Calicut," as appears from Ex. 17. In this connexion it is necessary to refer to the letter of guarantee, Ex. A, which has been found to have been signed by the defendant with knowledge of its contents. Ex. A is dated 15th March 1923 and runs as follows :

"In consideration of an overdraft for a sum of not exceeding Rs. 10,000 only to be opened by the Imperial Bank of India in favour of N. Nanchappa Chettiar Krishnappa Chettiar I have made and delivered to N. Nanchappa Chettiar, Krishnappa Chettiar one on demand promissory note, dated 15th March 1923, for a similar sum of Rs. 10,000 which promissory note the said Nanchappa Chettiar Krishnappa Chettiar has endorsed and delivered to you to be held by you as security for the repayment to you by N. Nanchappa Chettiar Krishnappa Chettiar of the amount of any advance of money which you have made or may make to N. Nanchappa Chettiar Krishnappa Chettiar or any balance of account which may now or hereafter be due by N. Nanchappa Chettiar Krishnappa Chettiar to you not exceeding the sum of Rs. 10,000. And I declare that it is intended that these presents shall be a continuing security and guarantee by me for such advances or balances not exceeding the said sum of Rs. 10,000 as may at any time be owing by N. Nanchappa Chettiar Krishnappa Chettiar to you unless and until the security and guarantee be revoked by me in writing, but any such revocation shall not affect any liability already incurred by me hereunder at the date of such revocation. And the balance of the said account which I hereby guarantee and in respect of which the promissory note had been deposited with you as aforesaid shall be the balance outstanding and due at any time by N. Nanchappa Chettiar Krishnappa Cehttiar to you for advances made from time to time notwithstanding that the original or any subsequent advance shall have been paid off and that fresh advances shall have been made or that the balance due at any particular date shall consist wholly or in part of such fresh advances or shall be the result of a series of transactions. And I agree to pay you any such balance at any time when called upon to do so, and I also agree to pay you interest on daily balances in the account of N. Nanchappa Chettiar Krishnappa Chettiar at your current rate for the time being, and in the event of the balance and interest hereinbefore referred to not being paid by N. Nanchappa Chettiar Krishnappa Chettiar on demand you shall be at liberty to give N. Nanchappa Chettiar Krishnappa Chettiar further time for payment without discharging me from my liability to you in respect thereof and you may at any time enforce payment of the said promissory note or recover the amount hereby secured from me."

It will be seen from this letter that the liability of the surety extends to the past and future transactions. The words:

"the amount of any advance of money which you have made or may make to N. Nanchaapa Chettiar Krishnappa Chettiar or any balance of account which may now or hereafter be due by N. Nanchappa Chettiar, Krishnappa Chettiar"

evidently contemplate past advances also. Further, the clause in the latter portion as regards liability :

"I agree to pay you any such balance at any time when called upon to do so and I also agree to pay you interest on daily balances in the account of, etc.,"

shows that balances were contemplated.

The defendant evidently must have been aware that this security was for past transactions also. He does not state that this particular clause was for some reason not read out to him or not explained to him ; on the contrary his case is that he never signed it and the documents were never explained to him at all. We must therefore take it on the finding that the letter was signed by him and explained to him and that this clause must have been brought to his notice. The probabilities also support this view, because we find that on the date on which this promissory note was executed and Ex. A was given a sum of Rs. 7,000 was paid into the current account headed "N. Nanchappa Chettiar;" and whereas on that date the account showed a debit balance of Rs. 4,199-10-0, the payment of this Rs. 7,000 which was borrowed on this promissory note made a credit balance of Rs. 2,800-6-0. The probabilities all point to the fact that the firm wanted to draw upon this current account when money was required and that this transaction was merely intended to enable the firm to got a loan from the bank.

which could be utilized in paying sums into the current account and converting a debit balance of Rs. 4,000 and odd into a credit balance of Rs. 2,800, to enable the firm to draw further cheques. On this point there can be little doubt that the defendant has not shown that he was not aware that he was rendering himself liable for any past amount that may be due under the account.

Then the question is: What amount was due? In this connexion two things have to be considered. There were three promissory notes executed by one Govindan Nair, all bearing the same date, 23rd January 1924, but maturing on different dates. Ex. F, one of them, is for Rs. 1,000, payable 70 days after date, executed in favour of N. Nanchappa Chettiar and it is signed by Govindan Nair. Nanchappa Chettiar endorsed it in favour of the Bank. The endorsement is signed "N. Nanchappa Chettiar by T. N. Krishnappa Chettiar" which we may say was the manner in which the promissory note for Rs. 10,000 was also endorsed suggesting that "N. Nanchappa Chettiar" was the name of the firm. The next note is Ex. F-1 for Rs. 1,000 payable 80 days after date. The third note, Ex. F-2, is for the same sum Rs. 1,000 payable 90 days after date. Both of them have been similarly endorsed over to the bank. The bank on getting these promissory notes treated the amount as paid towards the loan account and credited the firm with Rs. 2935-14 (Rs. 2823-9 principal and Rs. 112-5 interest) on 28th January 1924. These bills were presented for payment and dishonoured and they were noted for non-payment. When the bank was not able to realize these moneys it debited the current account with this Rs. 3,000. The effect of this was to reduce the balance in the current account proportionately and to swell the indebtedness of the firm. It is admitted that notices were sent to N. Nanchappa Chettiar (Exs. G-1 G-2) in April 1924 intimating that the bills have not been paid and that his account has been debited with the value of the bills and requesting him to place the amount in cash to the credit of his account and send a cheque in confirmation. This was not done and the bank had to make the entries already referred to. The bank also sent a notice to the defendant, Ex. 1, on 2nd April 1924 which runs as follows:

"In the matter of the interest loan granted to Mr. N. Nanchappa Chettiar on the security of your pro-note for Rs. 10,000 dated 15th March 1923, I have to advise that the obligants have not closed the account in spite of repeated reminders. I therefore now request you to make arrangements to close the account immediately, failing which I will be forced to place the matter in the hands of my vakil."

The defendant's reply to this is Ex. 4 which is as follows:

"In reply to your registered letter, dated 2nd April 1924, calling on me to make arrangements to close the account of the interest loan granted to Mr. N. Nanchappa Chettiar on the security of my pro-note for Rs. 10,000 dated 15th March 1923, I have the honour to point out that I understand from Mr. N. Nanchappa Chettiar that he has already paid the bank to the above account a sum of over Rs. 8,000 and that the balance now outstanding is about Rs. 1,000. Will you kindly furnish me with a copy of the account showing the various payments that have been made by the obligants to close the said account and oblige."

Then the bank wrote Ex. 5 in reply on 28th April 1924 directing the defendant to call at the bank's premises in connexion with the interest loan granted to Mr. N. Nanchappa Chettiar on the security of his pro-note. The defendant wrote Ex. 6 on 5th May 1924 stating that it would not be possible for him to go over to Calicut and asking for a copy of the accounts. Ex. 7 is the letter of the bank written on 9th May 1924 sending a statement of the account as it stood on 15th March 1924 for information and pointing out that Rs. 2,823-9-0 credited on 28th January 1924 represents the proceeds of the bills for Rs. 3,000 which were not paid and were past due. In Ex. 3, the statement of account, the balance is given as Rs. 2264-11-0 on 15th March 1924. Thereupon the defendant wrote Ex. 8 on 24th May 1924 disputing the correctness of the account and denying that the bank has any right to claim from him any amount in respect of the three promissory notes. Then, on 27th May 1924, Ex. 9 was written by the bank stating that the firm

"in order to reduce their loan account balance discounted bills on 28th January 1924 for Rs. 3,000 drawn by P.Govindan Nair, which on due dates were not taken up. By non-payment of these bills the balance of the loan account remains the same as it stood on 28th January 1924, viz. Rs. 5,000."

The letter also requests him to pay that amount with interest accruing. Then the defendant wrote Ex. 10 to the

bank saying that he could not comply with their request to pay Rs. 5,000 as the bank was not entitled to claim any sum in respect of these three promissory notes. Ex. 2 is the notice sent by the vakil on behalf of the bank. In this reference is made to the loan account and current account also and the amounts due thereunder and the letter of guarantee, and a claim is made for Rs. 10,000 with interest under the said guarantee. To this the reply is Ex. 11 which runs as follows :

"With reference to your registered letter No. 181 dated 16th June 1924, I have the honour to inform you that I do not remember to have executed and given to the Imperial Bank any letter of guarantee as stated therein. So I would request you to favour me with a copy of the said letter of guarantee on receipt of which I shall send a reply to the demand made on me by your letter."

Then the defendant again wrote Ex. 15-D which runs as follows :

"I received your letter, dated 1st July 1924. You know that I denied the letter of guarantee which you showed me when I came to your house, and I am quite surprised at your letter which you have sent me now which is quite contrary to it. I hereby inform you that your party will be held responsible for all the loss that I might incur for unnecessary litigation."

This letter shows that the defendant was shown the letter of guarantee and after having seen it he denied the execution of the guarantee.

The first question is whether in respect of these three promissory notes the bank was entitled to make an entry in the current account debiting the amount when the bills were dishonoured. There can be little doubt that these notes were endorsed over to the bank in order that credit may be given in the account for the amount of the bills and the bank took them upon the expectation that the money would be paid by Govindan Nair. When they were not paid the bank had a right to make the entries. It is not suggested that the bank treated them as complete discharge. The general presumption is that a promissory note given for reducing a liability only operates as a conditional discharge for the liability. We need only refer to *Palaniappa Chetty* v. *Arunachalam Chetty* (1), and the judgment of Bhashyam Ayyangar, J., in *Jambu Chetty* v. *Palaniappa Chettiar* (2). As regards the right to re-appropriate, it is clear in this case that no intimation was given to the surety of the first appropriation and therefore the bank, when they sent a letter through their vakil had a right to re-appropriate the amount. This is clear from the decision in *The Mecca* (3) and *Cheyganmull Sowcar* v. *Manicka Mudaliar* (4), when it was observed that so long as notice had not been given as to the appropriation of any amount to any particular account, it is open to the creditor to alter it and make re-appropriation. If the defendant is liable, he is liable also for the amount of the promissory notes accepted as conditional payment by the bank and which were dishonoured and on being dishonoured corresponding debits were made by the bank in the account.

Then the last question is as regards the guarantee not being enforceable owing to concealment of facts. In this connexion reference is made to S. 143, Contract Act, which runs as follows:

"Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid."

It is argued that the material circumstances in this case is that the fact that at the date of the guarantee letter Ex. A about Rs. 5,000 was due by the firm already to the bank was not disclosed, and that on account of this non-disclosure the contract of indemnity is not enforceable. It is not disputed that on the date of Ex. A the amount which was due by Nanchappa Chettiar under the current account was not mentioned; and the question is whether such non-mention vitiates the contract of indemnity. We have already given our reasons for holding that Ex. A the letter of guarantee covers past indebtedness also and that this fact was within the knowledge of the defendant when he signed it. The evidence of the defendant who is the only witness examined on his behalf does not touch any of the questions which were argued before us. In his evidence he says that he executed Ex. B and that he also signed another and then he signed in Ex. C and that P. W. 2 did not explain to him any document. This has been disbelieved. He refers to copies of letters Exs. 4 to 6, 8 and 11 and the originals Exs. 15 series.

(1) [1911] 10 I C. 118.
(2) [1903] 26 Mad. 526=13 M. L. J, 252.
(3) [1897] A. C. 286=66 L. J. P. 86=45 W.R. 667=76 L. T. 579.
(4) A. I. R. 1926 Mad 792=94 I. C. 384.

He then says that N. Nanchappa Chettiar and Co., became insolvents and he and some others filed a petition for declaring them insolvents, that he has mentioned in para. 3 of that petition the amount he was liable to pay to the bank for the firm which figure he got from a letter of the bank, that the other figure Rs. 2,823-9-0 mentioned in the petition was also taken from a letter of the bank and that if the bank had given the amount of both the accounts he would have mentioned the whole amount. This really does not touch any question of estoppel. There is therefore no statement of the defendant that if he had been informed of this already existing debt of Rs. 5,000 he would not have signed the letter of guarantee. We must therefore treat the case on the footing that there is a duty cast on the bank to disclose the past indebtedness under the current account of N. Nanchappa Chettiar irrespective of the defendant's knowledge to presume that that duty not having been performed the guarantee is invalid. We do not think that the authorities cited by Mr. Menon lead to this conclusion.

The balance of authority is that there is a difference between fiduciary guarantees and guarantees by persons in favour of banks and that though in the former case there may be a duty to disclose all material facts there is no such duty in the case of a bank which takes a guarantee from a person to disclose the indebtedness of the person guaranteed at the date of the guarantee. In *Hamilton* v. *Watson* (5), it was held by the House of Lords that a surety is not of necessity entitled to receive without enquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and the party and that if he wants to know any particular matter he must make it the subject of a distinct enquiry. The learned Judges who took part in this decision were the Lord Chancellor, Lord Brougham and Lord Campbell. In *North British Insurance Co.* v. *Lloyd* (6) it was held that the rule which prevails in assurances upon ships and lines, that all material circumstances known to the assured must be disclosed, though there be no fraud in the concealment, does not extend to the case of guarantee and that in the latter cases the concealment to vitiate the guarantee must be fraudulent. In *Wythes* v. *Labouchere* (7) a similar view was taken. In that case Lord Chelmsford observes as follows:

"I will consider the question of concealment solely upon the footing of the duty of the defendants towards the plaintiff as surety. It must of course be conceded that if the plaintiff has applied to the bankers, and they had given him a false account of the transactions between them and Mr. M. Gregor, the plaintiff would be entitled to be relieved from his suretyship. But not only was there no application to the defendants by the plaintiff, but they never came into communication with each other directly or indirectly in the transaction. Was there under these circumstances any legal or, I would add, any moral obligation upon the bankers, when they learnt that the plaintiff was willing to become security to them for a large advance to M. Gregor, to search for him and warn him against the danger of such a step, communicating the condition of his old account, the security which they had taken and the circumstances connected with the parliamentary qualification? No case which has been cited goes this length or near it. Indeed the case of the *North British Insurance Co.* v. *Lloyd* (6), expressly decides that the obligation of the creditor to communicate even material circumstances that are known to him is not co-extensive with the rule which prevails in insurances upon ships and lines, and that unless the non-disclosure amounts to a fraud upon the surety, he is not entitled to relief"

These cases have been considered in *London General Omnibus Co. Limited* v. *Holloway* (8), where it was held that suretyship for the fidelity of a servant is distinct from a guarantee in respect of a banking account. In that case Farwell, L. J., observes:

"There is a wide distinction between a case like the present and the cases which have been cited of guarantees for overdrafts given to bankers, such as *Hamilton* v. *Watson* (5), and *Wythes* v. *Labouchere*, (7), and he points out the difference."

He further observes:

"No surety asked to guarantee a banking account is entitled to assume that the customer of the bank had not been in the habit of overdrawing; the proper presumption in most instances is that he has been doing so, and wishes to do so again. That is a legitimate carrying on of business and that is what the surety is asked to guarantee."

Kennedy, L. J., observes:

"On the other hand the case of the suretyship or guarantee of a financial account, the

(5) 12 Cl. & F. 109.
(6) 10 Ex. 523=3 C. L. R. 264=24 L. J. Ex. 14=1 Jur. (N. S.) 45.
(7) 3 D. G. & J. 593=5 Jur. 499=7 W.R. 271.
(8) [1912] 2 K. B. 72=81 L. J. K. B. 603=106 L. T. 502.

previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure constitute only extrinsic circumstances. They may be material circumstances such as might affect the judgment of the person who is asked to be surety. But in the language of Sir Frederick Pollock's Principles of Contract, 8th Edition, p. 568, the creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates, and on this point there is no difference between law and equity. The bank or other creditor cannot reasonably be taken as affirming by mere silence respecting earlier dealings, the financial ability of the person whom the proposed surety is asked to guarantee."

Then the learned Judge quotes with approval a passage from Rowlatt J's., work on Principal and Surety, p. 155. At p. 154 the following passage occurs :

"A guarantee will fail if the creditor misrepresents to the surety the state of accounts between the principal and himself. But a surety proposing to guarantee a banking account should enquire whether there is any adverse balance already existing; he is not entitled to assume there is not."

So far as the Indian cases are concerned in *Balakrishna V. N. Kirtikar* v. *The Bank of Bengal* (9) Sir Charles Sargent C. J. and Bayley, J. took a similar view and held that the expression

"keeping silence' in S. 143, Contract Act, clearly implies intentional concealment as distinguished from mere non-disclosure and the withholding must be fraudulent as necessarily is the case when a material circumstance is intentionally concealed."

This case, so far as we are aware, has not been dissented from and is on a line with the English cases we have referred. It is contended by Mr. Menon that there is no difference between fidelity contracts and contracts of guarantee in respect of banking accounts, that some eminent English Judges have dissented from the view that there should be any such difference and that in each case the question is whether there is evidence to go to the jury to say that the non-disclosures of the past liability which was existing at the date of the guarantee amounts to concealment of the material fact or not; and *Lee* v. *Jones* (10) is referred to. In that case there was a difference of opinion, Crompton, J., Channell, J., Blackburn, J. and Shee, J., taking one view and Pollock, C. B., and Bramwell, B., taking another view. We may state that Blackburn, J., refers to the decision in 12 *Cl.* and *F.* in 107 and notes the distinction between the contracts referred to. He says :

"Now whether the handing the agreement by the plaintiff to the defendant amounted to an inaccurate representation or not, depends, as I think, on the question whether in such a transaction as that described in the agreement, it might or might not be naturally expected that the masters might have allowed a balance of this extent to accumulate, and might have allowed the account to stand over unsettled for so long a time. In *Hamilton* v. *Watson* (5) (at p. 118), the transaction was a security for a banker's cash account, and the decision of the House of Lords was that, in such a case, it might be so naturally expected that the proposed principal had already overdrawn his account, that there was no evidence of a representation that he had not."

Although Shee, J., took the view that there was no difference in principle between the contracts and that the question in the case was whether there was evidence for the jury to say that the suppression was material, Pollock, C. B., and Bramwell, B., took the opposite view. Reference was also made by Mr. Menon to *Railton* v. *Mathews* (11) where the Judges were of opinion that undue concealment need not be wilful or intentional with a view to the advantages the employers were thereby to gain, but it was sufficient if it was material. This case related to a fidelity contract. A party became surety in a bond for the fidelity of a commission agent to his employers. The commission agent was entrusted with the property of his employers. The employers discovered irregularities in the agent's accounts and put the bond in suit. The surety then instituted a suit on the ground of concealment by the employers of material circumstances. It was held by the House of Lords that mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment though not wilful or intentional or with a view to any advantage to himself. We think that the balance of authority is clearly in favour of the view that where a person stands surety for another as regards an advance to be made by a bank, the bank is under no obligation to disclose any past indebtedness existing at the date of the contract

(9) [1891] 15 Bom. 585.
(10) [1864] 17 C. B. (N.S.) 482.
(11) 10 Cl. & F. 934.

of suretyship and that it is a matter on which the person standing as surety has to inform himself. If, of course, he wanted information and the bank gave wrong information it might vitiate the contract of suretyship. In the present case the defendant did not require any information as to the state of the account between the firm and the bank on the date of the suretyship. There can therefore be no question of the guarantee being invalid because of the non-disclosure by the bank that about Rs. 5,000 was due. Further the defendant does not plead this in his written statement as a ground; he does not state that if he had been aware of this fact he would not have become surety. Even assuming that in every case it is for the surety there is nothing in the evidence which would entitle the jury to hold that if the defendant had been told that Rs. 5,000 was due by the firm he would not have stood surety. We find that Rs. 7,000 went in discharge of the indebtedness under the current account under which money was already due by the firm.

As regards the question of estoppel it is difficult to see where estoppel comes in on the pleadings in the written statement. What is stated is that because the bank said in Ex. 3 that Rs. 2,000 and odd was due the defendant put in a petition mentioning that figure to adjudicate the principal debtors as insolvents. It is not suggested that he would not have done so if Rs. 10,000 had been claimed instead of Rs. 2,000; all that is stated is that he had to amend this petition by stating the correct amount due, and this would involve some additional expenditure, however trifling it may be. The fact is that Ex. 2, the notice sent by the bank through their vakil giving full particulars is dated 16th June 1924. The insolvency petition was filed on 12th June 1924. Admittedly until 18th September 1925 nothing was done as the Judge points out. The mere filing of the insolvency petition would not amount to proof or admission of the amount due. That has to be proved in subsequent proceedings. It is not suggested that when the stage came, the defendant relying upon Ex. 3 minimized his claim and got it admitted for a smaller sum, whereas, as a matter of fact, a larger sum was due. In these circumstances it is difficult to see how there can be any estoppel by the defendant putting himself in a worse position owing to the conduct of the plaintiff.

We do not think that the decision of the Subordinate Judge can be supported on any of the grounds stated by him. The decree of the Subordinate Judge is set aside and in lieu thereof there will be a decree in favour of the plaintiff for Rs. 8,470-10-7 with interest at 6 per cent from the date of the plaint to the date of payment with costs in this and the lower Court on the entire amount decreed. The Subordinate Judge's decree allowing any costs to the defendant will be set aside.

The case having been set down for being spoken to this day, the Court made the following order :

Credit will be given for the amounts already collected and no interest will run on the amounts collected.

P.R.S./V.B. *Appeal allowed.*

A. I. R. 1930 Madras 881

WALLER AND PANDALAI, JJ.

(*Veliapalli*) *Sekhara Menon* — Petitioner.

v.

(*Karanath Kalati Manakkal*) *Narayanan* and *others* —Respondents.

Civil Misc. Petn. No. 1622 of 1929, Decided on 6th March 1930, from judgment in Letters Patent Appeal No. 71 of 1924, reported in *A. I. R.* 1929 *Mad.* 344.

Civil P. C. (1908), O. 22, Rr. 10 and 3—Suit for redeeming kanom by uralan making other urlan, defendants—Death of one of them does not ipso facto abate such an appeal.

The death or removal of one of the uralans who has been made a party defendant in a suit by one of the uralans to redeem a kanom on behalf of a Malabar devaswom does not ipso facto abate the appeal or suit and specially more so when suit of defendant merely supports the plaintiff's case : 11 *Mad.* 191 ; 35 *I. C* 116; *A. I. R.* 1924 *Mad.* 615; *A. I. R.* 1928 *Mad.* 246 and *A. I. R.* 1928 *Mad.* 607, *Ref.* ; *Mad. S. A.* 291 *of* 1921; 34 *Mad.* 292; *A. I. R.* 1922 *Mad.* 317 and *A. I. R.* 1924 *Mad.* 771, *Dist.* [P 882 C 2, P 883 C 2]

P. Govinda Menon—for Petitioner.

T. R. Ramachandra Ayyar—for Respondents.

Order.—This is a petition for review of judgment in a Letters Patent appeal based on an alleged defect of procedure which occurred during the pendency of

the appeal which, it is said, invalidates the judgment.

The suit was brought in 1919 to redeem a kanom on behalf of a Malabar devaswom by one out of the four uralans, the other three being joined as defendants 24 to 26. The other defendants were members of the tenant's tarwad of which defendant 1 was the karnavan. The District Munsif gave a decree as prayed. The District Judge on appeal and Phillips, J., on second appeal held that the suit was barred by O. 1, R. 9 by reason of the dismissal of a former suit brought for the same relief and dismissed the suit. The plaintiff preferred a Letters Patent appeal under Cl. 15, Letters Patent, and on 7th December 1928 a Bench of this Court consisting of Devadoss and Waller, JJ., set aside the judgment of the first and second appellate Courts and remanded the appeal to the District Judge to hear and determine it on the merits. We were informed at the hearing of this application that the District Judge has since heard the appeal and confirmed the decree awarded to the plaintiff by the District Munsif.

The petitioner is respondent 6 in the Letters Patent appeal, a junior member of the tenant's tarwad. He now objects that on 21st May 1928, i. e., more than six months before the judgment, respondent 3 (defendant 24) had died, that the petitioner knew this only on 28th January 1929, that as the appellant took no steps to bring on record the legal representative of the deceased respondent 3 one of the four uralans, without whom the appeal could not proceed, the appeal abated or became incompetent before the judgment and that therefore the judgment in the appeal reversing the decisions of the lower appellate Courts was wrong.

The petitioner's advocate argues that as it is necessary in every suit brought on behalf of devaswom to have all the uralans as parties either as plaintiffs or as defendants it follows that on the death of one of them in a pending suit to which they have all been made parties, a necessary party is eliminated, and that unless the legal representative of the deceased, who was the next uralan, is added in the time allowed, the suit or appeal abates and its continuance becomes incompetent for want of necessary parties, that, thereafter, subject to the abatement being set aside, the only legal order possible is one of dismissal, and that if a judgment on the merits is passed in ignorance of the death, such judgment is of no effect or validity. When the judgment was pronounced no one was aware that respondent 3 had died. The question in such circumstances, is not whether in the first instance all the uralans, or trustees should have been impleaded which had been done, but whether the death or removal of one of several trustees or uralans who have been impleaded ipso facto makes the further progress and decision on the merits of the suit or appeal illegal till his successor has been impleaded. It is material that the objection is raised not by the devaswom or in its behalf by the uralans, but by its opponent who has been defeated on the merits.

No decision exactly applicable was cited. But reliance was placed on an unreported decision of Devadoss, J., in *Manikkal Sankaran* v. *Rama Variar* (1). In that case the death of one of the uralans being known before judgment, an application to set aside the abatement and bring in the new uralans had been made but however was refused. Thereupon the learned Judge, while also basing his judgment on the merits, held that the appeal could not proceed in the absence of all the uralans. Whether that opinion was right or not, that is not the case here.

Similarly the case in *Arayil Kali Amma* v. *Sankaran Nambudripad* (2) was one in which the death of the co-uralan was known before the judgment and apparently there was no petition to set aside the abatement or bring in his successor. The decisions in *Shunmuga Moopanar* v. *Subbaraya Moopanar* (3) and *Kannan Kutty* v. *Veetil* (4) are of no assistance to the petitioner.

There is authority for the proposition that in order that a decree may bind a devaswom it is not necessary to have all the trustees or uralans as parties provided that the litigation was conducted bona fide in the interests of

(1) Second Appeal No. 292 of 1921.
(2) [1911] 34 Mad. 292=5 I. C. 420.
(3) A. I. R. 1922 Mad. 317=70 I. C. 645.
(4) A. I. R. 1924 Mad. 771=80 I. C. 139.

the devaswom by those uralans who were parties: *Madhavan* v. *Kesavan* (5). The ground of this was explained and approved in *Rangamma* v. *Narsimma Charyalu* (6). The principle governing the representation in suits of mutts, temples, etc., by dharmakarthas, uralars or matathipathis is illustrated by other decisions of this Court. In *Ratnam Pillai* v. *Nataraja* (7) Nataraja Desikar who had no rights to a mutt brought a suit on its behalf purporting to do so as head of the mutt. Pending the suit he was declared by the Privy Council not entitled to the headship. On the death of Nataraja Desikar the person declared to be the rightful head applied to be impleaded, and it was held that the case really fell under O. 22, R. 10, though the rule quoted was O. 22, R. 3, and that the applicant should be allowed to continue the suit. The principle is that on the death or removal of an uralan impleaded as such in a suit, what takes place is devolution of the office and the person entitled to be impleaded in the suit is the successor to the office. This is not affected by the fact that the office is hereditary or belongs to a tarwad, which merely means that the office-holder must be sought among the heirs or tarwad of the deceased.

That this is the correct view was indicated in *Sivakasi Viswanathswami Devasthanam* v. *Koodalinga Nadan* (8). There one of two trustees who were parties to an appeal on behalf of a devasthanam had died and the other had resigned and his resignation had been accepted and two other persons had been appointed trustees by the temple committee but had not taken charge of their office. In this state of affairs the appeal was heard and decided without bringing on record the new trustees. The contention raised in the High Court by the new trustees, that the decision in the lower appellate Court was incompetent was negatived on the ground that the new trustees had not taken charge of their office on the date of the judgment in the Court below. But Srinivasa Iyengar, J., also said that the case fell really under O. 22, R. 10, and that the policy of the Code is that if the proceeding originally instituted is right and proper any decision obtained therein is binding on all persons on whom the interest or right may devolve under that rule pending the disposal of the proceeding. Similarly, in *Ittunan Panikar* v. *Narayana Bharthikal* (9), which was a case of a mutt, it was held that a trustee who files an action which is properly framed and constituted at the time of its institution does not cease to be entitled to maintain and continue the suit merely because of his removal from office during the pendency of the suit. It was pointed out that the expression "by leave of the Court" in O. 22, R. 10, indicates that it was optional on the part of the assignee to apply and it is also in the discretion of the Court to allow him to do so or not. If this is so in the case of a plaintiff uralan it is a fortiori so in the case of a pro forma defendant like the deceased, respondent 3, who by his written statement merely supported the plaintiff's claim and whose death at the time of the judgment was not known to anyone.

In this view the petition, so far as it is based on the idea that there was any abatement in the proper sense of the term, is misconceived. In addition, we are satisfied, that the devaswom was substantially and sufficiently represented in this Letters Patent appeal even after the death of respondent 3, and that the decision given after contest between the devaswom and the petitioner's tarwad is binding upon both and is not liable to be questioned for failure to implead the successor of respondent 3. The petition is dismissed with costs.

P.R.S./V.B. *Petition dismissed.*

(5) [1888] 11 Mad. 191.
(3) [1916] 35 I. C. 116.
(7) A. I. R. 1924 Mad. 615=84 I. C. 200.
(8) A. I. R. 1928 Mad. 246=103 I. C. 401.
(9) A. I. R. 1923 Mad. 607=103 I. C. 789.

A I. R. 1930 Madras 883

BEASLEY, C. J., AND CURGENVEN, J.

(*Vatrapu*) *Subbarao* and *others*—Plaintiffs—Appellants.

v.

(*Pamireddi*) *Mahalakshmamma* and *others*—Defendants—Respondents.

Appeal No. 116 of 1928, Decided on 27th March 1930, from decree of Sub-Judge, Masulipatam, D/- 19th December 1927.

(a) Registration Act (1908), Ss. 17 (b) and 49—Partition document headed as "particulars of immovable properties falling to one member's share in division of family properties" — Document signed by both members and duly attested but not registered—Document held required to be registered and so not admissible so far as it was evidence of transaction affecting immovable property—But it could be used as evidence of division of status.

The question whether a document is a deed of partition or a mere memorandum of partition is a pure question of fact to be decided on perusal of the actual document. A partition document which was described as "share list" was headed as "particulars of the immovable properties which fall" to the share of a member in the divisions of family properties. The item then enumerated the several properties falling to the share of the member. It was signed by both the members between whom the properties were divided and was duly attested but was not registered.

Held: that the document could not be said to be merely the minutes of a previous oral agreement to divide. It was a document such as is described in S. 17 (b), Registration Act. and so, being unregistered, was to be excluded in so far as it was evidence of a transaction affecting immovable property.

Held further: that although inadmissible to prove partition it could be used in evidence as evidence of a divison in status, for a partition deed otherwise inadmissible, may be received in evidence of a division of status: 32 *I. C.* 486 (*F.B.*); *A. I. R.* 1925 *Mad.* 1097; 31 *I. C.* 615; *A. I. R.* 1923 *Mad.* 297; *A. I. R.* 1926 *Mad.* 402 and *A.I.R.* 1928 *Mad.* 1113, *Rel. on*; *A.I.R.* 1922 *P. C.* 266, *Expl*; *A. I. R.* 1916 *P. C.* 104; *Ref.* (*Other cases considered*). [P 888 C 1]

(b) Evidence Act (1872), S. 91 — Fact of partition may be proved by oral evidence although deed embodying terms of partition cannot be proved for want of registration.

The fact of partition may be proved by oral evidence, although the deed embodying the terms of partition cannot be proved for want of registration, for S. 91 does not preclude proof by parol evidence of a fact which is not a term of the document: 41 *Bom.* 466 and *A.I.R* 1926 *Mad.* 402, *Foll.* [P 893 C 1]

(c) Hindu Law—Adoption—Father-in-law after taking illatom son-in-law, alienating property—It lies heavily upon son-in-law to show that by specific customary law he has preferential right to rights of father-in-law's alienee.

The practice of illatom is a departure from ordinary Hindu law, and accordingly it lies upon the party claiming by virtue of the statute to override the provisions of that law to substantiate his claim. This cannot in general be done, as, for instance, can be done in a case of adoption, by appeal to settled rules of law because the practice of illatom being of late occurrence and confined to certain castes, has never become crystallized into fixed rules of law by a long course of judicial decisions. Where therefore, a father-in-law takes a son-in-law in illatom, and subsequently alienates some of his property, it lies heavily upon the illatom son-in-law to show that by specific customary law overriding the general Hindu law, he has a preferential right to the rights of father-in-law's alienees: 4 *Mad.* 272; 21 *Mad.* 266; 9 *Mad.* 114; *A.I.R.* 1927 *Mad.* 708; 7 *M. H. C. R.* 25 and *A. S. No.* 206 *of* 1912, *Rel. on.* [P 894 C. 1, 2; P 895 C 2]

Advocate-General and *C. H. Raghava Rao*—for Appellants.

S. Varadachariar and *V. Govindarajachariar*—for Respondents.

Beasley, C. J.—Plaintiffs 2 to 7 are the appellants. Plaintiff 1 died after the suit was filed. Defendant 1 is the wife of Sambayya, the deceased brother of plaintiff 1, and defendant 2 is the son-in-law of Sambayya having married Suramma, his fourth daughter. Plaintiff 1 and Sambayya were formerly members of an undivided Hindu family in possession of large properties. It is alleged in the plaint that Sambayya managed the family property and that he died an undivided member of the family on 24th November 1925. He was at the time of his death the Village Munsif of Dokiparru. One of the questions to be decided in this appeal is whether plaintiff 1 and Sambayya became divided or not. Neither plaintiff 1 nor Sambayya had any male issue. They had only daughters. It is alleged in the plaint that after the death of Sambayya the entire property of the joint family devolved upon plaintiff 1 by right of survivorship. It is alleged that defendants 1 and 2 nevertheless took possession of the joint family property and a decree is sought establishing the right of plaintiffs 2 to 7 and defendant 3 to enjoy the property set out in Sch. A and a permanent injunction is claimed restraining defendants 1, and 2 from causing obstruction to the enjoyment of plaintiffs 2 to 7 and defendant 3 in this property and other reliefs. The plaintiffs therefore base their claim on a right to enjoy the undivided property of plaintiff 1 and Sambayya. To meet this case the defendants set up the plea that Ramayya (plaintiff 1) and Sambayya were divided members and that the share of Sambayya did not pass to plaintiff after his death by right of surviorship. It is alleged that a partition was effected in November 1924 between Sambayya and Ramayya and that share lists showing division of the properties were prepared at Bunder on 9th November 1924, and in para. 5 of the

written statement the items which fell to the share of Sambayya are set out. At this time Sambayya was very ill and he died on 24th November 1925. Before he died it is alleged that he made a will at Bunder disposing of the property which fell to his share in the partition. The date of this alleged will is 26th February 1925. Under the terms of this document, Ex. 7, 15 acres of land passed to his daughters, 12 acres under a codicil of the same date to defendant 2, some 5 acres of land and godowns to a temple and the residue to one Koti Reddi who was the son of defendant 2 and whom, it is alleged by the defendants, Sambayya adopted. Sambayya's second daughter, Sowbhagyam who was a widow living in Sambayya's house was not provided for in the will. In Ex. 7 Koti Reddi is described as the adopted son of Sambayya and it is also stated in it that Sambayya had given authority to defendant 2 the natural father of Koti Reddi, to act as guardian of Koti Reddi and to act as Village Munsif during his minority and to manage all his properties. The rice mill at Gudlavalleru which in the will is stated by Sambayya to be his self-acquired property was bequeathed to Koti Reddi. This alleged will, I describe it as an alleged will because it is the plaintiffs' case that it is a spurious document, was attested by four witnesses, namely, Divi Rangacharyulu, a doctor who was attending on Sambayya, Pamireddi Ramayya plaintiff 1, Korapaty Venkatakrishnayya (D. W. 4) and another witness whose signature is illegible but who was examined as D. W. 5.

It is not disputed by the plaintiffs that the signature of plaintiff 1 is his but it is alleged that he was an uneducated man and under the influence at this time of defendant 2 and that he either signed the document being unaware of its contents or the document was written on blank paper which bore the signature of plaintiff 1. It will be seen therefore that the respondents' case is that Sambayya having effected a partition with Ramayya disposed of by will the share which fell to him by reason of the partition and that therefore the plaintiffs have no right to any of the property of Sambayya so disposed of; and a matter of considerable importance to be considered here is whether the allegation by the defendants that defendant 2's son Koti Reddi was adopted by Sambayya is true or false. It should be mentioned that defendant 2's son Koti Reddi died on 1st January 1926. Not however content with setting up a defence claiming Sambayya's property, a claim for Ramayya's property is also made by reason of an alleged relationship of illatom son-in-law to Ramayya. Defendant 2, it will be remembered, married Sambayya's fourth daughter. He was therefore a son-in-law of Sambayya but notwithstanding this it is the case of defendants 1 and 2 that Ramayya who had no unmarried daughters and no male issue brought up Surammal and gave her in marriage to defendant 2. In the written statement of defendants 1 and 2 it is stated that Sambayya and Ramayya effected an arrangement to the effect that Ramayya should take Surammal as his foster daughter and she should be given in marriage to his sister's son defendant 2, that the latter should have a joint right to the property of Ramayya and that after the death of Ramayya the entire property forming the share of Ramayya should pass to him. This illatom relationship and the rights attaching thereto are denied by the plaintiffs. It is also alleged by the defence and this is admitted by the plaintiffs that whilst the suit was pending Ramayya plaintiff 1 disposed of the bulk of the plaint properties having by means of a dhakal deed disposed of immovable properties worth Rs. 50,000 and under another dhakal deed properties worth Rs. 8,000. Ramayya died in July 1926.

Several points of great importance and difficulty arise in this appeal. They are; (1) Did Ramayya and Sambayya become divided before the death of the latter? (2) Is the will Ex. 7 and its codicil genuine? (3) Was Koti Reddi the adopted son of Sambayya? (4) Was defendant 2 the illatom son-in-law of Ramayya? (5) If he was, to what share of Ramayya's property is he entitled? and (6) Was the rice mill in Gudlavalleru the self-acquired property of Sambayya? In considering the before-mentioned matters several difficult questions of fact and law present themselves.

In dealing with the first question what we have to consider is whether what is described by the defendants as

a "share list" can be properly given that description and whether it is a deed effecting a partition as is alleged by the defendants. This question is a most important one because that document is an unregistered one. If it is a document which under the Registration Act is required to be registered, then the question arises whether it can be referred to in evidence in order to prove that there was a partition or division in status as between Sambayya and Ramayya, or whether it can be disregarded altogether and parol evidence admitted to prove a division in status or a partition. First of all, does this document require registration? Under S. 17 (b), Registration Act (16 of 1908), amongst other documents required to be registered are non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property. If Ex. 8 is a document of this description, then under S. 49 of the same Act it shall not affect any immovable property comprised in it or be received as evidence of any transaction affecting such property unless it has been registered. Therefore the first thing to be considered is whether this is a document such as is described in S. 17 (b), Registration Act. Ex. 8 is headed:

"Particulars of the immovable properties which fell to the share of Pamireddi Sambayya in the division of the family properties effected on 9th November 1924, between the son of Pamireddi Lakshmanna (1) Sambayya and (2) Pamireddi Ramanna's adopted son Ramayya, residents of Dokiparru village."

Then follow the survey numbers of the properties, their situation and their rough extent. This document was signed by both Sambayya and Ramayya. The writer of the document is stated to be Burra Ramayya (D. W. 3) and there are the signatures of two attesting witnesses, Naghabushanam who was not called as a witness in the Court below and Seetaramaswami (D. W. 7). For the plaintiffs it is contended that this document operates to create an interest in the immovable property described in it and by the defence it is contended that it is nothing more than a memorandum of a division of properties previously agreed upon. A wealth of authority upon this question has been presented to us in the course of the argument by both sides. Amongst the cases to which we were referred are the following: *Pothi Naicken* v. *Naganna Naicken* (1). There the document in question read as follows:

"As we have, in the presence of the undermentioned panchayatdars, divided into equal moieties the cash, moveables and immovables, Court decrees etc. of which we are now possessed, valued at Rs. 80,000 our connexion shall hereafter be only by relationship but we shall have no monetary connexion in respect of these properties."

It was there held by Sir John Wallis, C. J., Sadasiva Ayyar and Seshagiri Ayyar, JJ. constituting a Full Bench that the document had the effect of causing immovable properties heretofore held by the coparcener as joint tenants thenceforward to be held by them as tenants in common and as such without registration, could not affect immovable property. In my view the document in question did not create much difficulty on the face of it. It did more clearly appear to be a document effecting partition than otherwise. The question whether a document is a deed of partition or a mere memorandum of partition is a pure question of fact to be decided on a perusal of the actual document. This was the opinion of Jackson, J., in *Veerappan* v. *Mylai Udayan* (2), and also of Spencer, J., in *Ayyakutti Mankondan* v. *Periaswami Koundan* (3). In the former case, after an award directing a partition was passed by panchayatdars, a list was drawn up which contained the shares given to the different members and was signed by them and attested by witnesses.

Jackson, J., held that the document was a deed of partition declaring an interest in the immovable property mentioned therein, and, if unregistered, was inadmissible in evidence respecting any transaction affecting such property. Jackson, J., however thinks that at the most it will be evidence of an intention to divide and receivable in evidence as proof of such intention. The latter opinion deals with the question as to admissibility and the former as to whether it purports to create an interest in immovable property. In *Saraswatamma*

(1) [1916] 32 I.C. 486 (F.B.).
(2) A. I. R. 1925 Mad. 1097=87 I. C. 285.
(3) [1916] 31 I. C. 615.

v. *Paddayya* (14), the document was described as a "list of shares of division." Lands were divided in it and then the residential house, and it contained the statement:

"Both of us have agreed to the said shares and effect settlement without any dispute whatever."

Venkatasubba Rao, J., was of the opinion that this document afforded clear evidence of conduct from which an intention to divide on the part of the executants was deducible, but that all the coparceners not being parties to the document it did not affect an immediate division in status. With this opinion Spencer, J., agreed. On p. 349 he states:

"On the same principle I think that documents which are instruments of partition, as defined in S. 2 (15), Stamp Act, that is, instruments whereby co-owners of any property divide or agree to divide such property in severalty, are required by S. 17, Registration Act, to be registered when the property to be divided is immovable property over Rs. 100 in value and if they are not so registered they cannot by reason of S. 49 be admitted as evidence of the transaction they purport to effect; but they may be used for the collateral purpose of proving division of status among the parties to the documents. When so used they do not "affect" immovable property nor is the division of status a "transaction affecting immovable property" in the sense intended by the Act to be given to the word "affect." Documents that do not fall under the above description are not required to be registered at all and are admissible in evidence without registration."

The observations of Spencer, J., are useful in our consideration of the question whether and for what purposes a document, inadmissible under S. 49, Registration Act, by reason of want of registration, may yet be used in evidence. In *Gopayya* v. *Kristnayya* (5) it was held by Krishnan and Venkatasubba Rao, JJ., that if the parties had treated the "share list" as final it would be inadmissible in evidence without registration and that an oral agreement as to partition could be proved, and if proved the written deed could be treated as the minutes of agreement between the parties and not as a completed partition deed and even though unregistered, could under these circumstances be admitted in evidence to prove the terms agreed to. In *James R. R. Skinner* v. *R. H. Skinner* (6) it was held that an agreement for the sale of immovable property is a transaction affecting the property within the meaning of S. 17, Registration Act, inasmuch as, if carried out, it will bring about a change of ownership and that to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appeared to be little more that an evasion of the Act. This case was strongly relied upon by the learned Advocate-General in support of his argument, but when the agreement for sale is examined it will be seen that it, on the face of it, affected the property. In it Cl. 8 reads as follows:

"The said vendor confirms this to be a complete and conclusive sale binding on the said vendor and on all his heirs or assgins, etc., in favour of the said vendee..... and if the vendee should ever consider it necessary to execute a registered sale deed..... vendor or his heirs, assigns, etc., will always be ready to execute and register the same at the expense of the vendee."

It will be seen that this clearly purports to transfer the vendor's interest in immovable property. In *Gnanamuthu Nadan* v. *Veilukanda Nadathi* (7), Odgers and Hughes, JJ., held that a partition list containing a list of the properties which fell to each sharer on a partition did not require registration even though signed by all the cosharers and attested when it contained no words which could be construed as creating a partition of status. In this case *Gopayya* v. *Kristnayya* (5) was followed. This decision strongly supports the contention of Mr. Varadachari on behalf of the respondents, that the document is not one required to be registered. In Referred Case No. 5 of 1883 *a reference under S. 49, Stamp Act* (8) it was held by a Full Bench of this Court that a document signed by the members of a Hindu family and attested by witnesses, which purported to be an account or list of the share of one member of the family in the family property, and in which it was received that the parents of the family were to enjoy certain lands, and that the outstanding debts should be divided at a future date, was not liable to stamp

(4) A. I. R. 1923 Mad. 297=71 I. C. 274=46 Mad. 349.
(5) A. I. R. 1923 Mad. 160=69 I. C. 562.
(6) A. I. R. 1929 P. C. 269=119 I. C. 693=56 I. A. 363=51 All. 771 (P. C.).
(7) A. I. R. 1924 Mad. 542=79 I. C. 2.
(8) [1884] 7 Mad. 385 (F. B.).

duty as a partition deed. In *Ramaswami Ayyar* v. *Thirupathi Naik* (9), a case relied upon by the learned Advocate-General on behalf of the appellants, it was stated that the criterion for purposes of registration is what is expressed on the face of the document, not what incidents may be annexed by custom to a grant of the kind. This case was relied upon by the appellants because it was there held that the document must be taken to be an agreement to lease, and in consequence subject to the provisions of the Registration Act as if it were a lease.

On a consideration of these cases I have come to the conclusion, although not without some hesitation, that this document cannot be said to be merely the minutes of a previous oral agreement to divide. The fact that it is of the same date as the alleged oral agreement to divide is of importance but it does not necessarily follow that the proper conclusion to be drawn from that is that it is an agreement to partition and I am not basing my conclusion merely upon that fact because it seems to me that the document being signed and the other document (not produced) which is its counterpart also being signed indicate that it was intended that this document and the other should be the evidence of the partition. It must be borne in mind that no partition deed is effected without some previous discussion of its terms and it is not rendered any the less a partition deed on that account and although this case is not very dissimilar to *Gnanamuthu Nadan* v. *Veilukanda Nadathi* (7), for the reasons already given, Ex. 8, in my view, required to be registered and not having been so it is not admissible in evidence for the purpose required. But even though inadmissible in evidence to prove a partition, I am of the view that it could be used in evidence not for what it contains but as evidence of a division in status. As Jackson, J., stated in *Veerappan* v. *Mylai Udayan* (2) it would be evidence of an intention to divide, and as Spencer, J. stated in *Saraswatamma* v. *Paddayya* (4) being unregistered it could be used to prove a division in status. In *Ramu Chetty* v. *Panchamma* (10) it was held by Kumaraswami Sastri and Venkatasubba Rao, JJ. that a division of status can be proved even if the deed of partition is inadmissible in evidence for want of registration and that an unregistered document may be used to determine the nature of the possession held by a party and that where a deed of partition is inadmissible in evidence for want of registration the terms of the partition cannot be proved except by the document itself but if it is unnecessary to decide the terms of partition it is open to a Court to infer from the conduct and dealings of the parties that there was a division in status.

On p. 1029, Kumaraswami Sastri, J. states as follows :

"So far as the division of status is concerned, a recent decision of the Privy Council in *Rajangam Ayyar* v. *Rajangam Ayyar* (11), is clear to the effect that a division of status can be proved even though the document has not been registered. It has also been held by their Lordships of the Privy Council that an unregistered document may be used to determine the nature of the possession held by a party. The Subordinate Judge has not relied upon any unregistered partition deed. For the purpose of coming to the conclusion he has arrived at, he takes the conduct of the parties into consideration and comes to the conclusion that not only has the division of status been proved but all that the properties have been enjoyed by the defendant's husband in his own right. I do not see why the evidence as regards the conduct of the parties in their dealings with each other and with regard to specific items of property should not, coupled with the finding of a division of status, be used and relied upon to show that certain properties which the plaintiff claimed are not in wrongful possession of the defendant but belonged to the defendant's husband. I do not think that on the facts of the case S. 92, Evidence Act is necessary to be invoked by any of the parties. The plaintiff comes into Court and says that he is the absolute owner of the property, because he is member of an undivided family."

I may pause here and say that that is what the plaintiffs in this suit base their claim upon.

"The defendant says that her husband was not a member of an undivided family, that he was divided in status, and that he enjoyed certain properties separately as a divided member of the family."

that is what defendants 1 and 2 say in this suit :

"this is not a case when a claim is made by the defendant to any property on the

(9) [1904] 27 Mad. 43.

(10) A. I. R. 1926 Mad. 402=92 I. C. 1028.

(11) A. I. R. 1922 P. C. 266=69 I. C. 129=50 I. A. 134=46 Mad. 373 (P. C.).

allegation that it came to her by virtue of a deed of partition which is unregistered and so inoperative. The plaintiff's claim as a member of a joint family could not be sustained."

Although the correctness of Kumaraswami Sastri, J.'s, opinion in stating the effect of the decision in *Rajangam Ayyar* v. *Rajangam Ayyar* (11) has been questioned, his judgment in other respects is a very strong one in support of the respondents' contention here. Another case relied upon by the respondents is *Chhotalal Aditram* v. *Bai Mahakore* (12). There it was held that the fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved for want of registration. In the course of the judgment para. 405 of Taylor on Evidence (Edn. 10) was quoted. It is as follows :

"The fact of the existence of a particular relationship may be shown by parol evidence though the terms which govern such relationship appear to be in writing .... The fact of partnership may be proved by parol evidence of the acts of the parties without producing the deed."

In *Ahobilachariar* v. *Tulasi Ammal*, *A. I. R.* 1927 *Mad.* 830 Ramesam, J. took the same view. In *Subramaniya Ayyar* v. *Savitri Ammal* (13) Sankaran Nair, J. held that a partition deed not registered is admissible in evidence to prove the status of the members but is inadmissible in evidence to prove the transaction so far as it affects immovable properties and Pinhey, J. held that such a partition deed cannot affect any immoveable property comprised therein nor be received in evidence of any transaction affecting such property but is admissible to prove the fact of a partition having been effected. In *Sikhamani Pandithar* v. *Ammani Ammal* (14) Spencer and Phillips, JJ., held that a document which effects a partition by itself where there has been no prior partition is not admissible in evidence to prove a unilateral declaration or division in status but if such declaration has taken place prior to the document it can be received as evidence of that division in status. There is no doubt now that an unequivocal declaration by a member of an undivided family of his intention to be divided in status is sufficient to effect a partition and in *Girja Bai* v. *Sadashiv Dhundiraj* (15) it was held that a letter by a member of a Hindu family indicating his intention to separate himself and enjoy his share in severalty coupled with a suit for partition was as unequivocal and clearly expressed an intention as could be made and that it amounted to a separation with all its legal consequences. The case referred to by Kumaraswami Sastri, J., in *Ramu Chetty* v. *Panchammal* (10), viz. *Rajangam Ayyar* v. *Rajangam Ayyar* (11), and his opinion as to the effect of this judgment, has been doubted as before stated, and in my view it does no more than to decide that the document in that case not being a document by itself creating, assigning, limiting or extinguishing any right or interest in immovable property and not therefore requiring registration was admissible in evidence so far as it went. It did not decide that a document which did require to be registered could yet be used in evidence to prove a division in status although cases since that time, namely *Gnanamuthu Nadan* v. *Veilukandda Nadathi* (7), *Ramu Chetty* v. *Panchammal* (10) and *Mahalakshmamma* v. *Suryanarayana* (16) have clearly laid down that a document required to be registered as effecting a partition can be used as evidence of a division in status. The latter case is reported in *Mahalakshmamma* v. *Suryanarayana* (16). On p. 990 (*of* 51 *Mad.*) Reilly, J., states:

"The effect of the ruling of the Privy Council in *Varada Pillai* v. *Jeevaratnammal* (17) is that, while such a document cannot be used to prove such a transaction, it can be used to prove a different fact relating to the property even though that fact is intimately connected with the transaction;"

and on p. 991 dealing with the unregistered document he states :

"But the opinion has been expressed, and I venture to think rightly, that it can be used to prove a division in status which we can dissociate from and which does not necessarily imply a division of property."

In *Varada Pillai* v. *Jeevaratnammal* (17) there was a document reciting a gift and it was not registered, and it

(12) [1917] 41 Bom. 466=40 I. C. 83.
(13) [1909] 3 I. C. 321.
(14) [1917] 40 I. C. 36.
(15) A. I. R. 1916 P. C. 104=37 I. C. 321=43 I. A. 151=43 Cal. 1031 (P. C.).
(16) A. I. R. 1928 Mad. 1113=117 I. C. 113=51 Mad. 977.
(17) A. I. R. 1919 P. C. 44=53 I. C. 901=46 I. A. 285=43 Mad. 244 (P. C.).

was held that the gift was invalid and that the recitals in the document could not be used as evidence of a gift but might be referred to as explaining the nature and character of the possession thenceforth held by the person to whom the gift had been made. On p. 251 Viscount Cave in delivering the judgment of their Lordships of the Privy Council states:

"It should be added that, although the petitions of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisami."

A consideration of these cases leads me to the conclusion that Ex. 8 was admissible in evidence to prove a division in status but could not be used as evidence of how the property was divided; and furthermore in my opinion it was not necessary even to refer to Ex. 8 at all for the purpose of proving a division in status as such division could be proved by evidence as to the conduct of Sambayya and Ramayya. When that conduct is considered it seems to me clear that there was a division in status between them. (Here his Lordship discussed the evidence as to division and the will and concluded thus:) This disposes of the appellants' contention that they are entitled to the whole of Sambayya's property by right of survivorship. It is quite true that Ex. 8 cannot be referred to in order to say what properties fell to the share of Sambayya, and I do not think that the will can be referred to for that purpose either. The fact remains that he had a power of disposition over his half-share in each of the joint family properties. It is quite clear from the evidence already referred to that Sambayya took Koti Reddi in adoption. But the respondents' case is that the appellants are not entitled to any share in Ramayya's property because defendant 2 was his illatom son-in-law and by survivorship he is entitled to the whole of that property. It lies upon the defendants to prove this relationship and it must be proved very clearly and must not be left a matter of speculation at all. I have had the advantage of reading the judgment of my learned brother Curgenven, J., and entirely agree with the conclusions he has arrived at with regard to the alleged illatom relation between defendant 2 and Ramayya both on the facts and upon the law. and I also agree with him in his opinion as to the effects of an illatom relationship, if proved, on the shares in the property. With regard to the rice mill I am satisfied that it was the self-acquired property of Sambayya and as this question has been fully dealt with in the judgment of my learned brother I do not think it is necessary for me to add anything further upon this point.

The appeal is allowed in part. In modification of the decree of the lower Court we declare that the late Pamireddi Sambayya and Ramayya died divided in status from each other, that plaintiffs 2 to 7 and defendants 1 and 3 are entitled to the right and enjoyment of plaintiff's half-share of Items 1 to 51 of the plaint Sch. A and to be placed in joint possession of the same along with defendants 1 and 2 as co-owners in respect of the said items and that Items 52 and 53 of the said Sch. A were the self-acquired properties of the late Sambayya to which the plaintiffs have no right; and we further order that except as to the declaration before granted in respect of Items 1 to 51 of plaint Sch. A the decree of the lower Court is confirmed and that each party do bear his own costs throughout.

Curgenven, J.—The main facts of this case have been summarized in the judgment which my Lord has just delivered. The question of fact first arising is whether the partion deed, Ex. 8 and the will, Ex. 7, purporting to have been executed by Sambayya, are genuine. As to this there can, I think, be no two opinions, so that it is unnecessary to go at great length into the evidence. The two documents stand or fall together. (Here his Lordship discusses the evidence and finds). It necessarily follows that the adoption of Koti Reddi, recited in the will, must be considered established.

It has next to be considered whether Ex. 8 is admissible in evidence to prove the partition. The document opens thus:

"Particulars of the immovable properties which fell to the share of Pamireddi Sam-

bayya in the division of the family properties, effected on 9th November 1924, between the sons of Pamireddi Lakshmamna (1) Sambayya and (2) Pamireddi Ramanna's adopted son Ramayya, residents of Dokiparru viliage."

Then follows a list of the items of property comprising Sambayya's share. The circumstances in which this document, and the corresponding document setting out Ramayya's share, which is not now forthcoming, were executed are narrated by the writer of them. D. W. 3. Sambayya, gave him rough drafts and he wrote the fair copies from them in presence of the two brothers, Sambayya himself dictating the particulars from the drafts. The deeds were then signed and attested. We have to consider whether in the terms of S. 17, Regisration Act, Ex. 8 :

"purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in immovable property,"

and the first test to apply is whether the document formed an essontial part of the process of dividing the property, or whether there is ground to suppose that the partition had already taken place, perhaps by oral arrangement, and was complete when the document was executed. It appears to me that the circumstances narrated by the writer show that this was not a case of an oral partition completed and done with, and lists separately and subsequently drawn up. I think that if ever a partition deed can be regarded as an integral part of the partition, Ex. 8 was such a deed. The importance attached to it is shown by the previous preparation of a rough draft and by the employment of a draftsman, and its formal and binding character is apparent from its being signed by both the brothers and attested by witnesses. So far then as intention can be gathered from the course taken, it was not merely to prepare a list or memorandum but to execute a legally valid deed. In point of fact it affords virtually the only evidence relied upon in proof of the partition in this case, although it so happens that other incidental evidence of the fact of partition is forthcoming.

It is then necessary to see whether Ex. 8 can be said to purport or operate to affect immovable property within the meaning of S. 17. We have had a variety of other cases relating to partition documents brought to our attention, but no very useful purpose will be served by discussing them in detail as each document must be dealt with according to its terms. An instance of a somewhat extreme view is afforded by *Jiwan Ali Beg* v. *Basa Mal* (18), which dealt not with a partition document but with a receipt for money paid under mortgage bond. The contention was that the document pro tanto extinguished the mortgage debt and accordingly should be registered. I only refer to the case because Edge, C. J., who delivered the leading judgment, expressed the view that the strictest construction must be placed upon the provisions of the Registration Act and it must be clear that the document objected to comes within the four corners of those provisions. An alternative view is that the Court should ensure that the provisions of the Act are not evaded by any mere informality in the language, so long as the document was intended to operate and does operate in the manner laid down in S. 17. In *Ref. under S. 49 of the Stamp Act* (8), a Full Bench had to consider on a reference under S. 49, Stamp Act, whether the referred document was a partition deed, but in that case I think the terms of the document, which were bare of any operative words, led without difficulty to the conclusion that it was a

"note that a certain property had on partition been allotted for the maintenance of parents, and a memorandum of the particulars of property which had on partition fallen to the share of one of the brothers."

So too the document in *Gnanamuthu Nadan* v. *Veilukanda Nadathi* (7) was a mere list of property headed with the name of the sharer to whom it fell, and although it was signed and attested it was held to be admissible in evidence. Of a different character was the partition deed in *Pothi Naicken* v. *Naganna Naicker* (1) which contained the recital,

"as we have in the presence of the undermentioned panchayatdars divided,

and which was held actually to effect a division and so to be inadmissible for want of registration. No doubt the legal character and effect of Ex. 8 would be clearer if it contained some such formal declaration as "we hereby divide" but mere informality of language should not, in my view, be allowed

(18) [1886] 9 All. 103=(1886)A.W.N. 310 (F.B.)

to defeat the provisions of the Registration Act. The document says :

" Particulars of the immovable property which fell to the share of Pamireddi Sambayya in the division of the family properties effected on 9th November 1924."

If it had said :

" we hereby declare that the following are the particulars of immovable property etc."

no doubt could be entertained as to its nature ; and since it is in substance and intention a declaration to that effect, it must, I think, be deemed to operate within the meaning of S. 17. Indeed had it been a registered document and tendered in proof of Sambayya's title to his share in the property I have no doubt that any Court would accept it as such. In these circumstances I am clearly of opinion that under S. 49, Registration Act it must be excluded in so far as it is evidence of a transaction affecting immovable property.

Assuming then that the deed is inadmissible to show what disposition of the family property was made at the division, the point next arising is whether it is admissible to prove a division of status. Mr. Varadachari has endeavoured to show, I think successfully, that upon this question judicial opinion, as revealed by the decisions of this Court, has gradually but unmistakably settled to the view that a partition deed, otherwise inadmissible, may be received in evidence of a division of status. As an instance of the earlier view that such a document is in all respects inadmissible may be cited the judgment of Oldfield, J., in *Pothi Naicken* v. *Naganna Naicker* (19). The learned Judge held that a division in status alone necessarily converted the joint tenancy of a coparcener into a tenancy in common, and that this change extinguished one kind of right in the property and created another within the meaning of S. 17, Registration Act. The other member of the Bench, Sankaran Nair, J., took the different view that a document merely creating a separation in status did not fall within the provisions of the Registration Act because the consequential change in the tenure of the property was by operation of rules of Hindu law and not by virtue of the instrument. In the Letters Patent appeal from these judgments, reported as *Pothi Naicken* v. *Naganna Naicker* (1), the view was taken that the document must be treated as a whole, and as a whole was inadmissible, notwithstanding that it dealt with moveables as well as immovables. *Ayyakutti Mankondan* v. *Periaswami Koundan* (3) is another Letters Patent appeal from differing judgments of two learned Judges, Spencer and Sadasiva Ayyar, JJ. Spencer, J., thought that the document did not require registration at all, so that the further question did not arise ; Sadasiva Ayyar, J. took the opposite view and considered further that the division of status created by it could not logically or properly be separated from the extinction of joint rights in immovable property effected by the same document, which is the same view as Oldfield, J. took in *Pothi Naicken* v. *Naganna Naicker* (19). We find this opinion adopted again by Spencer and Phillips, JJ. in *Sikhamani Pandithar* v. *Ammani Ammal* (14). Two judgments of their Lordships of the Privy Council appear to have contributed more than anything else to an alteration of opinion. One is the well-known case, *Girja Bai* v. *Sadasvia Dhundiraj* (15), which held that an unequivocal expression of intention on the part of a coparcener was sufficient to effect a division of status. The other was *Rajangam Ayyar* v. *Rajangam Ayyar* (11), which dealt with the admissibility of a document drawn up in certain partition proceedings. Admittedly the document in the latter case effected a division of status, and although their Lordships did not refer to or discuss any of the Madras decisions upon this point, the only conclusion compatible with their judgment is that a document declaring a division of status does not require registration on the ground that such a division must necessarily affect the family property within the meaning of S. 49, Registration Act. In *Saraswatamma* v. *Paddayya* (4) a partition deed which was inadmissible to prove particulars of partition was accepted to prove an intention to be divided in status, the learned Judges relying much on *Girja Bai* v. *Sadasiva Dhundiraj* (15) in coming to this conclusion *Ramu Chetty* v. *Panchammal* (10)

(19) [1915] 39 Mad. 136=28 I. C. 625.

is another decision to the same effect ; and the principle was accepted by Kumaraswami Sastri and Reilly, JJ., in *Mahalakshmamma* v. *Suryanarayana* (16). I think accordingly that, following the current of recent judicial opinion, there is no question but that we may look into Ex. 8 to decide whether the brothers were joint or several in status. Even if the correct course were to exclude the document altogether, there is ample authority for the view that evidence of division may be received from other sources. Direct authority for this proposition is furnished by *Chhotalal Aditram* v. *Bai Mahakori* (12), where it is explained that S. 91, Evidence Act, does not preclude proof by parol evidence of a fact which is not a term of the document ; and the fact of division is not such a term any more than would be, for instance, the fact of relationship of mortgagor and mortgagee or of landlord and tenant. A case of this Court dealing with the same matter is *Ramu Chetty* v. *Panchammal* (10). The evidence, in order not to offend against S. 91, Evidence Act, must be restricted to the fact that a partition has taken place and must not extend to the particulars of the division, as for instance, the items which fell to Sambayya's share. That apart from the recital in Ex. 8, there is ample evidence of the fact of a partition, cannot be disputed. It is unnecessary I think to go further than the will Ex. 7 itself, attested as it is by Ramayya. Therein it is stated that Sambayya and his younger brother remained joint for a very long time and recently became divided. Ex. 1, Ramayya's petition to the Deputy Collector, contains an express admission to the same effect. The finding that Ex. 8 is inadmissible.

The next question is whether defendant 2 has succeeded in proving his relationship as illatom son-in-law to Ramayya. He is a son of a sister Machamma of Ramayya and Sambayya and evidence is adduced to show that he was brought into the house in which the brothers were jointly residing when he was 14 or 15 years old, and married to Sambayya's daughter, Suramma. This girl, it is said, was brought up by Ramayya who gave her away in marriage to defendant 2. In this way, it is explained, his illatom relationship to Ramayya originated. The proof which is offered of it consists, firstly, in some oral evidence as to what took place at the marriage, and what then and subsequently the brothers said and, secondly, in Ramayya's admissions contained in the applications already referred to, for the Village Munsif's post. In weighing this evidence, it will be well to bear in mind with what difficulties defendant 2 is confronted. An illatom relationship to a father-in-law may or may not be rare in the community to which the parties belong but there can be no question that such a relationship to a father-in-law's brother is quite unusual, so that it is unlikely on a priori grounds that such an expedient would be resorted to ; nor is it easy to see with what motive or intention an undivided brother would adopt such a course, to show what property fell to each brother's share must result in the conclusion that each enjoyed an undivided share in each item of property, a conclusion which must necessarily involve an alteration in the decree which has been passed in this suit.

The next question is whether defendant 2 has succeeded in proving his relationship as illatom son-in-law to Ramayya.

* * * *

Nor do I think that his admissions of the relationship have a special value as admissions contrary to his own interest in the sense that in making them he was conscious that what he was conceding would diminish or affect his personal interest in his own estate.

As has been observed by a Bench of this Court, *Panda Patayya* v. *Panda Venkamma* (20), claims of this nature should be very carefully scrutinized, as an ordinary son-in-law may be tempted to get possession of his father-in-law's property by such means. In the present case, defendant 2's claim is to an estate of about half a lakh in value, and he seeks to displace persons whose title is otherwise unimpeachable. Allowing all due weight to the admissions made by Ramayya, it cannot be gainsaid that they occur at a very late stage, and that there is no record to show that on any previous occasion the illatom relationship was asserted. On

(20) [1915] 29 I. C. 54.

the contrary, such documents as bear upon the matter rather run counter to the theory. Thus the oral evidence has a very heavy burden thrown upon it. It is unnecessary, I think, to hold that the witnesses are consciously misrepresenting the truth in order to arrive at the conclusion that it would be unsafe to act upon their statements. They are reporting observations made in conversation, for the most part a good many years ago, and there is the probable source of confusion arising from the identification of Ramayya with his undivided brother's concerns. He might quite naturally have said, as indeed he appears to have said to the Deputy Tahsildar in Ex. 2: "We have taken Krishna Reddi as illatom son-in-law." It may even be that, of his brother's daughters, he bestowed his affection and care specially upon Suramma—no other meaning has been suggested to the statements that he "brought her up"—and if so he would naturally take a particular interest in her husband, and may have gone so far as to say that he was going to make him his heir. However that may be, the oral evidence does not in my view establish the status, and, differing from the trial Court, which appears to regard as proved an unqualified agreement by Ramayya to make defendant 2 his heir, I am unable to accept the fact of illatom.

Even if the illatom relationship had been established, I do not think that the learned advocate for the respondents has succeeded in demonstrating that a father-in-law who takes a son-in-law in illatom thereby deprives himself of the right to devise his property much less to alienate any portion of it while still alive. It is not disputed that in the Reddi community to which the parties belong the custom is to be found of taking a son-in-law into a family, especially where there is no son. This may be done, it seems, without the execution of any document or the performance of any ceremony, though it cannot be inferred that every son-in-law who becomes an inmate of his wife's family house thereby acquires the status of illatom son-in-law. The practice is a departure from ordinary Hindu law, and accordingly it lies upon the party claiming by virtue of the status to override the provisions of that law to substantiate his claim. This cannot in general be done, as, for instance, can be done in a case of adoption, by appeal to settled rules of law, because the practice of illatom, being of rare occurrence and confined to certain castes, has never become crystallized into fixed rules of law by a long course of judicial decisions. Thus we frequently find that, when some legal consequence of the relationship has had to be decided, the Court has found it necessary to base its finding upon evidence specially recorded for the purpose. Upon the question now before us, no such evidence is available, and Mr. Varadachari has had to depend upon the available case law as the only means whereby to demonstrate his proposition.

Unfortunately little if any direct authority for it or against it has been found. There are cases where the question arose as to the right of an illatom son-in-law compared with that of a natural born son, as for instance *Hanumantamma* v. *Rami Reddi* (21), where the procedure I have already alluded to, that of taking evidence ad hoc, was resorted to, and the trial Court returned a finding that the illatom takes the same share as would be taken by an adopted son, while the High Court held that upon the evidence he should take an equal share with a natural born son, a difference which shows how doubtful may be the incidents of this custom. In the same case, the power of an illatom to demand partition was a question raised but not decided; and this same question was in *Chinna Obayya* v. *Sura Reddi* (22), held to depend upon custom and to be determinable only upon evidence. The case was remanded for evidence to be taken but what the result was has not been discovered. In *Chenchamma* v. *Subbayya* (23), the status of an illatom arose for consideration, and it was held that he was not a coparcener with an after-born son, nor a joint tenant, but a tenant-in-common. It has not been seriously contended that a coparcenary exists between the illatom and his father-in-law, and there is authority as for

(21) [1882] 4 Mad. 272.
(22) [1893] 21 Mad. 226.
(23) [1886] 9 Mad. 114.

instance in *Enni Sooranna* v. *Y. Varahalu* (24), that on the father-in-law's death he gets no right of survivorship. It is not possible, I think to deduce from these decisions, even were they capable which they are not, of universal application, that the illatom has, during the father-in-law's lifetime, such an interest in the latter's property as would give him a right to interdict alienation and devise. Mr. Varadachari admits that the interest enjoyed is of a peculiar kind, which he would define as vested but variable.

It would certainly be a very strong thing to hold that the father-in-law debars himself from disposing of any property thenceforward and indeed the learned advocate only goes the length of suggesting that alienation for the purpose of defeating the illatom rights would be invalid as against it. It would be more reasonable to impose a limit upon the father-in-law's power of devise, although whether this should be total or partial would need to be decided by reference to evidence of usage.

On the whole, later cases appear to me not to be in conflict with the earliest cited to us: *Challa Papi Reddi* v. *Challa Koti Reddi* (25). The finding in that case was that the defendant's father obtained his rights in pursuance of a special custom which entitled his father-in-law to select a son-in-law who should take his property as if a son. Holloway, J., (with whom Innes, J., agreed) held that the son-in-law did not become a joint tenant, and the father-in-law had no such restrictions imposed upon his powers of alienation as the existence of a son would entail. He goes on;

"The power of complete disposition as against both a widow and daughters has rightly or wrongly, been upheld, and there would be great difficulty in saying that the son-in-law so affiliated could be in a better position ..... There is nothing illogical in saying that the person so affiliated shall inherit all of which the affiliator died possessed, but he does not and cannot stand in the same position as one who became a joint tenant at the instant of birth."

So far as I can see, it is only by reference to a special agreement that this conclusion can be successfully resisted. In the present case, even if the evidence is relied upon to the full, I do not think that more could be derived from it than that Ramayya agreed to take defendant 2 as illatom, subject to what were known or understood to be the incidents of that status. As was held by the Judicial Committee in *Narain Das* v. *Ramanuj Dayal* (26), a promise to make a person one's heir may while giving rise to an expectation fall short of a contract.

Near the conclusion of the arguments Mr. Raghava Rao for the appellants, drew our attention to an unreported case of this Court, A. S. No. 206 of 1912, where the very question which now engages us arose. The learned Judges found the evidence available for the decision of the point so unsatisfactory that they called for a finding upon fresh evidence; and the District Judge, after examining numerous witnesses on each side, returned a finding that the father-in-law was not precluded from disposing of his property either inter vivos or by will, which was accepted by the Bench. The case came from the Kurnool District, and while it may not be permissible to import the conclusion, as partly a conclusion of fact, into this case, yet the procedure adopted is only one further illustration of the correct method of settling a disputed question of usage. It lay heavily upon defendant 2 in my view, to show that by specific customary law overriding the general Hindu law, he had a preferential right to the rights of Ramayya's alienees, and in this respect too I think that his case fails.

A question that remains is whether the mill and godown, Items 52 and 53, were owned jointly by the brothers or were the separate property of Sambayya. * * * * * *

It is impossible to suppose that Ramayya would have signified his assent to this arrangement if the mill had in fact been joint property and accordingly, in spite of one or two earlier indications to the contrary, I agree with the learned Subordinate Judge in regarding this last piece of evidence as conclusive of Sambayya's separate ownership. These are all the questions that have been argued in this appeal, and, agreeing with my Lord as to the answers which should be given to

(24) A. I. R. 1927 Mad. 703=101 I. C. 823.
(25) 7 M. H. C. R. 25.
(26) [1893] 20 All. 209=25 I. A. 45=7 Sar. 257 (P.C.).

them, I agree also as to the practical consequences which should follow, and the orders which should be passed.

P.R.S./S.N. *Decree modified.*

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* A. I. R. 1930 Madras 896

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

(*Penugonda*) *Venkataratnam* and *another*—Petitioners.

v.

Secy. of State and *others*—Respondents.

Civil Misc. Petns. Nos. 2447 and 4277 of 1929, Decided on 20th December 1929.

(a) Certiorari—Writ of—Jurisdiction of High Court is supervisory and corrective and extends to all inferior tribunals.

The jurisdiction possessed by the High Court in the matter of certiorari is original and supervisory or corrective, and on the English analogy extends over all inferior tribunals amenable to its authority. [P 902 C 1]

*(b) **Government of India Act (1919), S. 46—When orders passed by the Governor acting with Ministers are sought to be challenged by writs of certiorari, the writ should be directed against that body and against none else.**

Under S. 46 (1) the Madras Presidency is governed in relation to transferred subjects by the Governor acting with Ministers. Whether their advice is followed or not, the orders passed in relation to the transferred subjects are orders of the Governor acting with Ministers, and when the orders passed by this statutory body are sought to be challenged by writs of certiorari, it is clear that the application for the writs should be directed against that body and against none else.

Where therefore an application for the issue of a writ of certiorari against the Minister of Public Health, Government of Madras, was made :

Held : that the application was not in proper form and would be in proper form if directed against the Government of Madras, Ministry for Public Health. But the application could not be dismissed only on this account as the recipient of the notice knew exactly the scope of the application against which he was asked to show cause. [P 905 C 1]

*(c) **Government of India Act (1919), Ss. 106 and 110—Power to issue writs of certiorari falls within original jurisdiction as distinguished from appellate or other jurisdiction—High Court has no jurisdiction to issue writ of certiorari against Governor acting with Minister for Public Health—Jurisdiction**

In India the Madras High Court's power to issue the writs of certiorari falls within its original jurisdiction as distinguished from its appellate or other jurisdiction and it is in this sense that the expression "original jurisdiction" is used in S. 110. [P 910 C 1]

As the jurisdiction to issue a writ of certiorari falls under the original jurisdiction of the High Court, the High Court has no jurisdiction to issue such a writ against the Governor acting with the Minister for Public Health. The Governor acting with Ministers is entitled to claim exemption from the jurisdiction of the High Court for acts counselled or ordered by them in their public capacity both under S. 106 and S. 110 (a) : 1 *Mad.* 89 (*F.B.*); *A. I. R.* 1921 *Mad.* 524 ; 6 *B. L. R.* 392 ; 13 *Bom.* 520, *Ref.* ; *A. I. R.* 1919 *P. C.* 31, *not Foll.* [P 911 C 1]

C. P. Ramaswami Ayyar, *P. Satyanarayana Rao* and *G. Sivarama Krishnasastri*—for Petitioners.

Govt. Pleader, *B. T. M. Raghavachari* for *V. Govindarajachari*, *P. V. Rajamannar* and *Venkatarama Raju*—for Respondents.

Venkatasubba Rao, J.—This is a Rule calling upon "the Minister, Public Health, Government of Madras", to show cause why an order made by him on 11th March 1929 should not be quashed on certiorari. The ground on which the Rule was obtained may be shortly stated. The Nuzvid Union Board granted permission to a certain person to establish a rice mill within its jurisdiction. The Collector suspended the resolution of the Board, as in his opinion the establishment of a mill in the locality in question "was likely to be detrimental to public health". The Local Government passed proceedings under Ss. 38 and 196, Local Boards Act (1920) on 9th June 1928 directing that the Collector's order "shall continue in force permanently". Subsequently this order was rescinded on 11th March 1929, the result being that permission to establish the mill was accorded. This rule was issued at the instance of certain residents of the locality who complain that they are prejudicially affected by the order in question. The point of law raised by them is that the order impeached was one made without jurisdiction. They contend that there is no power of review enabling the Local Government to rescind its order purporting to be "permanent" under S. 38.

The order was issued by "the Government, Ministry of Public Health."

Section 46, Government of India Act, prescribes that the Presidency of Madras shall be governed in relation to reserved subjects, by the Governor in Council, and in relation to transferred subjects by the Governor acting with

Ministers. We are now concerned with a transferred subject.

Section 49 provides that orders and proceedings of the Government of a Governor's province shall be expressed to be made by the Government of the province. It further enacts that the Governor may make rules for the convenient transaction of business in his Executive Council and with his Ministers. It says that every order made or act done in accordance with those rules and orders, shall be treated as being the order or the act of the Government of the province.

It is clear from this that the application made to us is wrong in form. Sir C. P. Ramaswami Ayyar, for this reason, asks us for leave to amend his petition, by substituting "The Government of Madras, Ministry of Local Self-Government" for the words "the Minister, Public Health, Government of Madras." I shall deal with the real substance of the issue, as if the amendment has been allowed.

Two main questions arise :

1. What is the jurisdiction of the High Court in certiorari ?

2 Can certiorari issue against the Governor acting with Ministers ?

As regards the first point, the nature of this writ is thus described in Short & Mellor's Crown Practice :

"The writ of certiorari is the process by which the King's Bench Division, in the exercise of its superintending power over inferior jurisdictions, requires the Judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than could be done by the Court below." (2nd Edition p. 14).

The Court of King's Bench (or Queen's Bench when a Queen is on the Throne), as the learned authors explain, derives its title from the fact that the Soveriegn formerly sat in the Court himself. They then add :

"The theory of the Sovereign's presence has always been kept up . . . The jurisdiction of this Court is very high and transcendant. It keeps all inferior jurisdiction within the bounds of their authority . . . . . .
It commands Magistrates and others to do what their duty requires in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition." (page 2).

I am prepared to adopt and apply the law on this subject as laid down in English books and decisions. It is unnecessary to deal with the numerous cases which Sir C. P. Ramaswami Ayyar has quoted. The law has been most succinctly stated in some of the most recent decisions on the point.

In *Frome United Breweries Co.* v. *Bath Justices* (1), Lord Atkinson quotes with approval the following passage from the judgment of May, C. J., in *Reg John M'Evoy* v. *Dublin Corporation* (2).

"It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove an adjudication upon the validity of acts judicial, In this connexion the term 'judicial" does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability of affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts."

Similarly in *Rex* v. *Minister of Health* (3), Lord Hewart, C. J., cites with approval the following passage from the judgment of Atkin, L. J., in *Rex* v. *Electricity Commissioners* (4):

"Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The latest case on the point is *Rex* v. *North Worcestershire Assessment Committee* (5), and the law is admirably summed up in it, in regard to the powers of superior Courts to issue prerogative writs.

I may also refer to the observations of Bret, L. J., in *Queen* v. *Local Government Board* (6), at 321 :

"I think I am entitled to say this: that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

(1) [1926] A. C. 52.
(2) 2 Ir. 371.
(3) [1929] 1 K. B. 619.
(4) [1924] 1 K. B 171.
(5) [1929] 2 K. B. 397.
(6) [1883] 10 Q. B. D. 309=52 L. J. M. C. 4=31 W. R. 72=47 J. P. 228=48 L. T. 173.

These various statements, with great respect, I adopt. Subject to the exception with which I shall deal, the High Court possesses the same jurisdiction in certiorari as the Court in England.

I shall now deal with the second point. Sir C. P. Ramaswami Ayyar contends that we possess the same unlimited jurisdiction in this respect as the Court of King's Bench. He relies mainly, if not solely, on Cl. 8, Letters Patent, establishing the Supreme Court at Madras (dated 26th December 1801). It provides :

"And it is our further Will and Pleasure, That the said Chief Justice, and the said Puisne Justices, shall, severally and respectively be, and they are, all and every one of them hereby appointed to be Justices and Conservators of the Peace, and Coroners, within and throughout the settlement of Fort St. George, and the town of Madras, and the limits thereof, and the Factories Subordinate thereto, and all the Territories, which now are, or hereafter may be, subject to, or dependent upon, the Government of Madras aforesaid ; and to have such jurisdiction and Authority as Our Justices of Our High Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit."

This clause consists of two parts and we are concerned with the second. By the first part, the Judges are appointed Conservators of the Peace and Coroners. The second part confers on them a distinct and independent jurisdiction. This is not merely ancillary to or explanatory of the first, but confers on the Judges a separate authority and jurisdiction. Sundara Ayyar, J's construction in *In re Nataraja Iyer* (7) seems, with all respect, forced and far-fetched. My view receives support from the judgment of Sadasiva Ayyar, J. in that case :

"The High Court has inherited the powers of the Supreme Court and if this clause stood alone, I should, on the strength of it, hold without hesitation that we possess jurisdiction in certiorari, as extensive as that possessed by the Court of King's Bench."

This leads me to examine certain Statutes and Charters to which the learned Government Pleader has drawn our attention. They preceded the Letters Patent to which I have referred and serve to explain the scope and effect of Cl. 8 of that Patent. The first Act, which is material in this connexion, is, the East India Company Act, 1772 (13 Geo. 3, C. 63).

(7) [1913] 36 Mad. 72=13 Cr. L. J. 723=16 I. C. 755.

Section 13 enacted that it shall be lawful for His Majesty by Letters Patent to establish a Supreme Court of Judicature at Fort William, which Court shall have full power and authority to exercise all civil, criminal, admiralty and ecclesiastical jurisdiction.

I may pass over S. 14 and refer to Ss. 15 and 17 which alone impose certain restrictions in regard to the jurisdiction possessed by that Court.

Section 15 rendered the Governor-General and Members of his Council immune in respect of certain offences.

Section 17 exempted them and certain other high officers from arrest or imprisonment upon any action or proceeding in that Court.

These restrictions are not relevant to the matter in hand and the jurisdiction of the Supreme Court was not otherwise limited.

In pursuance of this Act, by a Letters Patent, dated 25th March 1774, a Supreme Court was established at Calcutta with plenary powers. Into the conflict that arose in consequence between the Judges of that Court and the Executive Government, it is needless to enter. It was then thought desirable in the interests of good administration to limit the powers of the Court, and to secure that object, the Act known as the East India Company Act (1780) (21 Geo. 3 C. 70) was next passed.

The preamble is instructive. After referring to the previous Act and the Letters Patent it goes on to say that they led to dissensions between the Judges of the Supreme Court and the Governor General and his Council. The result was disastrous. To use the very words :

"The minds of many inhabitants.....have been disquieted with fears and apprehensions and further mischiefs may possibly ensue . . . . . if a reasonable and suitable remedy be not provided."

It was therefore enacted :

"(1) That the Governor-General and Council of Bengal shall not be subjected, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only, and acting as Governor-General and Council.

(2) And . . . . . if any person or persons shall be impleaded in any action or process, civil or criminal, in the said Supreme Court for any act or acts done by the order of the said Governor-General and Council in writing, he or

they may plead the general issue, and give the said order in evidence; which said order, with proof that the act or acts done has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted and discharged from all and every suit, action and process whatsoever, civil or criminal, in the said Court.

(3) Provided always, that with respect to such order or orders of the said Governor-General and Council as do or shall extend to any British subject or subjects, the said Court shall have and retain as full and competent jurisdiction as if this Act had never been made.

(4) Provided also, that nothing herein contained shall extend or be construed to extend to discharge or acquit the said Governor-General and Council, jointly or severally, or any other person or persons acting by or under their order, from any complaint, suit or process before any competent Court in this Kingdom, or to give any other authority whatsoever to their acts than acts of the same nature and description had by the laws and statutes of this Kingdom before this Act was made."

It is the first section that is now material. In regard to the matters specified it totally removes the Governor-General and his Council from the jurisdiction of the Supreme Court.

What I have so far said pertains to the Supreme Court at Fort William. We must now turn to the Government of India Act, 1800 (39 and 40 Geo. C. 79). After reciting and referring to certain matters, it provides for the establishment of a Supreme Court at Madras. But that Court is to be, to quote the words of the Act,

"In the same form and with the same powers and authorities as that now subsisting . . . at Fort William in Bengal."

The relevant part of what follows : I reproduce:

"It shall be lawful for His Majesty to establish a Supreme Court of Judicature at Madras with full power to exercise such jurisdictions and to be invested with such power and authorities, privileges and immunities and subject to the same limitations, restrictions and control within the said Town of Madras and Territories dependent on the Government of Madras as the said Supreme Court of Judicature at Fort William in Bengal is invested with or subject to within the said Fort William or the Kingdoms of Bengal, Bihar and Orissa.

(3) Provided always that the Governor and Council at Madras and the Governor-General of Fort William aforesaid shall enjoy the same exemption and no other from the authority of the said Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid from the jurisdiction of the Supreme Court of Judicature there already by law established."

Thus, in every respect, the two Courts were placed on the same footing, that is the Court already existing and the Court to be established. The words used are direct and pointed. No higher powers can be conferred on the Supreme Court to be established, than those possessed by the Court at Fort William. The Governor and his Council are exempted from its jurisdiction in the same way, and to the same extent, as the Governor-General and his Council, from the jurisdiction of the Calcutta Court.

Then we come to the Letters Patent establishing the Supreme Court at Madras, dated 26th December 1800. Cl. 23 provides inter alia:

"Nor shall it be competent for the said Court to hear or determine, or to entertain or exercise jurisdiction in any suit or action against the Governor-General of Fort William, or the Governor or any of the Council of the said Settlement, for or on account of any act or order, or any other Act, Matter or Thing whatsoever, committed, ordered, or done by them in their public capacity, or acting as Governor-General, or Governor and Council."

The limitation here mentioned, it may be said, is not quite as extensive as that in the Act itself, for in this clause, only suits or actions are mentioned, whereas the Act totally excludes all jurisdiction and authority. This is a detail which may be ignored, it being obvious that the powers of the Court as laid down in the Act cannot be enlarged by the Letters Patent issued under it.

Now let us go back to Cl. 8 of this Charter on which, as I have said, Sir C. P. Ramaswami Ayyar so strongly relies. It confers on the Judges of the Supreme Court at Madras the same jurisdiction as that possessed by the Judges of the Court of King's Bench. Perfectly true ; but this clause is subject to the sections of the Act which controls the Charter. The position may be thus summed up. The Charter of the Calcutta Supreme Court gave that Court, as it were, unrestricted jurisdiction. It contained a provision (Cl. 4) in terms identical with Cl. 8 of the later Charter of the Madras Supreme Court. It said in terms that the Judges of the Supreme Court at Fort William shall have jurisdiction and authority as extensive as the Judges of the King's Bench Court in England. This led, as I have pointed out, to dissensions between the Judges of the Supreme Court at Fort William and the Executive Government. Thereupon, an Act was specially passed to curtail the powers of that Court. This

history was not allowed to be repeated in the case of the Madras Supreme Court. An Act was first passed which defined the limits of the Court to be established. It was specially enacted that that Court was not to have any higher powers than those the Calcutta Court possessed after its powers had been curtailed. What is the result? Cl. 4 of the Charter of the Calcutta Court was qualified by an Act passed subsequent to it, namely the Act of 1780; whereas Cl. 8 of the Charter of the Madras Court becomes restricted in its operations, by an Act which had been passed previous to it, namely the Act of 1800.

I now pass on to the next stage. The Indian High Court Act (1861) (24 and 25 Vic. Ch. 104) was passed and gave to the Crown authority to establish High Courts in the Presidency Towns. It abolished the Supreme Courts and the Sudder Courts and provided for the jurisdiction and powers of the High Courts.

Section 9 runs thus:

"Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts."

It is the second clause that is material for the present purpose. Each High Court, it says, shall have the jurisdiction and power vested in the abolished Courts at the time of their abolition. It is this provision that Sir C. P. Ramaswami Ayyar invokes in his favour. By virtue of it the High Court inherits the jurisdiction of the Supreme Court, but if the power contended for was not possessed by the Supreme Court itself, this clause cannot avail the applicant.

Having regard to the opening words of the clause referred to, the question arises: Have the Letters Patent "otherwise directed?" Far from it, they contain, in fact, no provision corresponding to Cl. 8 of the Charter of 1800. The High Court therefore derives its power to issue prerogative writs, not from any express clause in the Charter, but from S. 9 of the Act, which preserves intact the powers of the abolished Courts. It follows, therefore, that the Letters Patent have not enlarged the jurisdiction of the High Court in certiorari. I may refer to the dictum of Kernan, J. that the provision relating to the exemption of the Governor and Members of Council, is not affected by the High Courts Act of 1861 or the Letters Patent 5 of 1867: *Collector of Sea Customs* v. *Chidambaram* (8).

Finally, the various High Courts Acts were repealed in their turn by the Government of India Act. S. 106 (1) enacts:

"The several High Courts are Courts of record and have such jurisdiction, original and appellate including admiralty jurisdiction in respect of offences committed on the high seas and all such powers and authority over or in relation to the administration of justice, including the power to appoint clerks and other ministerial officers of the Court and power to make rules for regulating the practice of the Court as are vested in them by Letters Patent and, subject to the provisions of any such Letters Patent, all such jurisdictions, powers and authority as are vested in those Courts respectively at the commencement of this Act"

This does not carry the matter further. The question ultimately resolves itself into: Did the Supreme Court possess the power in question? If yes, the High Court (having inherited its jurisdiction) has it. If not, it does not possess it.

It is said by way of answer that the Government of India Act has repealed the East India Company Act 1780 (21 Geo. 3 C 70) and the Indian High Courts Act, 1861 (24 and 25 Vic. Ch. 104). But this is utterly irrelevant, for, what matters for the present purpose whether they have been repealed or not? The repealed Acts serve merely to show what the powers of the abolished Courts were. We are not directly concerned with the Acts themselves.

It is next suggested that the exemption of the Governor-General and Council is subject to the proviso relating to

(8) [1876] 1 Mad. 89 (F. B.).

British subjects : see the sections of 21 Geo 3 C. 70 quoted above. The argument is thus put: Since the passing of .the Government of India Act, 1858, natives of British India are British subjects (10 Hals. 588) and the order complained against affects the rights of such subjects and therefore the immunity claimed does not extend to it. The short answer is, that the proviso has no bearing on the section which relates to the exemption in question. That proviso (unlike the succeeding one) refers to matters dealt with in S. 2 and not in S. 1.

Then comes the question, Does the exception by statute in favour of "the Governor and Council" enure to the benefit of "the Governor acting with Ministers." The Act says:

"The Governor and Council shall enjoy the same exemption as is enjoyed by the Governor-General and Council (S. 3 of 39 and 40 Geo. 3 C. 70 already quoted.)

And what is the exemption that the latter enjoy The statute of 1780 provides that they are exempted jointly and severally. The Governor is thus individually not amenable for acts done in his official capacity. As granting the writ against "the Governor acting with Ministers" involves the exercising of jurisdiction against the Governor himself, it follows that we must even as against that body, refuse to issue certiorari. To this subject I shall return when dealing with an allied argument in connexion with S. 110, Government of India Act.

The learned Goverment Pleader relies upon S. 31, General Clauses Act (10 of 1897) for construing the expression "The Governor and Council" as including "the Goverment acting with Ministers." It provides (omitting words not material):

"In any enactment made by any authority in British India before the date on which S. 3, Government of India Act 1919, comes into operation, any reference to an authority authorized by law, to administer executive Government, shall, where a corresponding new authority has been constituted by the Government of India Act 1919, be construed as a reference to such new authority.

This was added to the General Clauses Act by Act 31 of 1920. Are the requirements of this section fulfilled? First, the enactment in question (the Government of India Act 1800) was made before the date specified in the section. Secondly, was it made by an authority in British India? Is this to be confined, as contended for by the applicant, to an authority situated in British India? I see no reason to limit it that way. The word "authority" according to Webster's dictionary may mean, a body exercising power. Substituting those words, the section reads thus:

"In any enactment made by any body exercising power in British India.

The British Parliament being such a body, the enactment in question answers this description. Is the Indian Legislature then competent to provide for the interpretation of words occurring in an Act of Parliament? Having regard to the fact that the Act in which the expression occurs is a repealed one and having advertence to the rule embodied in S. 65, Government of India Act, I am disposed to think that we can call in aid S. 31 in construing the words in the Act of 1800. In that case, what is the new executive authority which corresponds to the "Governor and Council" of 1800? S. 46, Government of India Act (already quoted), says that each Presidency shall be governed in relation to reserved subjects, by a Governor in Council and in relation to transferred subjects, by the Governor acting with Ministers. The authority with which we are now concerned is the Governor acting with Ministers and, therefore, the exemption extends to that body. But this was the conclusion at which I arrived also on another (and in my opinion safer) ground.

I now proceed to deal with the next contention of the Government Pleader, that S. 110, Government of India Act, also excludes our jurisdiction. This is pleaded in the alternative as the second ground. The relevant part of that section runs thus:

'The Governor-General, each Governor (Lieutenant Governor and Chief Commissioner and each of the members of the Executive Council of the Governor-General or of a Governor or Lieutenant Governor) (and a Minister appointed under this Act), shall not (a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only; nor (b) liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction."

In the first place, the question arises if exemption otherwise exists (as I have held it does), why was S. 110 enacted at all? Mr. Rajamannar's argument seems

plausible; he says by S. 9, High Courts Act of 1861 (already quoted), the Court was invested with two distinct jurisdictions; first, jurisdiction of the abolished Court (Cl. 2) and, secondly, jurisdiction freshly conferred (Cl. 11). The old jurisdiction was excluded in the manner already stated. How was exemption to be obtained from the jurisdiction newly conferred? This was secured by the enacting of S. 110. Then another difficulty presents itself, why was this exclusion restricted to the original jurisdiction? I do not think it necessary to refer to the answer attempted. The fact remains, that Governers and Ministers are declared not amenable to the original jurisdiction of the High Court in respect of their official acts. Then is the jurisdiction in certiorari original? I think the question must be answered in the affirmative. By S. 34, Judicature Act of 1873 (corresponding to S. 55 of the present Act of 1925), to the Queen's Bench Division of the High Court were assigned:

"All causes and matters . . . . . which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction."

This is explained thus in the "Supreme Court Practice:"

"Matters within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction at the commencement of this Act included the supervision of decisions of inferior tribunals generally by certiorari: see the Supreme Court Practice 1928, p, 1610."

I must guard myself against being understood that the term "original jurisdiction" in this context connotes that the writ cannot be issued outside the limits of the city. This is not the sense in which that expression is used. The jurisdiction in exercise of which the writ is granted is original, as contrasted with appellate. This jurisdiction termed "original" is not to be confused with "original civil jurisdiction" mentioned in S. 12, Letters Patent. The last-mentioned jurisdiction can be exercised by its very nature, within certain local limits. But the jurisdiction possessed by the High Court in the matter of certiorari is supervisory or corrective and on the English analogy, extends over all inferior tribunals amenable to its authority.

Again, under this section, a difficulty arises similar to the one I have already noticed. A Governor is exempted, so is a Minister, but there is no exemption in favour of "the Governor acting with Ministers." I may point to a similar lacuna in the section even in the case of "the Governor in Council," for, while it mentions both the Governor and the Members, it does not in terms refer to "the Governor in Council." Reading the section strictly, the Governor is exempted, so are the members and the Ministers. But this exemption does not extend to "the Governor in Council" or "the Governor acting with Ministers." We must construe the section reasonably. If each of these individuals enjoy immunity in respect of his public acts, it stands to reason that they should likewise be exempt when acting jointly.

I am, therefore constrained to hold that our jurisdiction is excluded. The restrictive provisions which drive us to this conclusion, are mere relics of the past, dating back to the discord of the Supreme Court and the Governor-General's Council: see supplement to the Government of India by Ilbert (1916), p. 154. In the words of Kernan, J., in respect of an allied matter in *Collector of Sea Customs* v. *Chidambaram* (8), already qouted, the continuance of these exceptions, is both unnecessary and useless. These remarks apply with greater force at the present day, having regard to the new constitution. In England as shown by the numerous cases cited at the Bar, prerogative writs lie to the Government in its various departments. I see no reason for retaining the restrictive provisions, in regard to the High Courts in India. It is, however, our duty to give effect to the law as we find it. I must therefore refuse to make the rule nisi absolute. The application is dismissed with costs (two sets). We must fix a special fee, but we cannot penalize the petitioner by ordering him to pay a sum adequate to the importance of the case and the time it has taken. Accordingly, we fix the fee of the Government at Rs. 350, and the other respondent's costs, at Rs. 75.

The petitioners will pay Rs. 350 to respondent 3 and Rs. 75 to respondent 4 for their respective costs in this petition.

Madhavan Nair, J.—In this application directed against: (1) the Secretary of State for India in Council;

(2) the Hon'ble the Minister for Public Health, the Governor of Madras; (3) the Secretary for Public Health, Government of Madras, and (4) Vezzu Venkata Narasimham of Nuzvid, the petitioners request this Court to issue a writ of certiorari to the Hon'ble the Minister, Public Health, calling for the records in the matter of G. O. No. Misc. 673-P. H. dated 11th March 1929, cancelling G. O. No. Misc. 1214 P. H, dated 9th June 1928, to quash the said proceedings and to pass such order or orders as this Court may deem fit.

Local Self-Government Department, G. O. No. Misc. 1214 P. H. dated 9th June 1928, was passed in the following circumstances: By its resolution No. 71, dated 20th January 1928, the Nuzvid Union Board granted permission to respondent 4 to establish a rice mill against the advice of the District Health Officer Kistna, who considered it most undesirable as the site was in the midst of dwelling houses and on a busy thoroughfare and in the heart of the town. The Collector in his proceedings dated 10th February 1928, suspended the Union Board's resolution as in his opinion the establishment of a mill in the locality was likely to be detrimental to the public health. The Union Board was given an opportunity to show cause why the Collector's order should not be made to continue in force permanently. The Government were not impressed with the argument of the Union Board; and they concurred with the Collector that the establishment of a mill in the heart of the town should not in the interests of public health be agreed to. Narrating these circumstances, the order ended as follows:

"In exercise of the powers conferred on them by sub-S. 2, S. 38 and S. 196, Madras Local Boards Act 1920, they accordingly direct that the Collector's order contained in his proceedings, dated 10th February 1928, shall continue in force permanently and the permission is cancelled.

(By order of the Government, Ministry of Public Health).
(Sd) C. W. E. Cotton,
Secretary to Government."

The above order was subsequently rescinded by the Government by Local Self-Government (Public Health) Department, G. O. No. Misc. 673—P. H., dated 11th March 1929 which this Court is now called upon to quash by the issue of a writ of certiorari. After mentioning in para. 1 that the Government in G. O. No. Misc. 1214 P. H., dated 9th June 1929, the Government order already quoted, directed that the Collector's Order suspending the resolution of the Nuzvid Union Board, No. 71, dated 20th January 1928, should continue in force permanently, the Government order proceeds as follows:

"Affidavits have now been filed by the residents of Nuzvid in respect of the working of the mill in question and the Government have after a careful consideration thereof come to the conclusion that the existence of the mill at its present site is not likely to cause danger to life, health or safety of the residents of the locality. In supersession of the orders contained in G. O. No. 1214 P. H., dated 9th June 1928 they accordingly rescind the proceedings of the Collector No. R, O. C. B-3 362-28, dated 10th February 1928, suspending the resolution of the Union Board referred to above.

(By order of the Government, Ministry of Public Health).
(Sd) S. Ranganathan,
Dy. Secretary to Government."

The rule nisi was issued by this Court calling upon the Hon'ble the Minister for Public Health for the records in the matter of these Government Orders for quashing the said proceedings.

At the time of the final hearing of the Rule, the petitioners' learned counsel filed an amended application for the issue of the writ in which:

"the Government of Madras, Ministry for Public Health,"

is substituted for: "The Hon'ble the Minister for Public Health."

On behalf of the Government the learned Government Pleader takes a preliminary objection that an application will not lie under the Government of India Act against the Hon'ble the Minister for Public Health, Government of Madras, and that the amendment asked for directing the fresh application against the Government of Madras, Ministry for Public Health, should not be allowed at this late stage. He next argues that this Court has no jurisdiction to issue a writ of certiorari against the Minister or the Government of Madras, Ministry for Public Health, and that in any event, having regard to the circumstances of this case, the writ of certiorari asked for should not be issued. All these points are disputed by the learned counsel for the petitioners. The three main questions arising for consideration are: (1) Should the preliminary objection be upheld? (2) Has this Court jurisdiction to issue a writ of certiorari

against the Minister or the Government of Madras, Ministry for Public Health? (3) If it has such jurisdiction should a writ be granted to the petitioners in the present case? I shall deal with these questions one after the other.

(1) The preliminary objection.—In these proceedings action has been taken by the Local Government under S. 38, Cl. 2, Madras Local Boards Act. It empowers the District Collector to suspend the resolution of any Local Board under certain circumstances :

"and report to the Government, who may thereupon rescind the Collector's order or after giving the Local Board and, if the order affected any act of the president, the president also, a reasonable opportunity of explanation, direct that it continue in force with or without modification permanently or for such period as they think fit."

Under S. 134, Cl. 4, Government of India Act :

"'Local Government' means, in the case of a Governor's province, the Governor in Council or the Governor acting with Ministers (as the case may require) . . . . . ."

This definition epitomizes the substance of S. 46 of the Act which is as follows :

"The Presidencies of Fort William in Bengal, Fort St. George, and Bombay . . . . . shall each be governed, in relation to reserved subjects, by a Governor in Council, and in relation to transferred subjects (save as otherwise provided by this Act) by the Governor acting with Ministers appointed under this Act."

The two limbs of the Local Government are the Governor in Council in relation to reserved subjects and the Governor acting with Ministers in relation to transferred subjects. The subject-matter of the Government Orders in the present proceedings admittedly falls within the category of transferred subjects, and as such the Local Government's order under S. 38, Cl. 2, Local Boards Act, will be made by the Governor acting with the Minister in charge of this particular subject.

Having regard to these provisions it is clear that the application for the writ should not have been directed against the Hon'ble the Minister for Public Health, Government of Madras. That is conceded by the petitioners. In strict propriety the application should have been directed against the Governor of Madras acting with the Minister in charge of this particular subject. S. 49 (1) enacts that

"All orders . . . . . of the Government of a Governor's province (such as Madras, Bombay etc.) shall be expressed to be made by the Government of the province and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings."

"Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the province."

Clause 2 enacts :

"The Governor may make rules and orders for the more convenient transaction of business . . . . . with his Ministers and every order made or act done in accordance with those rules shall be treated as being the order or the Act of the Government of the province."

Obviously, it must have been according to the rules made under this section that the order in this case has been issued in the following form :

"By order of the Government, Ministry for Public Health."

The expression "Ministry for Public Health" does not find a place in the Government of India Act; but rules must have been made under S. 49 which authorize the Governor acting with the Minister for Public Health being described as the "Ministry for Public Health." This, I think, is the explanation for the expression, "The Ministry for Public Health" being found in the order of the Government. So, if the application for the issue of a writ was directed against the Government of Madras, Ministry for Public Health, the application according to the provisions of the statute would have certainly been in proper form.

The learned Government Pleader argues that the application to be in proper form should be directed against the Governor. His argument is mainly based on S. 52, Cls. 1 and 3, Government of India Act. Under Cl. 1 the Governor may appoint Ministers and any Ministers so appointed shall hold office during his pleasure. Cl. 3 enacts that

"In relation to transferred subjects, the Governor shall be guided by the advice of his Ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice. Provided that rules may be made under this Act for the temporary administration of a transferred subject where, in cases of emergency, owing to a vacancy, there is no Minister in charge of the subject, by such authority and in such manner as may be prescribed by the rules".

It is argued that since the Ministers offer only advice which may be discar-

ded by the Governor and since he can administer the departments himself without Ministers in cases of emergency, the orders passed by the Government in relation to transferred subjects are really orders of the Governor and, as such, if they are sought to be questioned by writs of certiorari, the writs should be directed against the Governor. The point is sought to be further emphasized by reference to S. 47 (1) of the Act which deals with members of the Governor's Executive Councils and S. 50 (1) which deals with the procedure in case of difference of opinion in Executive Council.

The argument cannot be accepted. Under S. 46, Cl. 1, the Presidency of Madras is governed in relation to transferred subjects by the Governor acting with Ministers. Whether their advice is followed or not, the orders passed in relation to transferred subjects are orders of the Governor acting with Ministers, and when the orders passed by this statutory body are sought to be challenged by writs of certiorari, it is clear that the application for the writs should be directed against that body and against none else. I have shown having regard to the rule-making power contained in S. 49 (1) that the application would be in proper form if directed against the Government of Madras, Ministry for Public Health. As this has not been done in the present case, is the application to be dismissed? I think not; and this, apart from the question of amendment asked for at this hearing. The recipient of the notice knew exactly the scope of the application against which he was asked to show cause. He knew by the receipt of the petition and the affidavit annexed to it that the Court was being moved to issue a writ of certiorari calling for the records in the matter of G. O. No. Misc. 673 P. H., dated 11th March 1929, cancelling G. O. No. 1214 P. H., dated 9th June 1928, and for quashing the said proceedings. On his attention being drawn to the matter of these Government Orders it must have become clear to him that the proceedings were directed against the orders passed by the Local Government, i.e., the Governor acting with the Minister for Public health, i.e., the Government of Madras, Ministry for Public Health. In this view the application may be considered to have been directed against the proper department of the Government of Madras. Therefore the objection that the petition should be dismissed as it was directed against the Hon'ble the Minister for Public Health, Government of Madras, has no substance in it and is overruled. This dispenses with the necessity to consider the question whether the amendment asked for may be allowed at this stage.

(2) Has the High Court jurisdiction to issue the writ? The next question for consideration is whether the High Court has jurisdiction to issue a writ of certiorari against the Government acting with the Minister for Public Health or the Ministry of Public Health as the department is now called. The learned Government Pleader argues that it has no such jurisdiction relying on Ss. 106 (1) and 110, Government of India Act, under each of which he states that the Government can claim exemption. Generally stated, his argument is that, while the High Court has jurisdiction to issue writs of certiorari against Courts or persons entrusted with judicial functions *In re, Nataraja Iyer* (7). *In re Mrs. Annie Besant* (9) and *Annie Besant* v. *Advocate-General of Madras* (10), "the Governor acting with Ministers" is exempt from its jurisdiction "by reason of anything counselled, ordered or done" by that body in its "public capacity."

I shall first deal with S. 106 (1), Government of India Act, the relevant provisions of which are as follows:

> "The High Court has under this section such jurisdiction . . . . and all such powers and authority . . . . as are vested in it by Letters Patent and subject to the provisions of any such Letters Patent all such jurisdiction, powers and authority as are vested in that Court at the commencement of this Act."

In finding out the present jurisdiction of the High Court we have therefore to inquire into the jurisdiction, power and authority vested in it at the commencement of the Act. This requires examination of the various Letters Patent relating to the High Court and of the powers of the Supreme Court.

This High Court was established by 24 and 25 Vic. Ch. 104 known as the

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(9) [1916] 33 Mad. 1164=37 I. C. 607.
(10) A.I.R. 1919 P.C. 3 =52 I. C. 209=46 I.A. 176=43 Mad. 146 (P.C.).

High Courts Charter Act. S. 9 of that Act provided that:

"The High Courts to be established in each Presidency shall have and exercise all jurisidiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of the last mentioned Courts."

By S. 8 of that Act the old "Supreme Court" and the Court of Sudder Dewany Adawlat and Foujdary Adawlat were abolished. The High Court thus inherited the jurisdiction and all the powers of the old Supreme Court. These powers were continued in the Court under 28 and 29 Vic. Ch. 15. The Letters Patent issued with reference to this statute reenacted the powers already given and stated that the powers hitherto exercised "before the publication of these presents" shall vest in the High Court: see S. 17. Then came the Government of India Act which dealt with the jurisdiction of the High Court in S. 106, Cl. 1, already referred to. It is thus apparent that the High Court at the present day in exercising all the powers it has under the statutes we have referred to exercises amongst all such powers all the powers of the old Supreme Court; and when we examine what powers the Supreme Court had, it will be discovered that it had no jurisdiction over the Governor and Council jointly or severally for acts done or orders issued by them in their public capacity.

The Government of India Act of 1800 (39 and 40 Geo. III, Ch. 79), by virtue of which the Supreme Court at Madras was established by Cls. 2 and 3, enacted that a Supreme Court may be established at Madras with the same powers and authorities as the Supreme Court at Calcutta and that the Governor and Council shall enjoy the same exemption and no other, from the authority of the Supreme Court as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta. Paras 4 and 5 of Ss. 2 and 3, where the exemption of the Governor and Council is specifically referred to, are as follows.

Section 2, para 4:

"And whereas it may be expedient for the better administration of justice in the said settlement of Madras that a Supreme Court of Judicature should be established at Madras, in the same form and with the same powers and authorities as that now subsisted by virtue of the several Acts before mentioned at Fort William in Bengal."

Section 2, para 5:

"Be it therefore enacted, that it shall and may be lawful for His Majesty .... to enact and establish a Supreme Court of Judicature at Madras aforesaid .... with full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdictions .... and to be invested with such power and authorities, privileges and immunities .... and subject to the same limitations, restrictions and control with the said Fort St. George .... as the said Supreme Court of Judicature at Fort William in Bengal, by virtue of any law now in force and unrepealed or by this present Act, doth consist of, or is invested with or subject to, within the said Fort William or the Kingdoms or Provinces of Bengal, Behar and Orissa."

Section 3:

"Provided always that the Governor and Council at Madras and the Governor General at Fort William aforesaid shall enjoy the same exemption and no other, from the authority of the said Supreme Court of Judicature to be there erected as is enjoyed by the said Governor-General and Council at Fort William aforesaid from the jurisdiction of the Supreme Court of Judicature there already by law established."

As this Act specifically grants to the Governor and Council at Madras "the same exemption and no other" from the jurisdiction of the Supreme Court to be established as is enjoyed by the Governor-General and Council at Fort William, it becomes necessary to refer to the powers and authorities vested in the Supreme Court at Calcutta to find out the exact nature of the exemption that is granted to the Governor and Council. To anticipate a little, this will show the interesting fact, that, unlike the Supreme Court at Calcutta about the jurisdiction of which over the Governor-General and Council there were "many doubts and difficulties", the Supreme Court at Madras from its very origin had clearly no jurisdiction over the Governor and Council.

The East India Company Act, 1772, commonly known as the Regulating Act 13 (13 Geo. III, Chap. 63) authorized His Majesty by Charter and Letters Patent to erect and establish a Supreme Court at Calcutta: see S. 13. This Act was followed by the grant of the Charter dated 26th September 1774 establishing the Supreme Court which, briefly stated invested that Court within Bengal, Behar and Orissa with such jurisdiction and authority as the Court of the King's Bench exercised in England: see Cl. 4. Then came the historic struggle between

the Governor-General and Council and the Supreme Court which led to the passing of 21 Geo. III, Chap. 70 (East India Company Act of 1780). By S. 1 it is enacted that:

"the Governor-General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by any reason of any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only, and acting as Governor-General and Council."

Section 3 enacts that:

". . . . for any act or acts, done by the order of the said Governor-General and Council in writing . . . . the said order . . . . with proof that the act or acts done has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted and discharged from all and every suit, action and process whatsoever, civil or criminal, in the said Court."

These provisions show that the Supreme Court at Calcutta had in the year 1800, when the Supreme Court at Madras was established, no jurisdiction over the Governor General and Council of Bengal jointly or severally

"for or by reason of any act or order or any other matter or thing whatsoever counselled, ordered or done by them in the public capacity only and acting as Governor-General and Council"

as mentioned in S. 1; and also over persons for any act or acts done by them under the authority of the Governor-General and Council. In this connexion reference may usefully be made to *In re Ameer Khan* (11) by way of illustration to show what effect was given to S. 2 by the Calcutta High Court which inherited the limited jurisdiction of the Supreme Court by 24 and 25 Vic. Chap. 104. In that case a Mahomedan subject of the Crown was arrested in Calcutta and taken to the mufassil and detained in jail under a warrant of the Governor-General and Council in the form prescribed by Regn. 3 of 1818 and an application was made to the High Court to issue a writ of habeas corpus to the Superintendent (a European British subject) of the jail. It was held that the Supreme Court had power to issue writs of habeas corpus to persons in the mufassil and that the same power was continued to the High Court. It was also held that, as the person against whom a writ was applied for acted under the written order of the Governor-General and Council, the Court would not direct the writ to issue. The latter part of this decision illustrates the limitation of the jurisdiction of the High Court over the Governor-General and Council. Referring to Ss. 1 and 2 of 21 Geo. III, Chap. 70, which emphasise the limitation of the powers of the Supreme Court, Norman, J., states thus:

"Therefore, as the Superintendent of the Jail at Alipore holds the prisoner under the warrant in writing of the Governor-General in Council, it is clear that such order must prevail as against the command of any writ which this Court has power to issue. It appears to me therefore that I ought not to issue a writ which it would be the duty of the Superintendent of the Jail to disobey."

From this it follows that the jurisdiction of the Supreme Court at Madras over the Governor and Council (see 30 and 40 Geo. III, Chap. 79, already referred to) was limited in the same way as was the jurisdiction of the Supreme Court over the Governor-General in Council of Bengal by 21 Geo. III, Chap. 70. In other words, the Supreme Court at Madras, when it was established in 1800, had no jurisdiction over the Governor and Council for acts counselled, ordered or done by them in their public capacity as enacted in 21 Geo. III, Chap. 70 with reference to the Calcutta Supreme Court. Having regard to the fact that the Governor-General and Council enjoyed the exemption referred to, jointly and severally it must be held that in Madras also the exemption from the jurisdiction of the Supreme Court affected the Governor and Council jointly and severally. The Letters Patent of the Supreme Court were issued on 26th December 1801 in pursuance of the statute, 39 and 40, Geo. III, Chap. 79. S. 8 of that Charter enacted that the Supreme Court shall have

". . . . such jurisdiction and authority as our Justice of our Court of King's Bench have and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit."

In exercising these various powers of the Court of King's Bench, the Supreme Court had no jurisdiction as we have seen over the Governor and Council of Fort St. George. It follows therefore that the Madras High Court which has inherited the powers of the Supreme Court by Letters Patent in exercising its "jurisdiction, powers and authority" under S. 106 (1), Government of India

(11) 6 Beng. L. R. 392.

Act, has no jurisdiction over the Governor and Council jointly or severally.

The above conclusion is controverted by the learned counsel for the petitioners by referring to S. 130, Government of India Act, which repeals the Acts specified in Sch. 4 to the Act to the extent mentioned in Col. 3 of that schedule. It is pointed out that 13 Geo. III, Chap. 63, 21 Geo. III, Ch. 17, 39 and 40 Geo. III, Chap. 79 and 24 and 25 Vic. . . . . Chap. 104 are all repealed either in part or in whole, and that having regard to the following paragraph of S. 130 the exemption claimed by the Governor and Council no longer exists and that the only exemption which they can claim is under S. 110, Government of India Act, which, it is argued, according to its terms cannot be availed of by them:

". . . . . Any reference in any enactment, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations or others made under any such enenactment, or in any Letters Patent of other document, to any enactment repealed by this Act, shall for all purposes be construed as reference to this Act, or to the corresponding provision thereof : see S. 130."

This argument cannot be accepted as the powers of the Supreme Court limited in its operation are as shown above still retained by the High Court under S. 106 (1) and the High Court in exercising these various powers under that section can only exercise them subject to the restriction which I have pointed out. In this connexion it is also argued that having regard to the "powers and authorities" vested in the High Court without any restriction by S. 9 and the language of S. 11, High Courts Act, it must be held that the old restriction has not been carried out in the Act; but this argument is also untenable as the High Court has inherited the powers of the abolished Courts the jurisdiction of which was restricted in the manner already pointed out.

The argument as regards S. 110 will be dealt with later on.

Having thus established that under S. 106 (1), Government of India Act, the High Court has no jurisdiction over the Governor and Council jointly or severally for acts done or counselled by them in their public capacity, the respondent argues that the same exemption can be claimed by the "Governor acting with Ministers" in relation to a transferred subject. It is objected that unless by statute "Governor acting with Ministers" within the meaning of the Government of India Act is assimilated to the "Governor and Council" referred to in the enactments the exemption from the jurisdiction of the High Court granted to the Governor and Council cannot be extended in favour of the "Governor acting with Ministers." The petitioners are prepared to concede for this argument that the "Governor in Council" under the Act may claim the exemption in question. This leads to the anomaly that one limb of the Government that supplanted the Governor and Council of old is not subject to writs of certiorari, while the other is. The learned Government Pleader argues (1) that the acts done, counselled, etc., in the administration of the transferred subjects are acts done by the Governor; if this argument is not acceptable he states (2) that under S. 31, General Clauses Act, the Governor and Council may be identified with the "Governor in Council" and the "Governor acting with the Ministers" under the Government of India Act.

Section 31, General Clauses Act, is as follows:

"In any enactment made by any authority in British India before the date on which S. 8, Government of India Act, 1919, comes into operation, and in any rule, order, notification, scheme, bye-law or other document made under or with reference to, any such enactment, any reference by whatever form of words to an authority authorized by law, at the time the enactment was made, to administer executive Government in any part of British India, shall, where a corresponding new authority has been constituted by the Government of India Act, 1919, be construed for all purposes, after the above-mentioned date, as a reference to such new authority."

I have already overruled the argument that the orders of the Local Government in relation to transferred subjects are "orders of the Governor." Section 31, General Clauses Act, is of no use in solving the difficulty as it obviously applies only to laws made by "any authority in British India" and not to Acts of Parliament. It seems to me however that if the Governor can claim the exemption in question from the jurisdiction of the High Court under S 106 (1), as I have held he can, then clearly it is not illogical to infer from

this circumstance that no writ of certiorari can be issued by the High Court also against the Governor acting with Ministers. How can in actual practice exemption be given to the Governor which he is entitled to claim as a matter of statutory right, if it is held that proceedings can be directed against the Governor acting with the Ministers? The inconsistency is obvious. I must therefore hold that if the High Court has no jurisdiction to issue the writ of certiorari against the Governor under S. 106 (1), Government India Act, it has equally no jurisdiction to issue the writ against the Governor acting with the Ministers.

The next branch of the argument relates to the exemption claimed under S. 110, Government of India Act, which is as follows:

"The Governor-General, each Governor (Lieutenant-Governor and Chief Commissioner and each of the members of the executive council of the Governor-General or of a Governor or Lieutenant-Governor and a Minister appointed under this Act), shall not

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only."

The exemption from the original jurisdiction of the High Court granted by this section to the persons named therein relates only to

"anything counselled, ordered or done by any of them in his public capacity."

There can be no question that the order complained against in these proceedings was passed by the authority concerned in its public capacity. If with respect to such an order both the Governor and the Ministers are severally exempt from the jurisdiction of the High Court, provided that the jurisdiction invoked against them is its original jurisdiction, then it follows as a matter of inference that the Governor acting with the Ministers must also be exempt from the Court's jurisdiction. The question then for consideration is whether "the writ of certiorari" is issued by the High Court in the exercise of its original jurisdiction. Having regard to the authorities this question must be answered in the affirmative.

"Certiorari is an original writ issued out of the chancery of Court of King's Bench directed in the King's name to the Judges or officers of inferior Courts commanding them to return the records of a cause or matter depending before them, to the end the party may have the more sure and speedy justice before the King or such Justices as he shall assign to determine the cause: See note 1 at p. 14 of the Practice of the Crown Office by Short and Meller.

The High Courts Act, S. 9, in investing the High Court with the powers of the King's Bench, invested it with the power to issue writs of certiorari. Under the Judicature Act, 36 and 37 Vic. Ch. 66, S. 34 (2), the original jurisdiction to writs exercised by the Court of King's Bench was assigned to the Queen's Bench Division of the High Court. The following note under S. 34, Judicature Act, 1873, in the Yearly Practice of the Supreme Court (1924) clearly shows that writs in England were issued by the Court of Queen's Bench in the exercise of its original jurisdiction.

"Matters within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction at the commencement of this Act included the supervision of the decisions of inferior tribunals generally by certiorari: *R. v. Chantrell*, (12) and (1878) 4 *A. C.* 300."

The original jurisdiction of the Queen's Bench to issue a writ of certiorari was assigned to the King's Bench Division by S. 56 (2), Supreme Court of Judicature Act, 1925, and the same note which I have quoted above appears under this section in the "Yearly Practice" for 1928. To the same effect, the following note which appears in the Annual Practice 1929, under S. 56 (2), Supreme Court of Judicature (Consolidation) Act, 1925

"The exclusive jurisdiction extended to the supervision of inferior Courts by prohibition, certiorari, case stated at common law etc. etc: see p. 2171."

The authorities show that in England a writ of certiorari is issued by the King's Bench in the exercise of its original jurisdiction, and, as I have already stated, it is this jurisdiction which was vested in the High Court by the High Courts Act. It may be pointed out that in England under S. 45, Judicature Act, an appeal lies to the Divisional Court against an order in matters of certiorari. In this connexion the observations of Wallis, C. J., in *Chief Commissioner of Income-tax* v. *North Anantapur Gold Mines Ltd.* (13) at p. 725 (*of* 44 *Mad.*) regarding the jurisdiction under

(12) [1875] 10 Q. B. 587=44 L. J. M. C. 94=23 W. R. 707=33 L. T. 305.

(13) A. I. R. 1921 Mad. 524=64 I. C. 682=44 Mad. 718.

which the writ of mandamus (a prerogative writ like the writ of certiorari) is issued by the High Court, may usefully be referred to. The learned Judge observes :

"Now the issuing of the writ of mandamus to secure the performance of a public duty where no adequate remedy existed by action or otherwise was, it seems to me, clearly an exercise of original jurisdiction. It was a proceeding originating in the Court issuing it, and might be directed in a proper case to any class of public officer, executive or judicial. It must also be recorded as having been within the original jurisdiction of the Supreme Court because that Court had no appellate jurisdiction.

"Having regard to these authorities it must be held that in India this Court's power to issue the writs of certiorari falls within its original jurisdiction as distinguished from its appellate or other jurisdictions and it is in this sense that the expression "original jurisdiction" is used in S. 110, Government of India Act."

Sir C. P. Ramaswami Ayyar attempted to show with reference to the nature of the writ that the High Court in issuing it exercises its appellate or revisional or supervisory jurisdiction. No doubt the writ of certiorari is described as

"the process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdiction requires the Judges or officers of such jurisdiction to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below : see Short and Mellor Crown Practice."

This describes the nature of the writ, but no inference can be made from it as regards the special jurisdiction of the High Court under which it is issued. The petitioners' learned counsel relied on the following observation of Norman, J., in *In the matter of Ameer Khan* (11) at 438 in support of his argument :

"I may observe, moreover, that the issue of the High Prerogative writ of habeas corpus ad subjiciendum is not a matter of ordinary original civil jurisdiction. In England it issues on the Crown Side of the Court of Queen's Bench, and in the late Supreme Court the motion for such habeas corpus was made in the Supreme Court, and not on any side, such as the Plea Side or Equity Side of the Court : see Pulton's Reports, p. 372, note."

In understanding these observations reference must be had to the context in which they were made. The learned Judge was considering the question whether a writ of habeas corpus can be issued into the mufassil, that is, beyond the ordinary territorial jurisdiction of the original side of the High Court. The sentences which succeed the extract quoted above, to my mind, make the position clear :

"The limits within which such writs can be issued are, in my opinion, not affected by Cl. 11 of the Charter of 1865. The answer to the question as to the local limits within which such habeas corpus may be issued appears to me to depend on the jurisdiction which the late Supreme Court possessed under the Charter of 1774."

In the passage quoted the expression "original jurisdiction" is used in contrast with the jurisdiction over the mufassil which the High Court has and not in contrast with the appellate and other jurisdictions of the High Court. The passage in *Annie Besant* v. *Advocate General of Madras* (10) at p. 159 (*of* 43 *Mad.*) namely :

"their Lordships do not think that the powers of the High Courts, which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of certiorari, can be said to have been taken away,"

also, in my opinion, does not support the petitioners. The expression "ordinary jurisdiction" in this passage is used as opposed to "extraordinary jurisdiction" and the other jurisdictions of the High Courts and not in the technical sense in which I think the expression "original jurisdiction" is used in S. 110, Government of India Act. Attention may be drawn to the following observations of the Judicial Committee, in *In the matter of Candas Narrondas* v. *C. A. Turner* (14) at 533 to elucidate the meaning of the expression "ordinary jurisdiction" appearing in the above passage :

"Mr. Rigby argued that the passages of the Charter which have just been epitomized divide the jurisdiction into four classes, ordinary original, extraordinary, original, appellate and those special matters which are the subject of special and separate provisions. But their Lordships are of opinion that the expression "ordinary jurisdiction" embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it; and that it is opposed to extraordinary jurisdiction, which the Court may assume at its discretion upon special occasions and special orders."

If the expression "ordinary jurisdiction" is understood as explained by their Lordships in the Bombay case, then it is clear that the passage in *Annie Besant* v. *Advocate-General of Madras* (10) does not really help the petitioners. It

(14) [1889] 13 Bom. 520=16 I. A. 156 (P.C.).

must therefore be held that the jurisdiction to issue a writ of certiorari falling under the original jurisdiction of the High Court, this Court has no jurisdiction to issue such a writ against the Governor acting with the Minister for Public Health.

It will thus be seen that the Governor acting with Ministers is entitled to claim exemption from the jurisdiction of the High Court for acts counselled or ordered by them in their public capacity both under S. 106 (1) and S. 110 (a), Government of India Act. It is needless to speculate as to why the legislature has provided this double safeguard for the Local Government. We have seen how it originated and how it was passed on from statute to statute. It was argued that since provision for the exemption of the Government from the High Court's jurisdiction is found explicitly in S. 110 of the Act, it must be assumed that no such provision can be extracted from S. 106 (1). This assumption, even if correct, does not help the petitioners; but I have shown that S. 106 (1) also exempts the Government from the High Court's jurisdiction. The learned Government Pleader basing his arguments on the extensive powers given to the High Court under para. 1, S. 9 of 24 and 25 Vic. Ch. 104 as distinguished from the powers of the "abolished Courts" given to it under para. 2 has attempted to offer some explanation for including in the same Act two sections dealing with the same subject; but I do not think it is necessary to embark on this inquiry however interesting it is; we are familiar with legislation "by way of abundant caution;" probably, S. 110 was enacted to make sure that the wholesale repeals and amendments effected by the Government of India Act did not interfere with this safeguard which is a relic of antiquity.

We now come to the last question:

Should the writ be granted in the present case?

As I have held that this Court has no jurisdiction to issue a writ of certiorari against the Local Government this question does not arise for consideration.

In the result, this Civil Miscellaneous Petition is dismissed with costs.

C. M. P. 4277 *of* 1929.

This case is governed by the judgment we have just delivered. The petition is dismissed with costs of the Government. The petitioner will pay to respondents 1 and 2 Rs. 150 for their costs in this petition.

P.R.S./R.M. *Petitions dismissed.*

A. I. R. 1930 Madras 911

WALLACE AND ANANTAKRISHNA AYYAR, JJ.

Meenakshi Ammal and *others*—Appellants.

v.

A. Rangaswami Ayyar and *another*—Respondents.

Second Appeals Nos. 2242 and 2243 of 1927, Decided on 3rd December 1929, from decree of Dist., Judge, Ramnad, in Appeal Suits Nos. 8 and 9 of 1924.

(a) Madras Estates Lands Act (1908), S. 112—Notice sent to Collector in proper time—Proceedings are legally initiated.

The landholder legally initiates proceedings under S. 112 if he sends the notices contemplated by S. 112 to the Collector in proper time. [P 912 C 1]

(b) Madras Estates Land Act (1908), S. 112—Landholder transferring his interest to stranger can recover past arrears if he has initiated proceedings under S. 112 prior to transfer.

Even where a landholder has transferred his interest as landholder in the lands to a stranger, he is entitled to recover past arrears, if he has initiated proceedings under S. 112 before he transferred his interest in the land to a third person: *A. I. R.* 1914 *P. C.* 111, *Dist.* [P 912 C 2]

P. R. Ganapati Iyer and *K. P. Panchapagesa Iyer*—for Appellants.

C. S. Venkatachariar and *M. S. Venkatarama Iyer*—for Respondents.

Anantakrishna Ayyar, J.—The landholder proceeded to take steps under S. 112, Estates Land Act, to attach and sell the holding of the ryots for non-payment of arrears alleged to be due to him by the ryots. The ryots instituted the two suits, Second Appeals Nos. 242 and 250 of 1922, to set aside the attachment under S. 112. Second Appeal No. 2242 relates to the suit filed to set aside the attachment in respect of the arrears for fasli 1329 and Second Appeal No. 2243 relates to the suit similarly instituted to set aside the attachment made by the landholder in respect of the arrears for fasli 1328. The main pleas raised by the ryots, the plaintiffs in these suits, were that the landholder had agreed on 31st March 1920 to transfer his rights as landholder in favour of a stranger. He took proceedings in respect of rent due for fasli

1329 on 15th August 1920, and in respect of rent due for fasli 1328 in June 1920. The saledeed however was executed only on 16th August 1920. On these facts the plea raised by the ryots that the landholder had no locus standi to take proceedings under S. 112, Estates Land Act, was overruled by both the lower Courts. There was also a question raised on behalf of the ryots as to whether they had encroached on some portion of the mulaimal land, and if so what rent was due by them in respect of the same for the faslis in question. The first Court held that the encroachment was proved, whereas the lower appellate Court held that Ex. 6 was not reliable and that the alleged encroachment was not proved and consequently that the ryots were not bound to pay anything in respect of the alleged encroached lands. The ryots have preferred these second appeals.

The first point raised by the learned advocate for the appellants in these cases is that the landholder is not entitled to take, nor to continue. proceedings under S. 112, Estates Land Act. The learned advocate argued that the decision of the Privy Council in *Forbes* v. *Maharaj Bahadur Singh* (1) is an authority for the position that after a landholder transferred his interest as landholder in the lands to a stranger, he is not entitled to take any steps in respect of any past arrears under the Madras Estates Land Act. For the purpose of disposing of the present appeals, we think it is enough to confine our decision to the actual facts of these two cases. As already remarked, the landholder had initiated proceedings under S. 112, Estates Land Act, before he transferred his interest in the land to a third person. The case is not therefore one where a landholder, after transfer of his rights in the lands, began proceedings under the Estates Land Act. The learned advocate however argued that proceedings under S. 112 could be taken to be initiated only when the ryots were actually served with notices. We are unable to agree with that contention. The landholder legally initiates proceedings under S. 112 if he sends the notices contemplated by S. 112 to the Collector in proper time. It is not disputed that the landholder's acts in sending the notices were in fact before he sold the properties to a stranger by a document dated 16th August 1920. In the Privy Council case their Lordships took care to remark at p. 939 :

"The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced."

Having regard to the facts of the present case, the landholder had the right to initiate proceedings at the time that he did, and therefore the learned advocate's argument on the first point is not, in our view, sustainable.

The second question raised was that the lower appellate Court had not made deductions in respect of road cess in respect of the ryot's claim allowed on appeal. We think that the lower appellate Court should have, when it decreased the amount of rent payable, also made a proportionate decrease in the amount of road cess and railway cess, and also interest payable. The decrees of the lower appellate Court will be modified accordingly in that the landholder's claim to road cess, railway cess and interest will be proportionately decreased on the amounts disallowed by it. The learned advocate also argued that the rate at which the lower Courts calculated railway cess and road cess was in excess of what was allowed by law. Such a question has not been raised in the lower Courts and we cannot allow the learned advocate to raise that point for the first time here in second appeal.

The last point that he raised was that patta was not properly served upon the ryots. This is not one of the points mentioned by the lower appellate Court to have been raised before it. In fact the lower appellate Court specifically remarks that, excepting the points dealt with by it, no other points were raised before it. Therefore we cannot allow this point to be raised before us in the circumstances.

Nor can we allow him to raise another point, namely that the amount claimed in the attachment notices was not the amount actually due because there were some subsequent payments. For these reasons we think that, except in respect of the modification made above, the decrees of the lower Courts

(1) A. I. R. 1914 P. C. 111=23 I. C. 632=41 I. A. 91=41 Cal. 926 (P. C.).

should be confirmed. As the appellants have substantially failed the second appeals will be dismissed with costs.

P.R.S./S.N. *Appeals dismissed.*

A. I. R. 1930 Madras 913 (1)

RAMESAM, J.

Sivarama Krishna Ayyar—Petitioner.

v.

Sankarnarayana Ayyar—Respondent.

Civil Revn. Petn. No. 1463 of 1929, Decided on 19th March 1930.

Civil P. C., O. 1, R. 10—Alienees of joint family property can be added as defendants at the instance of a party other than alienor.

It is no doubt a general rule that defendants to be added must be defendants against whom the plaintiff has some cause of complaint, but if a strong case is made out other parties against whom the plaintiff does not wish to proceed may be made parties.

Where the plaintiffs, in a partition suit, applied that some of the defendants, who had been impleaded at the instance of defendant 1 on the allegation that there had been alienations of the family properties by plaintiff 1 in their favour, may be expunged and the application was refused and the plaintiffs applied to have the order revised.

Held: rejecting the application, that in cases relating to partition of Hindu joint family properties, alienees of joint family properties may be made parties at the instance of the parties other than the plaintiffs. [P 913 C 2]

S. Ramasami Iyer—for Petitioners.

K. Venkateswaran—for Respondents.

Judgment.—This revision petition is filed against an order of the Subordinate Judge of Tinnevelly refusing to strike out the names of defendants 4 to 16 who had been previously added as parties to suit O. S. No. 12 of 1929. The suit was one for partition. Defendants 1 and 2 are the sons of plaintiff 1 and defendant 3 is the son of defendant 1. Plaintiff 2 is the grandson of plaintiff 1. On defendant 1's allegations that there had been alienations of the family properties by plaintiff 1 in favour of defendants 4 to 16 they were previously directed to be made as parties by the Court. Now the plaintiffs apply that they may be expunged. The Subordinate Judge refused the plaintiff's prayer and hence this revision petition. Before me the learned advocate for the plaintiffs relies on the case *Norris* v. *Beazley* (1). There Coleridge, C. J., pointed out that defendants to be added must be defendants against whom the plaintiff has some cause of complaint and it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim. This is perfectly true and it is no doubt the general rule, but as Denman, J., in the same case points out, if a very strong case is made out other parties against whom the plaintiff does not wish to proceed may be made parties. In cases relating to partition of Hindu joint family properties, alienees of joint family properties may be made parties at the instance of the parties other than the plaintiffs. Similarly the case in *H. Sitaramayya* v. *M. Ramappaya* (2) is a case where it was found that there was no need to bring in additional parties and if such a need is found additional parties will be rightly made parties. On the allegations of defendant 1 the order of the Court below is right. It may be that if defendant 1 fails to make out his case ultimately the costs due to the added parties should be paid by him. If he succeeded in making out his case then it may be that the plaintiffs may be liable for the costs of these parties. Whether anybody should be made to pay the costs of the added parties depends on the finding in the case after the trial. It is said that the plaintiff has to send summonses to these defendants. So far as this is concerned, I direct that copies of the plaints and the summonses should be issued at the expense of defendant 1. Subject to this modification the order of the Subordinate Judge is confirmed and the petition is dismissed with costs.

P.R.S./K.N. *Order accordingly.*

(1) [1877] 2 C. P. D. 80=46 L. J. C. P. 169=25 W. R. 320=35 L. T. 845.

(2) [1917] 39 I. C. 160.

** A. I. R. 1930 Madras 913 (2)

Full Bench

BEASLEY, C.J., SUNDARAM CHETTY AND WALSH, JJ.

Moonrumugamkondan Asari — Defendant—Appellant.

v.

Chockalingam Asari—Plaintiff—Respondent.

Second Appeal No. 1431 of 1927, Decided on 30th July 1930, from decree of Sub-Judge, Tinnevelly, in Appeal Suit No. 171 of 1926.

**** Provincial Insolvency Act (1920), S. 28—Jewels entrusted with goldsmith for**

sale are entrusted in ordinary way of business and so are not goldsmith's "reputed" property — They therefore cannot vest in receiver in case of goldsmith's insolvency.

Where goods, precious stones and such like things are given into the hands of a goldsmith or a jeweller either for the purpose of being converted into ornamants or for sale, they are given to him in the ordinary way of his business; where therefore jewels are entrusted to a goldsmith for sale, they cannot be called the reputed property of the goldsmith. They are the jewels of the bailor and so being easily identifiable cannot vest in the receiver in case of the goldsmith's insolvency : *A. I. R.* 1924 *Mad.* 223 and *A. I. R.* 1927 *P. C.* 108, *Ref.*

[P 915 C 1]

C. T. Ramanujachariar — for Appellant.

B. Sitarama Rao for *K. Venkateswaran* —for Respondent.

Beasley, C J.—The question referred to us for decision is :

"Is it open to an undischarged insolvent to maintain a suit regarding his after-acquired properties subject to the right of the Official Receiver to intervene in such proceedings ?"

In our view, upon the facts of this case this question does not arise and we are not disposed to enter into any further discussion of this question which is purely one of academic interest.

The facts of the case may be quite shortly stated. The insolvent was the plaintiff in the District Munsif's Court. He was also an undischarged insolvent. His case as set out in the plaint was that he got emeralds from one Sita Lakshmi Ammal for sale and that he gave them to the defendant in the suit for sale. The value of the emeralds was fixed, as he alleged at Rs. 1,000 and it was agreed that the excess realized by the defendant by the sale should be shared equally between the plaintiff and the defendant. He sued to recover the emeralds or Rs. 1,000 the price of the emeralds and for Rs. 250 being his share, as he alleged, of the profits made by the defendant on the allegation that the defendant sold the emeralds for Rs. 1,500 and he asked for the return of the emeralds in case they were not sold by the defendant. Amongst other contentions the defendant raised the plea that the plaintiff was an undischarged insolvent and was consequently not entitled to sue. An issue was taken upon that contention and the District Munsif found that the plaintiff was an undischarged insolvent but that he could maintain the suit for recovery of the articles bailed. I wish to draw particular attention to the fact that the articles were described by the District Munsif as articles bailed. Then there was an appeal and the first appellate Court fixed the value of the emeralds at Rs. 800 and gave the plaintiff a decree for that amount only. The case came up on second appeal to this Court and the question of the maintainability of a suit by an insolvent with reference to after-acquired property was raised and in view of the fact that a Letters Patent appeal raising this very point was then pending decision by a Full Bench, our learned brother Anantakrishna Ayyar, J., adjourned the case until the opinion of the Full Bench was delivered. The Letters Patent appeal however abated and the matter again came before our learned brother, who, in view of what appears to be a difference of view in a case decided by Krishnan and Odgers, JJ., in *Ramanatha Iyer* v. *Negendra Iyer* (1) and a later decision of the Privy Council in *Kala Chand Banerjee* v. *Jagannath Marwari* (2) referred the case to us.

Upon the facts of this case the plaintiff's suit was divided into two parts: (1) relating to his commission of Rs. 250, that claim has been held against and (2) for the return of or the value of the emeralds which he handed over to the defendant for sale. In our view, the first essential in the appellant's case is that the emeralds themselves or their cash value should vest in the receiver as the after-acquired property of the insolvent under S. 28, Prov. Insol. Act. That section deals both with the actual property of an insolvent at the time of his adjudication and property which may pass into his possession after the adjudication. In the case of property coming into his possession after adjudication it is after-acquired property that shall forthwith vest in the receiver. There is another class of property dealt with in that section and that is the reputed property of the insolvent. Upon the facts of this case the value of the emeralds can in no sense of the word be described as the property of the insolvent. His own case was that this property was given to him by Sita Lakshmi

(1) A. I R. 1924 Mad. 223=76 I. C 805.
(2) A. I. R. 1927 P. C 108=101 I. C. 442=5 I. A. 191=54 Cal. 595 (P.C.).

Ammal for sale. He was a jeweller and goldsmith and so was the defendant. So that in the ordinary course of business, according to his own case, these emeralds were entrusted to him for sale. That statement in his case completely negatives any position occupied by him other than as a bailee of goods for sale and it is important to remember that this statement that there had been an entrustment to the insolvent of these emeralds as a bailee is not controverted anywhere in the written statement of the defendant. Clearly the emeralds were not the property of the insolvent but it has been urged before us that although they are not the property of the insolvent, they may yet be his reputed property. Where goods, precious stones and such like things are given into the hands of a goldsmith or a jeweller either for the purpose of being converted into ornaments or for sale, they are given to him in the ordinary way of his business, and assuming that at the time of his adjudication he is in possession of these jewels, clearly they are not his jewels at all but they are the jewels of the bailor and as such, being easily identifiable, do not pass to the receiver in the insolvency. The further question arises as to what is to happen if he has recovered the proceeds of the sale. Here again if those proceeds have not been intermixed with the money belonging to the creditors and can easily be identified, the money does not vest in the receiver but this case is a stronger one from the respondent's point of view because the jewels had been parted with and the insolvent had no money in his possession which he had received in respect of the sale. He claims in his suit to get that money from the defendant. If he succeeds, no one, I think, would contest that that money is clearly earmarked as money belonging to the real owner of the jewels, namely, Sita Lakshmi Ammal up to the extent of the agreed value Rs. 1,000 and is not available at all for distribution by the receiver amongst the creditors in the insolvency. This matter, I think, is made perfectly clear by the notes to S. 38, which is the vesting section, in the English Bankruptcy Act: Williams on "Bankruptcy," Edn. 13, p. 229. The marginal note is "Trusts arising from employment of bankrupt" and the note says:

"Lastly, then, there is the third class of trusts, where the bankrupt has not the general, but only a special property, e. g., where property is vested in the bankrupt as an agent, such a factor, etc. Such property, so long as it or its proceeds remain distinguishable from the mass of the bankrupt's property, will not pass to the trustee of the creditors."

Then again at p. 230, it is stated:

"It is always to be remembered that, although goods in the hands of an agent may be easily distinguishable, they may yet, on the bankruptcy of the agent, pass to his trustee if the principal has permitted the agent to have a possession not consistent with the ordinary usages of trade, and raising a reputation of ownership in the bankrupt."

Here the case for the plaintiff uncontradicted by the defendant in his written statement is that there was no entrustment at all which was not consistent with the ordinary usages of trade. As before stated, the insolvent was a jeweller and goldsmith and he himself says that the emeralds were entrusted to him for sale that is what a jeweller and goldsmith does and it cannot be said that the emeralds or their value were the reputed property of the insolvent. Under these circumstances and upon the facts of this case the question before us really does not arise. It would arise if the property were property which vested in the Official Assignee or the receiver as the case may be. Therefore we decline to decide the question. We need express no opinion upon what would happen had the property been the after-acquired property of the insolvent. With regard to the claim for Rs. 250 no question arises with regard to that because that claim has been disallowed in all the Courts. The case must therefore be dealt with by the referring Judge in the light of these observations.

P.R.S./S.N. *Case remanded.*

A. I. R. 1930 Madras 915

RAMESAM AND CORNISH, JJ.

Ammani Ammal—Appellant.

v.

M. Narayanaswami Naidu—Respondent.

Original Side Appeal No. 87 of 1929, Decided on 4th February 1930, from orders of Eddy, J., D/- 3rd October 1929.

(a) Original Side Rules (Madras), O. 34, R. 57—Applicability.

Order 34, R. 57. Original Side Rules of the Madras High Court, applies to cases of al-

Letters of Administration either with the will annexed or without will. [P 917 C 1]

(b) Will—Proof of—Onus of proof is on party propounding will — Succession Act, S. 218 (1).

Where a will is to be proved in solemn form the onus probandi lies upon the party propounding the will, who must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator: 2 *Moore P.C.* 480, *Ref.* [P 918 C 1]

But in the case of an intestate Hindu the party whose grant of administration has been called in must satisfy the Court that a grant can be made under S. 218.

G. Ramakrishna Ayyar and *Srinivasachariar*—for Appellant.

K. Krishnaswamy Iyengar and *P. Thiruvengadaswami*—for Respondent.

Ramesam, J.—This appeal raises an important question of procedure. The facts out of which the matter arises may be stated. One Perumal Naidu died in Madras in 1924, leaving his sister Ammani Ammal. A brother of his named Ramaswami Naidu predeceased him. One M. Narayanaswami Naidu, who is a brother of Govindammal, widow of Ramaswami Naidu, applied for Letters of Administration to the estate of Perumal Naidu. That application was O. P. No. 106 of 1924. Letters of Administration were granted to him on 5th February 1925, after notice to Ammani Ammal and to Govindammal.

The present application was filed on 17th August 1929, praying that the Letters of Administration granted to Narayanaswami Naidu should be recalled. The grounds disclosed in the affidavit accompanying this application are that Narayanaswami Naidu in his application of 1924 claimed to be the adopted son of Ammani Ammal, but as a matter of fact he was not the adopted son, that Ammani Ammal was made to appear to consent to the former order by being induced to put her mark to certain papers the contents of which she was not able to understand clearly and that in short her consent was procured fraudulently. This application was filed under S. 263, Succession Act, and O. 34, R. 54, Original Side Rules, by means of a Judge's summons and a citation. Narayanaswami Naidu appeared on the Judge's summons and filed an application with an affidavit on 27th August 1929 and opposed the application on the merits and also contended that the application by way of Judge's summons and citation under R. 54 does not lie. The matter came on before our brother Krishnan Pandalai, J., on 6th September and he passed an order to this effect. "Issue citation under O. 34, R. 62. Number as a T. O. S." And on the defendant's application, he passed the following order:

"The applicant has now taken out a citation under O. 34, R. 62, and does not press this Judge's summons. Costs to be provided for in costs in the T. O. S. in citation."

The matter again came on before our Brother Eddy, J., on 27th September, when he passed the following order: "Leave to amend and reserve citation. Adjourned until 3rd October." On 3rd October further orders were passed as follows:

"Citation having been amended by consent, no order except that the applicant do have the costs of this application."

It is against this last order that the present appeal is filed.

The learned advocate for the respondent takes a preliminary objection that this appeal does not lie. As the order of the learned Judge finally disposes of the application of Narayanaswami Naidu and awards costs, we think that this is a final order and an appeal lies. We overrule the preliminary objection.

The amendment ordered by Eddy, J., and made pursuant to his order, amends the citation into a form similar to No. 99 at p. 923 of Edition 16 of Tristram and Coote's Probate Practice. This order was passed apparently on the ground that there is no form in the original side rules expressly providing for a matter of this kind and that therefore O. 34, R. 62, applies. This brings in the practice and procedure of the Probate Division of the High Court of Justice in England. That is why Form 99, already mentioned, has been adopted. It is now contended before us that there is no need for bringing in the English practice and for relying on R. 62. R. 54 applies to a case where a person to whom the grant of Probate or Letters of Administration has been made desires to have the same revoked. The case where a person other than the grantee of the Probate or Letters of Administration desires that the grant may be revoked has got to be provided for, and as I will presently show, R. 57 was intended to provide for such a case. Reading the opening words of the rule

"If, subsequent to the grant of Probate or Letters of Administration with the will annexed, any person interested in the property of the testator, other than the grantee, etc.,"

one would think that R. 57 was intended to apply only to cases where Probate or Letters of Administration with will annexed has been granted and a person other than the grantee desires revocation of the grant. But continuing to read the rule we find it contains a provision that the Registrar shall issue a citation in Form No. 123 or 124. Form No. 123 refers to a case where Probate was granted and where it is desired that the grant should be revoked. Form No. 124 refers to a case where Letters of Administration were granted, but a will had been discovered afterwards, or some other reason existed why the Letters of Administration should not be granted and it was desired that the grant should be revoked. It does not refer to a case where Letters of Administration without a will were granted. Thus it appears to directly conflict with the rule referring to it. Reading R. 57 with Form No. 124 we have only two alternatives before us so far as Letters of Administration are concerned: (1) the rule and the form contradict each other which is meaningless; or (2) the rule was intended to apply to cases of all Letters of Administration either with the will annexed or without will, and the form illustrates one of the cases where Letters of Administration were granted without any will.

The latter mode of construction commends itself to us. The omission of the case of grant of mere Letters of Administration without a will in R. 57 seems to be a slip. R. 54 provides for the grant of Probate or Letters of Administration, but where the grantee desires revocation of the grant, R. 57 was obviously intended to apply to cases of grant of probate or Letters of Administration but where a person other than the grantee desires revocation of the grant. That this was the general object of R. 57 is shown by Form No. 124 and we ought to construe the rule in the light thrown by the form. So read, we think that R. 57, O. 34, taken with Form No. 124, applies to this case and there is no need to bring in O. 34, R. 62. We invite the attention of the Registrar to this fact so that proper steps might be taken to make the language of R. 57 clear.

The learned advocate for the respondent does not object to the citation. His anxiety seems to be that if the citation is issued under R. 57 the burden of proof would be on him, but if the citation is issued under the English form the burden of proof will be upon the appellant, and he wants to avoid the onus on himself. I do not think that the burden of proof necessarily changes with the form adopted. On this matter, I agree with the observations of my learned brother and the respondent's burden may be lightened by the conduct of the appellant in the former proceedings and other considerations, and may be even shifted, and I do not propose to say anything further on this matter. At present we hold that the citation ought to be issued under O. 34, R. 57. The order of Eddy, J., is set aside and a citation in Form No. 124 with the necessary changes will now issue.

Having regard to the considerable doubt resting in the matter, and the way in which the rules are drafted, we do not think this is a matter in which Narayanaswami Naidu ought to have costs of the application. Costs of the parties including court-fee will abide the result of the enquiry.

Cornish, J.—I do not think that there was any need to have had recourse to R. 62, O. 34. Form 124, which is the form of citation directed to be used by R. 57, specifically applies to the calling in of a grant of Letters of Administration, which has been made upon the footing of an intestacy. Reading the rule with the form therefore it appears that the rule was intended to embrace proceedings to revoke grants of Letters of Administration, although in terms the rule mentions Probate and Letters of Administration with will annexed only. There is no reason why a different procedure should be followed in the case of revoking a grant of Letters of Administration to that which is prescribed by the rule for the revocation of a grant of Probate. In the one case the object is to compel the party who has obtained the Probate to propound the will, and in the result the suit becomes one for proving the will in solemn form of law. And in the other case, the object is to compel the party who has obtained the

grant of administration to establish such a decree of relationship with the deceased as will entitle him to the grant, and in the result it becomes an interest suit: see Coote and Tristam, 16th Edn., p. 427. As there was some discussion by the learned counsel upon the question of onus of proof in the testamentary suit which follows upon the issue of a citation under the rule, it may be pointed out that where a will has to be proved in solemn form

"the onus probandi lies upon the party propounding a will, who must satisfy the conscience of the Court that the instrument propounded is the last will of a free and a capable testator: *Barry* v. *Butlin* (1)."

But when, as here, the deceased died intestate and was a Hindu, the party whose grant of administration has been called in must satisfy the Court that a grant can be made to him under S. 218 (1), Succession Act, that he is, in the words of the section,

"a person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the estate or any part of such deceased's estate."

P.R.S./K.N. *Order accordingly.*

(1) 2 Moore P.C. 480.

A. I. R. 1930 Madras 918

REILLY AND ANANTAKRISHNA AYYAR, JJ.

B. Sivaram Dubai—Appellant.

v.

R. Rajagopala Misra and *another*—Respondents.

Civil Misc. Appeal No. 254 of 1930 and Civil Revn. Petns. Nos. 1000 and 1001 of 1930, Decided on 23rd July 1930, from order of Dist. Judge, Madura, D/- 17th April 1930.

Civil P. C. (1908), S. 92—Scheme providing that Court should fill up vacancies occurring in office of trustees appointed for five years—Such provision does not amount to modification of scheme and so Court can entertain application to fill up vacancies—No separate suit under S. 92 is necessary—If on application being made Court fills up vacancies, no appeal would lie because such matters are not such as arise under Civil P. C. (1908), S. 47.

A scheme made in a suit under S. 92 provided: "Each of the two trustees to be appointed by the Court should hold office for a term of five years, but shall be eligible for reappointment; and any vacancy in the office of either of the said trustees shall be filled up by the Court." The Court filled up the vacancies on an application made to that effect.

Held: that the provision that the vacancies should be filled by the Court, did not amount to any alteration or modification of the scheme and the Court had therefore jurisdiction to entertain the application for filling up the vacancies. No separate suit under S. 92 was necessary for the purpose: *A. I. R.* 1927 *Mad.* 1073 (*F. B.*) *Expl.* and *Dist.* [P 920 C 1]

Held further: that such matters could not be taken to be matters arising under S. 47 and so no appeal would lie: 17 *Mad.* 343 (*P. C.*), *Dist.*; *A. I. R.* 1928 *Mad.* 61, *not Appr.*; 13 *Mad.* 338; *A. I. R.* 1926 *Mad.* 130; *A. I. R.* 1926 *Mad.* 799 and *A. I. R.* 1926 *Mad.* 559, *Rel. on.*; *A. I. R.* 1925 *P. C.* 155, *Ref.* [P 921 C 1]

P. R. Ganapathi Iyer and *T. R. Srinivasa Iyengar*—for Appellant.

K. Rajah Aiyar and *V. Ramaswami Iyer*—for Respondents.

Reilly, J.—I agree that in this case no appeal lies both because, as my learned brother has pointed out, the proceedings before the District Judge were not proceedings within S. 47 of the Code arising in execution and because the parties concerned are not parties to the suit. But the most interesting and important part of Mr. Ganapathi Aiyar's contentions was that Cl. 4 of the Scheme for this trust, under which the District Judge has appointed the two respondents trustees, is ultra vires, having been made in a scheme suit under S. 92, Civil P.C., but, according to his contention, being in conflict with the Full Bench decision of this Court in *Veeraraghavachariar* v. *Advocate-General, Madras* (1). In this case we are fortunate in the fact that my learned brother was a member of that Full Bench, and he has expounded the decision of the Full Bench. As he has pointed out, it was there laid down that if a scheme made in a suit under S. 92 of the Code provides for liberty to apply for the modification of that scheme, then that provision is ultra vires; and, as I understand the case, it was also decided that, if the scheme provides for liberty to apply for directions, those directions cannot extend to anything which the Court is empowered to do under S. 92 of the Code. Mr. Ganapathi Ayyar urges that under that section the Court has power to appoint a new trustee; and from that he argues on the strength, as he says, of the Full Bench decision that any provision in a scheme made under the section that a trustee shall be appointed to fill a vacancy by the Court is ultra vires. To my mind the selection and appointment of a trustee by the Court in accordance

(1) A. I. R. 1927 Mad. 1073=106 I. C. 665=51 Mad. 31 (F. B.).

with such a scheme when a vacancy occurs is a very different thing from the appointment of a new trustee referred to in the section. If we look at the section, we find that under it the question of the Court appointing a new trustee arises only when the direction of the Court is deemed necessary for the administration of the trust. That may happen when a trustee is removed by the Court and no other machinery for replacing him comes into play or when a direction in the matter is required in other circumstances. But, when a scheme had provided regular machinery for the appointment of a trustee if a vacancy occurs, no direction of the Court is required for working that machinery in an ordinary case or in a case such as this. The machinery is there ready for use; and it does not appear to me to make any difference whether the machinery set up by the scheme is a Court which would have jurisdiction in a suit under S. 92 of the Code or any other body or person. In my opinion therefore the provision in this scheme that, when vacancies occur among the trustees other than the life trustee the vacancies shall be filled by the District Court is not in any way in conflict with the interpretation of S. 92 of the Code by the Full Bench in 51 *Mad.* 31. I agree that this appeal and the revision petitions should be dismissed. I also agree with the order proposed by my learned brother as to costs.

Anantakrishna Ayyar, J.—This appeal and the revision petitions arise out of an order passed by the learned District Judge of Madura, by which he appointed two new persons as trustees of the Ranga Chattram charities in the place of the two old trustees whose term of office expired after they had held office for five years under the scheme. One of the trustees whose term had so expired sought re-appointment and as he was not re-appointed, he has preferred this miscellaneous appeal and the connected revision petition. Mr. Rajah Ayyar, who appears for the respondents, the newly-appointed trustees, raised a preliminary objection that the appeal does not lie; and the answer of Mr. Ganapathi Ayyar was that the matter in dispute is really covered by S. 47, Civil P. C., and that an appeal lies. He also argues that we should in any event interfere under our revisional powers because, he says, that the learned District Judge was not entitled to make the appointment complained of and that, in spite of the terms of the scheme decree, such an appointment could be made only in a suit instituted under S. 92, Civil P. C., after the necessary sanction had been obtained. I think it will be more convenient to deal with the second objection first. To appreciate Mr. Ganapathi Aiyar's argument it is necessary to refer to paras 4 and 15 of the schme. Para. 4 runs as follows :

"Each of the two trustees to be appointed by the Court should hold office for a term of five years, but should be eligible for re-appointment, and any vacancy in the office of either of the said trustees shall be filled up by the Court."

Paragraph 15 is to the following effect:

"Liberty is reserved for the parties to the suit or for the Advocate-General to apply to the Court with reference to the carrying out of the directions contained in the scheme."

Mr. Ganapathi Aiyar argued that the provision in para. 4 of the scheme only means that the Court, when approached under S. 92, should have the power to appoint proper trustees in cases of vacancy. He also relied on the decision of the Full Bench in *Veeraraghavachariar* v. *The Advocate-General, Madras* (1). I am unable to agree with him. That decision only laid down that, in cases where it is sought to effect alterations or modifications of a scheme, the same could be effected only by proceedings taken under S. 92, Civil P. C. The question referred to the Full Bench was whether, in cases where liberty to apply is reserved to a person to ask for directions as to the carrying out of a scheme or to move the Court for alterations or modifications of the scheme, applications to have such things carried out could be made in the suit itself or whether the same could be done only by separate proceedings taken under S. 92, Civil P. C. At p. 45 of the judgment of the learned Officiating Chief Justice, who delivered the opinion of the Full Bench, it is mentioned as follows :

"A scheme having been framed, any modification or alteration of it is in effect a new scheme and the power to frame a new scheme is given only subject to the condition specified in S. 92."

In the present case, if by virtue of the liberty given by the scheme to apply to the Court, it be sought to effect alterations or modifications of the scheme, then, by virtue of the Full Bench decision, they can be effected only after proceedings are taken under S. 92. But there is para. 4 of the scheme which I have already mentioned. It provides for the filling up of vacancies whenever such vacancies occur; and it says that any vacancy in the office of either of the said trustees should be filled up by the Court. I do not agree with the arguments of the learned advocate for the appellant that filling up vacancies under such provisions of the scheme amounts to either alteration or modification of the scheme. I put him the question whether he would contend that, if the scheme contained a provision for the filling up of vacancies by a vote of the majority of a Board of Electors, or by any specified authority, and such authority appointed particular persons to fill up the vacancies, the same also would come within the ruling of the Full Bench. If I understood him correctly, he was not prepared to go to that extent; and his argument was that in cases where the right to appoint is given to the Court the power of appointment could not be exercised as the provisions of S. 92 are automatically attracted. I am unable to agree. In this respect I am unable to find any material difference between a case where under the scheme, the power to appoint is given to an outside body and one where such power is given to the Court itself. It therefore seems to me that the present is not a case where any modification or alteration of the scheme is asked for by virtue of any power to apply reserved under the scheme. If I am right in this view, it would follow that the lower Court had jurisdiction to entertain the application and that we should not be justified in interfering in revision.

But the learned advocate argued that in that view the matter must be taken to be one arising in execution and falling within the scope of S. 47, Civil P. C., and that he would have a right of appeal. In support of that argument he relied on the decision of the Privy Council in *Ponnambala Tambiran* v. *Sivagnana Desika Gnana Sambhanda Pandara Sannadhi* (2), and that of a Bench of this Court in *Thyagarajaswami Devasthanam* v. *Balayee Ammal* (3). After carefully considering the words of the decree which was the subject of comment by the Privy Council, I find that that case does not really lend support to his contention. The decree which was the subject of discussion before the Privy Council is found at p. 339 of *Gnana Sambhanda* v. *Visvalinga* (4). The decree is set out in extenso there, and I find that the operative portion of the decree was:

"That the Subordinate Judge of Kumbakonam in order to fill up the now vacant office of Tambiran of the Tiruppanandal Mutt do direct the appellant, etc. . . . . (to name a tambiran from among the Tambirans of his adhinam, competent to discharge the duties of managing Tambiran of the Benares (Kasi) Mutt at Tiruppannandal.")

The matter before the Court thus relates to the filling up of a then existing vacancy, and not to provide for the filling of all future vacancies should there be any, and it was with reference to the filling up of the actual vacancy which was the subject matter of the suit that the litigation was carried to the Privy Council; and when the remarks of their Lordships of the Privy Council are read in the light of the wording of the decree in that case, I think that the judgment of the Privy Council does not support the contention of the appellant before us. The provision in para. 4 of the scheme before us is not for the filling up of any existing vacancy; and that, I think, is a material distinction between the case quoted by the appellant and the one before us. The other case referred to by the learned advocate, 27 *L. W.* 32 a judgment of Ramesam and Cornish, JJ., was a case where the learned Judges specifically observed that they did not question the correctness of the numerous cases quoted before them, in which with reference to scheme suits generally it was held that the matter did not relate to execution and that an appeal did not lie; they distinguished the case before them on the ground that when specific directions were given in the scheme decree, then, with reference to such

(2) [1894] 17 Mad. 343=21 I. A. 71=6 Sar. 434 (P.C.).
(3) A. I. R. 1928 Mad. 61=107 I. C. 186.
(4) [1890] 13 Mad. 338.

directions the decree would be an executable decree. They however felt some doubt on the question, and accordingly resolved to treat the matter before them as coming under Cl. (2), S. 47 under which Courts are given discretion to allow a petition filed under that section to be treated as a plaint. Both the learned Judges refer to this aspect of the case, and they finally resolved to treat the proceedings before them as a plaint as there was no other objection to their doing so.

Having thus disposed of the two cases on which reliance was mainly placed by the learned advocate for the appellant, I may state that our attention was drawn by the learned advocate for the respondent to numerous cases where this Court held that an appeal does not lie in such cases, and that such matters could not be taken to be matters arising under S. 47 of the Code: *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar* (5), Oldfield and Venkatasubba Rao, JJ.; *Sivan Pillai* v. *Vekateswara Iyer*(6), Spencer and Madhavan Nair, JJ.; *Bangarammal* v. *Ramanuja Iyengar* (7), Devadoss and Waller, JJ.; *Abdul Hakim Beg* v. *Burramuddin* (8), Devadoss and Wallace, JJ., are among the cases to which our attention was drawn by the respondent's learned advocate. It was there held that in such cases S.47 would not apply. I do not see any reason for not following those cases; more especially as the observations of the Privy Council in the Dakore case, *Sevak Jeeram Chod Bhogilal* v. *Dakore Temple Committee* (9), seem to lend support to the contention of the respondents.

For the above reasons I hold that no appeal lies in this case under S. 47, Civil P. C., and I would accordingly dismiss the appeal with costs. I would fix the pleader's fee at Rs. 250. I have already mentioned that the lower Court had jurisdiction to proceed to make the appointments by virtue of the provisions of Cl. 4 of the scheme and that the decision of the Full Bench in *Veeraraghavachariar* v. *Advocate-General, Madras* (1) does not suport the contention of the petitioner that the lower Court had no jurisdiction to do so. That being so, I would dismiss the revision petitions also, but, in the circumstances, without costs. No orders are necessary on the miscellaneous petitions.

P.R.S./S.N. *Appeal dismissed.*

(5) A. I. R. 1924 Mad. 369=75 I. C. 189=47 Mad. 139.
(6) A. I. R. 1926 Mad. 130=92 I. C. 556.
(7) A. I. R. 1926 Mad. 799=94 I. C. 610.
(8) A. I. R. 1926 Mad. 559=95 I. C. 720=49 Mad. 580.
(9) A. I. R. 1925 P. C. 155=97 I.C. 313 (P.C.).

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* A. I. R. 1930 Madras 921

VENKATASUBBA RAO, J.

(*Unnaithanakath Puthan Veettil*) *Kumukutty* and *another*—Defendants—Appellants.

v.

Munnodath—Plaintiff—Respondent.

Second Appeal No. 1521 of 1928, Decided on 10th March 1930, from decree of Sub-Judge, South Malabar, in Appeal Suit No. 131 of 1927.

*** (a) Civil P. C. (1908), O. 21, R. 89—Even if deposit under R. 89 is made by person other than judgment-debtor depositor cannot insist that decree-holder shall furnish security before drawing out amount.**

Payment made into Court under R. 89 implies that the payment was made, not under protest, but voluntarily. Hence even where the person making the payment is other than the judgment-debtor, he cannot insist that the decree-holder shall not draw the amount out without furnishing security. When therefore the Court takes the security in such a case it acts in excess of its power: *A. I. R.* 1921 *Bom.* 169; *A. I. R.* 1928 *Pat.* 193; 12 *C. W. N.* 151 and 40 *Cal.* 598, *Foll.* [P 923 C 1; P 924 C 1]

(b) Practice—Justice, equity, good conscience—Duty of Court explained.

Where the facts of the case show that the claim of the plaintiff is utterly inequitable and unjust, his case is clean out of the principle: "One of the first and highest duties of all Courts is to take care that the act of the Court does no injustice to any of the suitors": *Rodger* v. *Comptoir D'Escompte de Paris* 23 *P. C.* 465, *Ref.* [P 924 C 1]

K. P. Ramakrishna Ayyar—for Appellants.

A. Parameshwaran—for Respondent.

Judgment. — This appeal raises a question in regard to O. 21, R. 89, Sch.1, Civil P. C. If a person other than a judgment-debtor pays money into Court under that section, can he insist that the decree-holder shall not draw the sum out without furnishing security? The facts of the case take us so far back as 1905. One Sri Devi of Mundathode Illam conveyed in jenm to Tuppan Nambudri, the brother of the plaintiff, here entire property (consisting of 140 items). The sale deed (Ex. 1), is dated 16th October 1905 and mentions the consideration as Rs. 16,000. The purchaser by that deed is directed to pay certain spe-

cified debts of the vendor and it then provides that he shall also be bound to pay up all other lawful debts due by her. Eramutti, the brother of defendant 1, filed against Sri Devi O. S. No. 561 of 1905 claiming a certain amount as due. It was to Thuppan's interest, having regard to Ex. 1, to get the suit dismissed. He accordingly fought the case on behalf of Sri Devi and lost it in spite of vigorous defence. As the District Munsif points out, the case was fought out up to the High Court and it was decided that the debt claimed by Eramutti was due. Thuppan then became under the terms of Ex. 1 instantly liable to discharge this decree debt. He however committed default and the decree remained unsatisfied. Sri Devi, as I have said, by the sale deed completely deprived herself of all property. Eramutti in the circumstances, followed the only course open to him, that of attaching some items brought by Tuppan. The latter thereupon preferred a claim under O. 21, R. 58. The Court rejected it, observing that the debt not having been discharged, the property conveyed under Ex. 1 remained liable. Even then, Thuppan did not honestly pay up the debt. He filed a regular suit (O. S. No. 414 of 1911) contesting the order rejecting the claim. In the meantime the attached property was brought to sale. Thuppan applied in his suit that the sale might be stopped. On 23rd October 1911, his application was dismissed. Every dilatory method was resorted to; he next applied that the sale might be adjourned. The petition he filed (Ex. 3) contains the following significant statement:

"The properties obtained by me from the defendant are proclaimed. The sale must be adjourned to enable me to produce the decree amount."

This application met with the same fate as the previous one. Thuppan then determined to save his property, applied under O. 21, R. 89, for the setting aside of the sale. He made the deposit prescribed by that rule. But, before it should be drawn out by the persons entitled, he applied that security should be taken from the decree-holder. The Court, for some reason not disclosed, complied with this request and directed that security should be furnished. Ex. A, dated 18th December 1911, was thereupon executed by the heirs of Eramutti, including defendant 1. It contains the clause that they would bring back the amounts into Court, if Thuppan should succeed in the regular suit then pending. The rest of the story may be briefly told. Thuppan won O. S. No. 414 of 1911, which dragged a weary length. The case went up as far as the High Court. All the Courts that dealt with the suit in the various stages held that the sale was valid; but the point to note is that the sale was upheld on the sole ground that Sri Devi acted honestly and got Thuppan to undertake by the deed to discharge her debts. There is one further fact which is important. Sri Devi's reversioners (attaladakkam heirs) filed a suit questioning the alienations evidenced by Ex. 1. Thuppan having died, his brother, Nilakantan, the present plaintiff, filed a written statement Ex. 4. Seeking to justify the sale, he asserts that the terms of the sale deed were carried out and that the amount due to Kunhutti was fully paid up. This statement (made in March 1921) implies that the deposit made by Thuppan under O. 21, R. 89, had the effect of discharging the decree debt. Whether this result follows in law or not, it shows that the plaintiff was conscious that he was under a moral duty to pay up the debt. It now suits him to suggest that he made a false allegation in the written statement, to defeat the claim of the reversioners. In any event, that allegation is inconsistent with the present claim based on the security bond. That claim is shortly this: under the bond if Thuppan's suit was decreed, the executants bound themselves to bring back the money. Now, Thuppan having succeeded, the plaintiff seeks to enforce the bond and claim the amount from defendant 1. It may be mentioned that this suit was filed in 1923.

The first question that arises is: Was it competent to the Court to have taken the bond in question? To answer this question, one must have regard to the object and scope of O. 21, R. 89. The Code in various sections lays down in what circumstances a judgment-debtor may contest the sale of his property. Similarly, there are sections under which a person claiming adversely to a judgment-debtor may object to attachment and sale. But O. 21, R. 89 enacts

a special provision. Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property ; the decree-holder's claim is satisfied and the auction-purchaser is compensated. The section would be frustrated if the person paying money under it is permitted to do so under protest. Cl. 2, R. 89, enacts:

"Where a person applies under R. 90 to set aside the sale of his immovable property he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule."

This shows that the two proceedings referred to in this clause are utterly incompatible. If the debtor wants to keep a dispute open, he cannot claim the benefit of this section. In fact, this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decree-holder nor the purchaser, are sacrificed. It follows from this, that when the judgment-debtor pays the amount specified, he pays it unconditionally. The payment followed by the order setting aside the sale has the effect of automatically extinguishing the decree-debt. If an application is made under R. 89, and the deposit required by that rule is made within 30 days from the date of the sale, the Court has no option but to make an order setting it aside : see R. 92. This assumes that the decree debt is discharged and the decree-holder's remedy is gone. The section then is inconsistent with the notion that payment can be made either under protest or coupled with conditions. I have so far dealt with the question on the footing that the person making the deposit is a judgment-debtor; but under the rule any person owning an interest in the property, by virtue of a title acquired before the sale, can make the application. Supposing such a person happens to be not a judgment-debtor but a third party, even then he is subject to the same restrictions. If the property is not liable to be attached for the debt he can ignore the attachment and sale. If, on the other hand, it is liable, or he believes it to be liable, he can avail himself of this provision and get rid of the sale. But, in that case, he must be taken to have admitted the validity of the sale and it is not open to him either to dispute the sale or to get back the money. Take the case, for instance, of a debtor who, before the decree, has conveyed his property to trustees for the benefit of his creditors. The trustees, if they choose, may dispute the attachment and the Court sale. But they may gain nothing by such a course, and being under a duty to pay up the debt, may choose to take advantage of this provision. To hold that they would still be entitled to contest the sale, or to claim a refund of the money, would be wholly opposed to the principle underlying the section.

This view receives support from several decisions. In *Narayan* v. *Amgauda* (1) the property was sold in execution of a decree obtained by the defendant against a third party and purchased by the former. The plaintiff claiming to be the owner of the property protested against the sale and ultimately got it set aside under O. 21, R. 89 by paying the required amount into Court. The money having been paid over to the defendant, the plaintiffs sued for a refund of it, as having been involuntarily paid. It was held that the amount must be taken to have been deposited voluntarily and unconditionally, and therefore no suit could lie for its recovery. Macleod, C. J., observes :

"If then the plaintiff, to suit his own convenience, got rid of the sale of the judgment-debtor's right, title and interest in the property by paying the decretal amount into Court, it is quite clear that he could not recover the amount as having been involuntarily paid."

In *Raghu Ram Pandey* v. *Deokali Pandeo* (2), a decree had been obtained by defendants 1 and 2 against defendant 3. In execution of that decree, a certain property was brought to sale and the plaintiff objected, stating that it belonged to him and not to the debtor, but his objection was disallowed. He then deposited the decretal amount and 5 per cent under O. 21, R. 89 and got the sale set aside. The money was withdrawn by defendants 1 and 2 and the plaintiff filed the suit in question, for a declaration that the property belonged to him and for a refund of the amount withdrawn. In spite of a finding that he was the owner of the property, his suit was dismissed on the ground that he

(1) A. I. R. 1921 Bom. 169=62 I. C. 104=45 Bom. 1094.
(2) A. I. R. 1928 Pat. 193=115 I. C. 193=7 Pat. 80.

was not entitled to get the money back. I quote the following passage from the judgment:

"Once a payment is made under O. 21, R. 89 it is clear that the person making the payment cannot be heard to say that the sale was not a valid sale and that the money deposited should not be paid to the decree-holder. The judgment-debtor or the person interested is under no compulsion to make the deposit under O. 21, R. 89. Such a deposit is a voluntary deposit and the person making the deposit cannot in my opinion maintain a suit for a refund of the money deposited by him."

The same view was taken in *Kunjabehari Singha* v. *Bhupendra Kumar Dutt* (3). The case relied upon for the plaintiff, *Kanyalal* v. *National Bank of India Ltd.* (4) does not help him. The defendant bank had obtained a decree against the Delhi Cotton Mills Company and attached certain Mills. The plaintiff claiming to be the owner of the mills paid the decree amount under protest and having freed his property from the attachment brought an action claiming a return of the money so paid. The Judicial Committee held that the procedure provided in the Code, in regard to claims to attached property, is merely permissive, and the fact that such a procedure is open to him, if he chooses to adopt it, interferes in no way with his right to take any other lawful alternative. In that case the money was paid before the sale and the payment was not made under O. 21, R. 89. The decision has clearly no application.

If this be the correct view, it follows that the Court had no right to take the security bond in question. It acted clearly in excess of its powers. But it may be contended that though its action was illegal, there is a higher rule which is called into play, namely:

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors: *Rodger* v. *Comptoir D'Escompte de Paris* (5)."

But the facts to which I have referred take the case clean out of this principle. The claim of the plaintiff is utterly inequitable and unjust. The District Munsif has carefully analyzed the facts and stated them in detail. The Subordinate Judge, who has reversed his judgment, does not advert to them and, confining his attention merely to the security bond, thinks that there are equities in favour of the plaintiff. The truth is, as I have shown, not only is there no equity in the plaintiff's claim, but all the equities appear to be the other way. The facts I have fully set forth and I do not propose to repeat them. It would suffice to point out again that first in 1911 Thuppan stated, when applying for an adjournment of the sale, that he would bring into Court the decree amount, and that in 1921, ten years later, the plaintiff himself (Thuppan having in the meantime died) asserted in the reversioner's suit that the decree debt had been fully paid up. These assertions show that Thuppan as well as the plaintiff were fully conscious of their obligation under Ex. 1. The present claim is not only unjust but inconsistent with their own declarations. The suit is dismissed, but I direct the plaintiff to pay only the costs of this second appeal. Some blame attaches to defendant 1, who voluntarily executed the security bond, and that is the reason why I do not propose to give him costs in the Courts below.

P.R.S./S.N. *Suit dismissed.*

(3) [1908] 12 C. W. N. 151.
(4) [1913] 40 Cal. 598=18 I. C. 949=40 I. A. 56.
(5) [1871] 3 P. C. 465=40 L. J. P. C. 1=24 L. T. 111=19 W. R. 449=7 Moore P. C. 314.

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* A. I. R. 1930 Madras 924

KUMARASWAMI SASTRI AND WALSH, JJ.

Maila Rai—Appellant.

v.

Derappe and *others*—Respondents.

Letters Patent Appeal No. 26 of 1926, Decided on 24th October 1929, from judgment of Philips, J., D/- 27th July 1925, in Second Appeal No. 1788 of 1922.

*** Transfer of Property Act (1882), S. 60—Mortgage prior to 1858—Court must give effect to intention of parties—Rule is neither confined to mortgages by conditional sale nor does it require that terms of document should have been completed before 1858.**

In the case of a mortgage executed prior to 1858 the intention of the parties according to the terms of the contract should be enforced and the Court should give effect to the intention; there is no reason to confine the application of the rule to documents which are in form mortgages by conditional sale nor is it necessary in such cases that the terms of the document should have been completed before 1858 : 13 *M. I. A.* 560; 3 *Mad.* 26; 4 *Mad.* 179 and 26 *I. C.* 376, *Rel. on.* ; 1 *Mad.* 1, *Expl.*

[P 926 C 2 ; P 926 C 2 ; P 927 C 1]

B. Sitaram Rao—for Appellant.

T. Rangachariar and *K. Y. Achiya*—for Respondent.

Judgment.—This is an appeal against the decision of Phillips, J., reversing the decrees of both the lower Courts and dismissing the suit to redeem.

The facts are shortly these:

A deed of mortgage executed in 1844 was sought to be redeemed. The deed which is said to be a usufructuary mortgage deed dated 11th December 1844 begins by stating that the mortgagor on account of his necessity usufructuarily mortgaged to the mortgagee for 248 varahas the property described in the document. The material portion is as follows :

"Thus in total I received from you 243 varahas as detailed above and delivered this day to your possession the entire land bagayat house, cow-pen and also outhouse bearing the said beriz and I have also given to you one decision obtained by me in respect of the said land and also one yadast executed by Shama Rao, Amin of Uppinangadi Taluk Munsif's Court for having delivered the said land to me. In future you alone shall pay the sirkar tirva to Government and enjoy the said land, bagayat, house, cow-pen and outhouse lying within the boundaries mentioned in the decision. You shall have no reason to claim interest for the amount and I shall have no reason to claim any profits out of the said land. I shall pay the consideration amount of 248 varahas to you in one lump sum after a period of 25 years and within a period of 30 years from this day and get back from you the said land bagayat house-cow-pen and outhouse and the two documents viz., decision and yadast given to you. If I fail to pay the amount and get back the land etc within the period mentioned above you shall get the warg of the said land entered in your name, plant therein trees etc., effect improvements therein and shall enjoy the same from generation to generation. I and my descendants shall have no interest therein. To this effect is the usufructuary mortgage deed of land executed out of my free will."

The word in the original is "moulya" or price. This mortgage was not redeemed within the period specified and a suit was filed in 1920 for redemption. Phillips, J., held that the case came within the ruling *Thumbuswamy Mudali* v. *Hossein Rowthen* (1) which was followed in *Bapirazu* v. *Kamarazu* (2) and *Ramaswami* v. *Saniyappa Nayakan* (3). The learned Judge observes:

"It seems to be immaterial whether the document purports to be a sale with a condition of re-sale or whether it purports to be a mortgage with a condition that on failure to pay the mortgage money the property shall pass to the mortgage. If the document was executed prior to 1858 when first the above principle of law began to be modified effect must be given to the intention of the parties."

As regards the second contention that the terms of the document should have been completed before 1858, the learned Judge following *Kanthu* v. *Dasa Upadhya* (4) held that that made no difference as regards the construction of the terms.

It is argued before us by the learned Advocate-General that the principle of giving effect to the intention of the parties evidenced by the contract in cases like the present should be confined to cases of mortgage by conditional sale pure and simple and as regards other mortgagees this principle has no application. It is also contended that in cases where the period fixed in the deed would carry us later than 1858, the principle in *Thumbuswami Mudali* v. *Hossein Rowthen* (1) should not be applied and the ordinary rule as regards redemption must be applied. As regards the first point we do not see any reason for confining the principle to mortgages by conditional sale pure and simple which have been defined later on by the S. 56, T. P. Act. The Advocate-General's contention is, that unless the document is ostensibly a sale coupled with a condition for defeasance you ought not to apply the ruling in *Thumbuswami Mudali* v. *Hossein Rowthen* (1). So far as we can see, the decision in *Pattabiramier* v. *Venkat Rao Naicken* (5) was on a document which was not worded as a sale with a condition for defeasance. On the contrary it begins like a mortgage and contains a clause converting the mortgage into a sale if not redeemed. The document is set out at p. 561. The report is as follows:

"A mortgage bond had been executed by the original parties stipulating that the mortgagee should enjoy the lands in lieu of interest and that if the principal should be paid in the season of harvest of any year, the mortgagee should receive it and give up the lands of which possession was then given to the mortgagee and it was also alleged that

(1) [1876] 1 Mad. 1=2 I. A. 241=3 Sar. 531 (P.C.).
(2) [1881] 3 Mad. 26.
(3) [1882] 4 Mad. 179.
(4) [1914] 26 I. C. 376.
(5) [1869] 13 M. I. A. 560=15 W. R. 35=2 Suther 410=2 Sar. 628 (P.C.).

this mortgage debt had been liquidated from the usufruct of the lands."

That was not a case of a document which began with sale and ended with power to redeem. Similarly in *Thumbuswami Mudali* v. *Hossein Rowthen* (1) also we find that the document begins as a mortgage refers to the principal payments by instalments and enjoyment and then winds up by saying:

"If by the 30th of Panguni of the said Pramadhi the money be not paid up in full and a balance still remains due, you yourself shall take hold and enjoy such of the lands (herein) as you may like and as may be equivelent to the balance due . . . . as if under the terms of a deed of absolute sale."

We can find very little in *Pathabiramier* v. *Venkata Rao* (5) and *Thambuswami Mudali* v. *Hossein Rowthen* (1) to hold that the Privy Council confined their observations to cases where the document was in the form of a sale with a condition for redemption. If their Lordships of the Privy Council as contended for by the appellant's advocate decided that the rule as to giving effect to the intention of the parties applied only in cases of mortgage where there was a sale with a covenant to reconvey on the mortgage money being paid, they would have stated the rule especially as the mortgage before them was not such a document. Their judgment applies equally to mortgages with only a clause for reconveyance. In *Bapirazu* v. *Kamarazu* (2), it was decided that as regards mortgages executed before 1858 the intention of the parties to the instrument must be given effect to. The Full Bench decision in *Ramaswami Sastrigal* v. *Saniyappa Nayakan* (3), deals fully with the various kinds of mortgages and it is clear from the judgment of Sir Charles Turner, C. J., that he considered the question as regards the applicability of the ruling in *Pattabiramier* v. *Venkata Rao* (5), to cases where the document is in the usual form of a usufructuary mortgage containing a condition that it should become an absolute sale in a particular event. At p. 183 the learned Chief Justice observes:

"The various forms of mortgage known to the Hindu law are mentioned in Colebrooke's Digest, Edition. of 1801. Vol. 1, pp. 81 and 82. Among these is the mortgage with a condition that, in the event of default being made in the payment of principal on or before a date named, the property mortgaged shall pass to the mortgagee as an absolute purchaser."

He then refers to various forms of mortgage. According to him, the decision in *Pattabiramier* v. *Venkata Rao* (5), would apply to mortgages prior to 1858. Under these circumstances we think there is no reason to confine the application of the rule to documents which are in form mortgages by conditional sale. The test in these cases is what was the intention of the parties. We must presume that in the case of a mortgage prior to 1858 the intention of the parties, according to the terms of the contract, should be enforced and the Court should give effect to the intention.

The second contention is that as the terms of sale became absolute, and the property became absolute property of the mortgagee subsequent to 1858, the ordinary principle of redemption should be applied. Reliance is placed upon a decision of Muthuswami Iyer and Parker, JJ., in *S. A.* 122 *of* 1889. In that case the mortgage was executed in 1857 and their Lordships thought that there was no reason to apply the strict ruling of the Privy Council. The question however has been considered in a later case in *Kanthu Desa* v. *Upadhya* (4). The point directly arose for determination in that case and the learned Judges Ayling and Sadasiva Iyer, JJ., had to consider whether the fact that the term in the document went later than 1858 affected the question. The learned Judges observed:

"The respondent's learned vakil, Mr. Yognanarayana Adiga, tried to take away the transaction under Ex. 22 out of the class of transactions to which the ruling in *Pattabiramier's* case (5), applied by an ingenious comment on two sentences which occur in the latter case in *Thumbuswamy Moodelly* v. *Hossein Rowther* (1). Those two sentences in the judgment are: "On a stale claim to redeem a mortgage and dispossess a mortgagee who had before 1858, acquired an absolute title, there would be strong reasons for adopting the former course." (That is, the course of treating the sale as having been absolute.) In the case of a security, executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted'. It was argued that the first sentence favours only those deeds under which the alienees had acquired absolute titles before 1858 and not a deed like the present, under which the absolute title was acquired only in 1859, though the deed itself was executed before 1858. Having regard to the observa-

tions in *Pattabiramier's* case (5) and the whole tenor of the observations in *Thumbuswamy Moodelly* v. *Hossein Rowther* (1), (including the second sentence quoted above), we have no doubt that their Lordships of the Privy Council favoured the natural construction of all documents executed before 1858, whether the title had become absolute before 1858 or became absolute only after 1858 provided the suit to redeem was brought after the title had become absolute."

It seems to us, with all deference that the decision in *Kantha* v. *Dasa Upadhya* (4) ought to be followed, and we have to give effect to the intention of the parties at the date of the transaction. That intention is evidenced by the condition in the document which says:

"If I fail to pay the amount and get back the land, etc., within the period mentioned above, you shall get the warg of the said land entered in your name . . . . and shall enjoy the same from generation to generation. I and my descendants shall have no interest therein."

If the terms of the deed were to be enforced, the rights must depend on what was agreed to when the mortgage was executed and not on any change in the law at the date when the money was payable.

We agree with the decision of the learned Judge on both the points and dismiss the Letters Patent Appeal with costs.

P.R.S./V.B. *Appeal dismissed.*

A. I. R. 1930 Madras 927
Full Bench

BEASLEY C, J., SUNDARAM CHETTY AND WALSH, JJ.

In the matter of R. V., Advocate, High Court, Madras.

Case under S. 12 (3), of Indian Bar Council Act, Decided on 28th July 1930.

Legal Practitioners Act (1879) S. 13—Legal practitioner receiving money on behalf of client and retaining it in his hands without authority from client—He subsequently treating it as loan and giving security which he felt himself at liberty to withdraw at his own will—This amounted to professional misconduct.

A legal practitioner received money from the Court on behalf of his client and retained it in his own hands without any authority from the client so to retain it. Subsequently he chose to treat it as loan and gave security which he felt himself at liberty to withdraw at his own will and pleasure.

Held: that this was a grave offence which amounted to professional misconduct, for no practitioner was entitled to hold his client's money in his hands and to use it himself for his own private purposes without the consent of his client. [P 928 C 1]

K. Krishnaswamy Iyengar — for the Advocate concerned.

The Advocate-General—for the Crown.

Beasley, C. J.—This matter comes up before us on a roport by the Tribunal of the Bar Council. A charge was framed by the Tribunal against the advocate of having received a sum of Rs. 150 on behalf of the complainant who was the plaintiff decree-holder in a suit in the Small Cause Court, Madras, and appropriated that money to his own use without any authority from him. The facts of the case are that on 5th November 1927 the advocate received a cheque for Rs. 150 from the defendant judgment-debtor in the suit already mentioned in pursuance of the decree in that case and that on 7th November he cashed that cheque; and the case against him is that he put the proceeds of that cheque into his own pocket and utilized those proceeds for his own purposes. The petitioner made demands upon him for payment of the money by Ex. K, dated 25th November 1927, Ex. A, dated 3rd December 1927 and Ex. C, dated 26th January 1928. On 1st February 1928, by adjustment, the advocate paid Rs. 105-9-9 towards the amount of Rs. 150. Previous to this he had given a security letter to the complainant by means of which he pledged his horse and carriage with him. His case is that the complainant accepted the .horse and carriage as security for the Rs. 150 then outstanding. His defence is that the complainant was out of Madras at the time when he received the cheque. There is certainly evidence, the complainants' diary, that with the exception of about a day and a half he was out of Madras and did not return until 19th November, and that on the day he returned or some date afterwards he tendered the Rs. 150 to the complainant asking him at the same time to lend him that amount for a fortnight and that the complainant agreed. This defence the Tribunal has totally disbelieved, and in fact it is definitely and flatly contradicted by two exhibits in the case. Putting it at its very earliest, the date of the alleged loan was 19th November, and therefore the fortnight's time would expire on 3rd or 4th December;

yet it is very strange to find that on 3rd December there is a letter written by the complainant to the advocate (Ex. A) demanding payment of the amount by 8 p. m. and stating that if the amount was not paid by that time, he would be compelled to seek legal help to realize the amount from the advocate and take such other steps as might seem necessary. That certainly is quite inconsistent with the advocate's case that there was an arrangement to lend the money for a fortnight. But there is a stronger piece of evidence than that, and that is to be found in Ex. K, dated 26th November 1927. That is a letter from the complainant to the advocate and reads as follows:

"Will you please pay the amount to Mr. V. R. Krishnaswami Mudali viz. Rs. 150 due to me in S. C. S. No. 10700 of 1927 of Small Cause Court paid by B. Satyanarayana to the credit of the abcve suit."

That again is quite inconsistent with the advocate's statement that the money was by arrangement to be treated as a loan to him for a fortnight. We are in complete agreement with the Tribunal in coming to the view that this story of the alleged loan is a complete concoction. With regard to the security letter Ex. 11, dated 20th January 1928 written by the complainant to the advocate stating "I hope you will not remain quiet with the idea that you have assigned me the horse and carriage as security". It seems to us toindicate that the security letter had been pressed upon the complainant by the advcoate who was in financial difficulties at the same time and unable to pay, and it certainly is by no means clear that the complainant ever accepted that security at all. The fact remains that from the date of receipt of the money to the date when the security letter was given the advocate retained in his own hands the money which belonged to his client without any sort of authority from his client at all to so retain it. That of course is, as the Tribunal has found, misconduct and we are bound to say that it is clearly professional misconduct. No practitioner is entitled to hold his client's money in his hands and use it himself for his own private purposes without the consent of his client, and the Tribunal has found that he has been guilty of that offence. We might at the same time add that when a person who is not a practitioner receives money in his hands for some other person and converts it to his own use he commits the offence of criminal breach of trust, and that offence is none the less committed because a person happens to be a legal practitioner. Such acts as these are very serious ones indeed and certainly cannot be dealt with lightly by any Court. This advocate has a lready been dealt with in this Court on another occasion in 1928 when he was sentenced to be suspended for six months for an offence similar to this committed in 1927 ; so that this is the second case of professional misconduct and dishonesty. We have had urged upon us by Mr. K. Krishnaswamy Iyengar the fact that the security letter was executed by the advocate and that some time the complainant was in possession of the horse and carriage, but we are now told that after the arrangement, by means of which Rs. 105 odd was paid to the complainant, the advocate took back the horse and carriage and this was of course whilst the balance of the amount was still unpaid and it still remains unpaid. That does not seem to us to be an extenuating circumstance at all. The facts of the case are that the advocate kept this amount in his own hands, used it for his own purposes, chose to treat it as a loan and then gave security for it which he felt himself at liberty to withdraw at his own will and pleasure. This is a very grave case and we have very carefully considered what our order should be as regards the sentence to be passed upon him. Speaking for myself, I had at one time the view that this being the second offence of this nature, the advocate should be prevented from practising again. However, after mature consideration we are going to pass an order which, in view of the circumstances, we consider to be a light sentence. The order of the Court is that Mr. V. Advocate, be suspended from practice for 18 months from this date.

P.R.S./S.N. *Order accordingly.*

A. I. R. 1930 Madras 929

PANDALAI, J.

Palani Goundan—Petitioner.

v.

Krishnappa Goundan and *others*—Respondents.

Criminal Revn. No. 27 of 1930, and Criminal Revn. Petn. No. 26 of 1930, Decided on 28th March 1930, against judgment of Sess. Judge, Coimbatore Division, in Criminal Appeal No. 14 of 1929.

(a) Criminal P. C., (1898), S. 250—Summary trials—Magistrate acting under S. 250 must record reasons thereunder.

Even in records of summary trials under Chap. 22, where the Magistrate or Bench acts under S. 250 the requisites of that section as to recording of reasons must be carried out.

[P 929 C 1, 2]

(b) Criminal P. C., (1898), S. 250—Bench after closing evidence in summary trial stating to complainant that case was false and vexatious and as part of same statement calling upon him to show cause against compensation being ordered against him—Statement held to be sufficient compliance with requirements of S. 250.

In a trial under Chap. 22, after the evidence was closed and the impression made by it on the Bench was fresh in their mind, the Bench called upon the complainant to show cause why compensation should not be granted in this wise: "The case brought by you has been proved to be false and vexatious and it is clear that this has been brought simply to harass the accused. Please show cause why compensation should not be ordered?" The complainant answered that the case brought by him was true. The Bench holding that it was no explanation ordered compensation.

Held: that although the passage that the case was brought simply to harass the accused occurred as a portion of the question, it must have been intended as record of their own reason for thinking that the complaint was false and vexatious and hence satisfied the requirements of S. 250.

[P 930 C 1]

K. Periaswami Gounden — for Petitioner.

Order.—This is a petition to revise an order awarding compensation to six accused (at Rs. 10 each) made by the 1st Class Bench of Magistrates of Dharapuram and confirmed by the learned Sessions Judge of Coimbatore. Two objections are raised: (1) that the record of the trial does not contain, as it should, the reasons why the Bench considered the complaint to be false and vexatious and (2) that this vitiates the order.

On the first point on which there seems to be no direct decision of this Court the contention must be upheld that even in records of summary trials under Chap. 22, Criminal P. C., where the Magistrate or Bench acts under S. 250, the requisites of that section as to recording of reasons must be carried out. This seems to follow from the provisions of S. 262 which lays down that the procedure prescribed for summons cases shall be followed in summons cases and that prescribed for warrant cases shall be followed in warrant cases even when they are tried in a summary way. The only exceptions to this rule are contained in the next two following sections Ss. 263 and 264. The former applies to cases where no appeal lies and the latter to cases in which an appeal lies; which means, to cases where an appealable sentence is or is not passed upon the accused. These Ss. 263 and 264 do not, if reasonably read provide for proceedings under S. 250 by which alone compensation to the accused is ordered against the complainant. There being thus no express exception from the general rule laid down by S. 262, it follows that even in summary trials the requisites of S. 250 must be satisfied.

The next question is whether in this case they have been satisfied. This point was apparently not raised before the Sessions Judge on behalf of the petitioner. But that learned Judge was of opinion that the order of the Bench does not contain a record of reasons for awarding compensation although he also thought that the omission had not prejudiced the appellant and therefore did not, under S. 537, invalidate the order. Taking the record of the trial as a whole and remembering that the record is itself the record of a summary trial, it is not quite accurate to say that it does not contain a record of reasons for awarding compensation. After the evidence was closed the Bench put the fellowing question to the complainant:

"The case brought by you has been proved to be false and vexatious and it is clear that this has been brought simply to harass the accused. Please show cause why a compensation of Rs. 25 to each of the accused or Rs. 150 in all should not be ordered."

The complainant answered that the case brought by him was true. The Bench therefore go on to state that when called on to explain why compensation should not be ordered for bringing this false and vexatious complaint, P. W. 1 says that his complaint was

true and that this is no explanation at all. Then they make the order directing him to pay Rs. 25 each. Reading this in a fair and reasonable way the passage where the Bench said that it is clear that this case has been brought simply to harass the accused, although it occurs as a portion of the question put to the complainant, may be understood and must have been intended as a record of their own reasons for thinking that the complaint was false and vexatious. They had just then taken the evidence and the impression made by it upon their minds was still quite fresh and they concluded, as they said in plain terms, that the case was false and vexatious because it was brought to harass the accused. I am not able to say that the requirements of law have not been satisfied. It is needless to add that, even if there had been any omission, S. 537 would have been sufficient to cure the omission in view of the fact that the petitioner himself did not raise the question before the Sessions Judge. The petition is dismissed.

P.R.S./V.B. *Petition dismissed.*

A. I. R. 1930 Madras 930

MADHAVAN NAIR AND REILLY, JJ.

Chaturbhujadoss Kushaldoss & Sons and *another*—Defendants — Appellants.

v.

Rajamanicka Mudali and *others* — Plaintiffs—Respondents.

Appeals Nos. 250 and 332 of 1925, Decided on 1st May 1930, from decree of Sub-Judge, Vellore, in Original Suit No. 86 of 1922.

(a) Hindu Law—Widow—Decree against—Deceased, having no heir except widow, by will making his nephew his residuary legatee — Legatee suing for declaration — During pendency of that suit, creditor of deceased suing widow, who then was in possession of some of deceased's property, bona fide believing her to be legal representative —In execution of decree obtained, not only properties in widow's possession but also other properties sold — Widow sufficiently represented deceased's estate, and decree obtained against her and sale in execution thereof of all properties sold held binding on legatee — Although creditor's suit and sale in execution of decree obtained in it took place during pendency of declaratory suit, decision on it was not affected by Transfer of Property Act, S. 52—Civil P. C., O. 22, R. 4.

Even where a suit is instituted by a creditor of the deceased against his wrong legal representative, the decree passed in the suit and the sale of the property of the deceased in execution of that decree is binding on the true legal representative. The estate is to be deemed as sufficiently represented if the suit was instituted bona fide against the alleged legal representative and the decree was obtained without any fraud or collusion between the parties. The binding nature of the decree is not limited only to the items of property in the possession of the alleged legal representative but extends to the whole of the estate of the deceased.

The deceased, who had no other heir except his widow, had made a will whereby he had made his nephew his residuary legatee, who instituted a suit for declaration on the basis of the will. During the pendency of that suit, a creditor of the deceased sued the widow who was then in possession of some of the items of the deceased's property, and obtained a decree against her without there being any fraud or collusion between him and the widow. In execution of that decree not only the properties in possession of the widow but other property of the deceased also was sold.

Held: that the estate of the deceased was sufficiently represented by the widow and the decree obtained against her and the sale in execution thereof of all the properties sold was binding on the legatee, the true representative: 33 *Mad.* 6; 32 *Cal.* 296; 26 *Mad.* 230; 14 *M.I.A.* 605 and 1 *Marsh.*614, *Rel. on.*;31 *I.C. 920, Foll.*; 33 *Mad.* 75; 35 *I. C.* 124 and *A. I. R.* 1926 *Mad.* 487, *Expl.* and *Dist.*; *A. I. R.* 1927 *Mad.* 197, and *other cases referred.* [P 933 C 2]

Held further: that although the creditor's suit was instituted during the pendency of the lagatee's declaratory suit, S. 52, T. P. Act, would not affect the sale in execution because the interest of both the widow as well as the legatee were really identical. [P 938 C 2]

(b) Civil P. C. (1908), O. 22, R. 4—Scope.

Rule 4 reproduces with no change in principle S. 568 of the old Code as amended in 1883: *A. I. R.* 1925 *All.* 479, *Rel. on.* [P 936 C 1]

(c) Debtor and Creditor — Debtor dying making will—Creditor is not expected to know whether will was effected.

Wills are not yet so common among the country people of this Presidency that a creditor whose debtor dies can be expected to inquire whether the debtor has left a will and what its dispositions are, if no one gives him information that a will has been made. [P 939 C 1]

M. A. Thirunarayana Chariar, A. K. Ramachandra Iyer and *K. S. Desikan* —for Appellants.

A. Viswanatha Iyer, K. S. Desikan, H. Ramaswami Iyer and *A. K. Ramachandra Iyer*—for Respondents.

Madhavan Nair, J.—Defendant 1 is the appellant in Appeal No. 250 of 1925 and he is the decree-holder in C. S. No. 81 of 1921 on the file of the High Court, Madras. Defendant 2 is the appellant in Appeal No. 332 of 1925 and he is the auction-purchaser of the properties sold in execution of the decree in C. S. No. 81 of 1921. These appeals

arise out of a suit instituted by the plaintiff for a declaration that the decree in C. S. No. 81 of 1921 and the attachment and sale held in execution of that decree are not binding on him.

The facts are briefly these. One Parthasarathi Mudali who was doing business in yarn and cloths had dealings with defendant 1 Kushaldoss & Sons and owed them a considerable sum of money. He died on 18th May 1920, leaving a will dated 14th May 1920. By this will the plaintiff, his nephew, was given the whole estate of the testator subject to the other dispositions mentioned in it. After the death of Parthasarathi Mudali, his widow, Sengalani Ammal applied on 5th October 1920, for a succession certificate in order to enable her to ollect the outstandings due to him. The plaintiff's father as his guardian objected to the issue of the certificate. But an order was passed in favour of the widow as the counter-petitioner said that he intended to file a separate suit to establish his rights under the will and that he had no objection to the petitioner being given the certificate provided she furnished substantial security. On 22nd December 1920, O. S. No. 65 of 1921 on the file of the Court of the Subordinate Judge of Vellore was filed by the plaintiff to establish his rights. It was disposed of in his favour on 24th April 1922. Meanwhile, on 31st January 1921, that is, after the institution of O. S. No. 65 of 1921 the present defendant 1 filed C. S. No. 81 of 1921 on the file of the High Court against Sengalani Ammal, the widow of the deceased Parthasarathi Mudali as representing her husband's estate, for the recovery of money due from Parthasarathi Mudali. The suit was heard and decided ex parte on 30th March 1921, i. e., before the disposal of O. S. No. 65 of 1921. The decree directed that

"Sengalani Ammal, the defendant . . . . do from and out of the assets of her deceased husband Parthasarathi Mudali, come to her hands, do pay to the plaintiffs the sum of Rs. 3,518-11-0 etc."

This decree was transferred for execution to the Court of the District Munsif of Ranipet on 3rd July 1922 and the sale of the suit properties was posted to 28th August 1922. As the plaintiff had by that time obtained a decree in his favou he intervened in execution proceedings and wanted to be brought on record in order to oppose the execution, but as his petition was filed on the day fixed for sale of the properties it was dismissed as being too late. The sale proceeded and defendant 2 purchased the suit properties for a sum of Rs.3,850. It is the decree in C. S. No. 81 of 1921 on the file of the High Court and the execution sale in favour of defendant 2, which the plaintiff now contends do not bind him.

His case is that defendant 1 was well aware when he instituted C. S. No. 81 of 1921 that he was the true legal representative and the residuary legatee under the will of the deceased Parthasarathi Mudali and knowing that, he instituted that suit in collusion with Sengalani Ammal, the widow, in fraud of the plaintiff's rights, and that she allowed the decree for the principal and interest to be passed ex parte without contesting the claim for interest which she could have successfully resisted if the case had been properly conducted. These grounds are alleged to show that the decree obtained by defendant 1 against Sengalani Ammal could not be regarded as a decree obtained bona fide and without fraud or collusion; and therefore cannot bind the plaintiff who is the real heir of Parthasarathi Mudali. It is also alleged that the execution proceedings in connexion with the sale of the properties were not carried on bona fide. These allegations are denied by the defendants. The claim of defendant 1 for the principal sum is admitted by the plaintiff.

The learned Subordinate Judge found that in the matter of the institution of the suit there was no collusion between defendant 1 and Sengalani Ammal and that there was no evidence that defendant 1 was actuated by any fraudulent motive in instituting the suit against the widow. He held that interest was rightly claimed in that suit by defendant 1 and the claim for interest therefore cannot be considered to be a fraud perpetrated upon the estate of Parthasarathi Mudali. Notwithstanding these findings, the learned Subordinate Judge came to the conclusion that the decree was not obtained bona fide and cannot bind the present plaintiff on the ground that defendant 1 had opportunities of finding out the true legal representative

of the deceased Parthasarathi Mudali and that he instituted the suit without making sufficient enquiries. His conclusion might be stated in his own words :

"The conclusion that must be adopted is that C. S. 81 of 1921 was inst ituted against Sengalani Ammal without enquiry as to who was Parthasarathi's real heir when there was every opportunity to make such enquiry and when if such enquiry had been made in the right spirit and in the proper way it would disclose the fact. It cannot be regarded as a suit instituted bona fide against the widow as heir."

As regards defendant 2's participation in the proceedings the learned Judge held that he purchased the suit properties knowing that there was a will set up by the plaintiff constituting him as the legal heir of Parthasarathi Mudali. He also held that defendant 2 had no hand in the matter of filing C. S. 81 of 1921 and that the properties purchased by him were not sold for an inadequate price. As a result of these findings a decree was given in favour of the plaintiff as prayed for.

In appeal it is argued on behalf of the appellants that the circumstances of the case would show that defendant 1 instituted the suit against Sengalani Ammal in the full belief that she was the true legal representative of the deceased Parthasarathi Mudali and that he made sufficient enquiries before instituting the suit and that his conduct in connexion with the suit and its proceedings was throughout bona fide. On behalf of the plaintiff-respondent it is urged that the Judge's finding that interest was properly decreed in the prior suit is not supported by the evidence, and that the properties were sold for an inadequate price, and that even if it is held that the decree against the widow was obtained by defendant 1 bona fide and without fraud and collusion in law the decree is not binding on him as it was not obtained against him, he being the true legal representative of the deceased Parthasarathi ; and that if binding at all, it will be binding only as regards items 3 and 4 which are in the possession of the widow. It was also argued having regard to S. 52, T. P. Act, effect should not have been given to the decision in C. S. 81 of 1921 as it was decided during the pendency of O.S. 65 of 1921 which ended in his favour. I shall first deal with the question whether the claim for interest was rightly allowed by the Court in C. S. 81 of 1921. The learned Subordinate Judge has found in favour of the appellant on this point. I cannot say that the evidence in the case does not support the conclusion of the Subordinate Judge. The witnesses who speak in support of the claim for interest are D. W's. 1 and 2. Their evidence is to the effect that Parthasarathi Mudali was liable to be charged interest on his money dealings with defendant 1's firm and that he was not charged interest for a considerable time ; but that in 1919 he was specifically told that he would be charged interest in future. Reading the evidence of these two witnesses carefully I fail to see any real inconsistency in their statements. It is true as may be seen from the accounts, that Parthasarathi Mudali was not charged interest up to 1919 ; but the liability to pay interest always existed and that was enforced from 1919 onwards. *Exs. 1, 4* and 5 support defendant 1's claim for interest in C. S. 81 of 1921. In Ex. 1, the patti dated 19th April 1920, it is stated that interest will be charged on the amount specified in it at the rate of 9 per cent per annum. Ex. 4, a letter from defendant 1 to Parthasarathi Mudali dated 30th April 1920, distinctly states that interest will be charged up to date.

Ex. 5, a card dated 10th June 1920, was written subsequent to the death of Parthasarathi Mudali. It is curious that by that time though defendant 1 must have known about the death of Parthasarathi Mudali the card was addressed to him. No satisfactory explanation has been given for this proceeding but I am not satisfied that this is an indication of fraudulent conduct on the part of defendant 1. This letter also says that if the account is not settled, interest will be recovered. In thus declaring that interest will be claimed this is quite consistent with Exs. 1 and 4. As no large amount was due from Parthasarathi Mudali to defendant 1 in 1919, the demand for interest thereafter may no doubt appear to be somewhat unreasonable. But it does not follow from this that the defendant's evidence regarding the agreement on the part of Parthasarathi Mudali to pay interest thereafter should necessarily be disbelieved as the liability to pay interest

always existed though it was not enforced till 1919. This point is dealt with by the learned Subordinate Judge in para. 11 of his judgment. On the whole I am inclined to agree with him on his finding on this point. It therefore follows, the claim for principal being admitted, that Sengalani Ammal's failure to resist C. S. 81 of 1921 was in no way detrimental to the interests of the estate of Parthasarathi Mudali.

The next question for consideration is whether defendant 1 knew at the time when he instituted the suit that a will was left by Parthasarathi Mudali and that the plaintiff was his true legal heir. The plaintiff's case that the death of Parthasarathi Mudali and the fact that he died leaving a will were brought to the notice of defendant 1 soon after Parthasarathi's death has been disbelieved by the learned Subordinate Judge. It was not seriously argued by the respondent that on this point the learned Subordinate Judge's conclusion is wrong. Defendant 1's case is that he knew of the death of Parthasarathi only in July 1920 when he went to his village and sold some of his properties. But it is clear from the evidence, as pointed out by the learned Subordinate Judge that he must have known about it some time earlier in June but this does not affect the bona fide of his conduct in instituting the suit against the widow. The evidence does not show that defendant 1 or his agents knew anything about the succession certificate proceedings before the institution of the suit. When his agents went to the village of Parthasarathi in July 1920 the evidence is to the effect that they learnt that Parthasarathi's only heir was Sengalani Ammal, his widow, that they do not hear anything about the will and that they obtained the keys of the shop of Parthasarathi from Sengalani Ammal. Some yarn was sold on that occasion and defendant 1 was able to realize a sum of Rs. 1,500 towards his dues. It appears from the plaint that Sengalani Ammal is in possession of items 3 and 4 though the point is disputed by the respondent. I do not think it can be seriously contended that she was not in possession of these items when defendant 1 instituted his suit. But for the will it is clear that Sengalani Ammal would be the heir of Parthasarathi entitled to represent his estate. This fact, coupled with other facts already referred to that Sengalani Ammal was in possession of some items of property belonging to her husband, that the keys of the shop were obtained from her, may well be considered as sufficient justification for the conduct of defendant 1 in instituting the suit against her as Parthasarathi's legal representative. The Subordinate Judge does not say that defendant 1's agents refrained from making any enquiries. His opinion seems to be that if they had made fuller enquiries they might probably have known of the existence of the will and that the plaintiff was the real heir of the deceased.

Probably this might have been so. But I cannot accept the argument having regard to the circumstances referred to above, that defendant 1's failure to prosecute more detailed enquiries should necessarily lead to the conclusion that in instituting the suit against the widow he was not acting bona fide. All the facts then known to him and present before his mind pointed out that Sengalani Ammal was the legal representative of the deceased. The agents of defendant 1 seem to have made some enquiries, though the evidence on the point is not quite definite. In this connexion it is important to notice that defendant 1 does not improve his position in any way by making the widow the legal representative of the deceased Parthasarathi and by refraining from making enquiries as to who his true legal heir is. The learned Subordinate Judge has found that there was no collusion of any kind between the widow and defendant 1 in the matter of the institution of the suit. We have not been referred to any evidence in support of any collusion. It is admitted that the amount claimed except as regards interest was really due from Parthasarathi to defendant 1, and as regards interest we have found that the claim has been substantiated. In these circumstances why should defendant 1 not have sued the plaintiff as the defendant in C. S. 81 of 1921 instead of the widow if he really knew that there was a will and that the plaintiff was really the legal representative of Parthasarathi? No satisfactory answer has been given by the respondent to this question except

that the suit was brought at the instigation of some of the enemies of the deceased Parthasarathi. In these circumstances I cannot agree with the opinion of the lower Court that it cannot be regarded that C. S. 81 of 1921 was instituted bona fide against a wrong heir. In my opinion the evidence in the case shows abundantly that the suit C. S. 81 of 1921 was instituted by defendent 1 bona fide against the widow as the legal heir of the deceased Parthasarathi and that there is nothing fraudulent in the conduct of defendant 1 or the widow in connexion with the proceedings in the suit and that the decree was obtained without fraud and collusion.

As regards the value realized at the time of the sale, I agree with the learned Subordinate Judge that the value is not inadequate. He has considered the matter in para. 17 of his judgment, and I do not think I can add anything to that discussion. For the above reasons, I would hold that the widow Sengalani Ammal sufficiently represented the estate of the deceased Parthasarathi in C. S. 81 of 1921 and that the decree in that suit is binding on the plaintiff.

Mr. Viswanatha Ayyar next argues as a proposition of law that even if C. S. 81 of 1921 was instituted by defendant 1 bona fide against a wrong heir, and even if there be no fraud or collusion between the parties in respect of that suit, still the decree passed in the suit cannot be considered binding on the true legal representative (that is, the plaintiff), and if it is binding at all it will be binding only with respect to the properties of the deceased which were in possession of the widow at the time of the suit, that is, only items 3 and 4 in the suit. In support of this argument he relied strongly on *Madavarayudu* v. *Subbamma* (1), *Gnanambal Ammal* v. *Veerasami Chetti* (2), *Kaliappan Servaikaran* v. *Varadarajulu* (3), *Srinivasa Ayyangar* v. *Kanthimathi Ammal* (4), *Bachu Soorayya* v. *T. Chinna Anjaneyulu* (5) and *A. Mallappa* v. *N. G. Kare Gowd* (6).

The question how far and under what circumstances a decree passed against the wrong heir of a deceased person will bind his true heir has been considered in various cases. Prima facie a decree will bind only the parties to it or those claiming through them; but there are exceptions to this rule. The Courts have held that in certain circumstances when one who is not the true legal representative of a deceased person is impleaded as his legal representative, then a decree passed against him in his character as the legal representative of the deceased would be binding on the true representative though he is not a party to it. The suit may have been instituted against the wrong legal representative at the very commencement or the wrong legal representative may have been brought on record during the pendency of the suit or after the decree and for purposes of execution. An examination of these cases will show that in deciding the point the learned Judges put before themselves the question whether the estate was sufficiently represented by the alleged legal representative on record as the important factor for consideration and this they answered in the affirmative, if it was found that the suit was instituted bona fide against the alleged legal representative and the decree was obtained without any fraud or collusion between the parties.

In *The General Manager of the Raj of Durbhanga* v. *Maharaja Coomar Ramaput Singh* (7), the suit was brought against a widow as the mother and guardian of her son who was then a minor, to recover arrears of rent due from his deceased father. It was held by the Judicial Committee that the decree obtained against the widow as the legal representative of her husband was binding on the son who in law was the true legal representative of the deceased, though the suit was not prosecuted against him.

This Privy Council decision entirely approved of the decision in *Ishan Chunder Mitter* v. *Buksh Alli Soudagur* (8). In that case, which is the earliest one mentioned in the reports, it was held the decree obtained against a Hindu widow for her husband's debt was bind-

(1) [1916] 35 I. C. 124.
(2) [1915] 31 I. C. 920.
(3) [1910] 33 Mad. 75=3 I. C. 737.
(4) [1910] 33 Mad. 465=5 I. C. 917.
(5) [1919] 52 I. C. 509.
(6) A. I. R. 1926 Mad. 487=93 I. C. 625.
(7) [1870-72] 14 M. I. A. 605=10 B. L. R. 294=17 W. R. 159=2 Suther 575=3 Sar. 117 (P.C.).
(8) 1 Marsh. 614.

ing on the son who was not a party to the suit. It would seem from the reports that the plaintiff knew of the existence of the son when he sued the widow. The judgment shows that the question for consideration was whether the widow sufficiently represented the estate of the deceased. This is really the point that has to be decided in cases of this description.

In *Kadir Mohideen Marakkayar* v. *Muthu Krishna Ayyar* (9), the defendant died during the pendency of the suit and only one of his sons was brought on record as his legal representative. It was held that the share of the second son also was bound by the decree in the suit notwithstanding the fact that he was not joined in the suit as one of the legal representatives of his deceased father. The learned Judges based their conclusion on the following reasoning:

"In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant, and whose name the Court enters on the record in the place of such defendant, sufficiently represents the estate of the deceased for the purposes of the suit, and in the absence of any fraud or collusion the decree passed in such suit will bind such estate."

It is true that this is not a case where a person was wrongly brought on record as the legal representative, but it lays down a general principle.

In *Khiarajmal* v. *Daim* (10), the Judicial Committee pointed out that the question whether the estate is or is not properly represented is not a mere question of form but of substance. That also was not a case where a wrong legal representative was brought on record in the place of the deceased person, but it was a case in which some of the legal representatives were brought on record with respect to one of the deceased persons and no legal representative was brought on record with respect to another person. In the case of the one, their Lordships held that the estate was sufficiently represented, while in the other case they held that it was not represented at all.

In *Ramaswami Chettiar* v. *Oppilamani Chetti* (11), the defendant died after the decree and the plaintiff in the course of the execution proceedings brought on record as his legal representative one of two persons who appeared to have a better title at that time. It was held that the sale of properties in execution of the decree with such a person on record would bind the person who was subsequently found to be the true legal representative. The principle on which the decision is based is thus stated by the learned Judges:

"The creditor must, if he is not to be liable to lose his money, be permitted to apply for execution against that one of the rival claimants whom he honestly and reasonably believes to be the legal representative; and if the person so nominated, though it may turn out afterwards that he is not the true legal representative, is yet competent in fact to represent the estate, if his interests in respect of the proceeding in question are identical with those of his rivals and if he acts without fraud or collusion, it is hard to see any reason why his representation should not be held to be sufficient."

Later on, speaking of the representation of the estate by the wrong person being brought on record, they observe as follows:

"His interests were absolutely identical in this matter with those of his rivals and he was better able than they to protect them. There existed therefore no reason why, if one of the claimants was to represent the estate, it should not be he, and no fraud or collusion has been proved in this case to vitiate his representation. There is then no good reason why, as the person with the best prima facie title, and holding possession of the property, Krishnaswami Panikondar should not be held to have sufficiently represented his natural son's estate in fact."

In my opinion there is no justification for confining the principle enunciated in this decision only to those cases where a wrong representative is brought on record in the course of execution proceedings. The question to be considered, whether it arises in the course of execution proceedings or in the course of the suit, is this: whether the estate of the deceased person was sufficiently represented by the legal representative who has been actually brought on record. I think the same principle should govern all cases where a wrong representative has been brought on record, where such representative has been added in the course of the suit or in the course of the execution proceedings. The same consideration should apply also to a case where the suit itself is instituted against the wrong legal representative at the very commencement.

(9) [1903] 26 Mad. 250=12 M. L. J. 363.
(10) [1905] 32 Cal. 296=32 I. A. 23=8 Sar. 784 (P.C.).
(11) [1910] 33 Mad. 6=4 I. C. 1059.

The principle of the decision in *Ramaswami Chettiar* v. *Oppilamani Chetti* (11) has been applied to a case in *Gnanambal Ammal* v. *Virasami Chetty* (2) where the suit itself was instituted against a wrong legal representative of the deceased person as in the case before us. Referring to these decisions Sadasiva Ayyar, J., in that case observes as follows:

"In that same volume *Ramaswami Chettiar* v. *Oppilamani Chetti* (11) a case is reported which was argued by eminent vakils on both sides, and it was held therein that a decree-holder may select from among several rival claimants to the estate of his judgment-debtor anyone whom he believes honestly to have the best prima facie title as legal representative and that that representation in the absence of fraud or collusion will be sufficient to validate sales held in execution and to convey the title of the deceased judgment-debtor through such sales. The broad principle of the decision in that case clearly seems to me to apply to the present case."

If the principle of the decision in *Ramaswami Chettiar* v. *Oppilamani Chetti* (11) applies to the case before us, as I think it does, there can be no doubt, having regard to the findings given above that the decree against the widow who has a prima facie title to represent the estate, and whose interests in respect of the suit are identical with those of the plaintiff, must be considered to be binding on the plaintiff. It was argued that the decisions in *Ramaswami Chettiar* v. *Oppilamani Chetti* (11), and in the prior cases, are no longer good law as the wording of S. 368 of the old Code which was in force when those cases were decided has been altered in the present Code. O. 22, R. 4, is no doubt differently worded, but I do not think it was intended to introduce any new principle by the alteration in the language. As pointed out in *Dip Narain Rai* v. *Lachman Upadhiya* (12) O. 22, R. 4, reproduces with no change in principle S. 368 of the old Code as amended in 1888.

In *Kaliappan Servai Karan* v. *Varadarajulu* (3), a case very much relied on by the respondent, a suit was brought against *A*, the widow of the deceased person as his representative and a decree was passed directing the recovery of the sum sued for from the estate of the defendant's deceased husband in her hands. Another person *B* brought a suit against *A* to establish his title to the property of the deceased and having obtained a decree in his favour took possession of the estate. The decree-holder then sought to execute the decree against *B* under S. 252, Civil P. C. It was held that the decree was not against the estate but against *A* the legal representative, and was capable of execution only against *A* and her representatives. Thus stated the decision no doubt supports the respondent, but Sadasiva Ayyar, J., points out the true scope of this decision in *Gnanambal Ammal* v. *Virasami Chetty* (11) to be this: What was decided in that case was that the true legal representative cannot, after decree, be brought on the record for the purpose of execution and that the deceased debtor's property in his hands cannot be attached and sold in that same suit. Further on, he points out that the decision is not to be taken as having decided that if the wrong representative had been bona fide added or sued and a decree had been obtained and the property of the deceased had been brought to sale, the sale itself was invalid, and could not affect the estate of the deceased (see p. 703 of 29 *M. L. J*). If the decision is not read in this way, it really will not be reconcilable with the decisions in *General Manager of the Raj Durbhanga* v. *Ramaput Singh* (7) and *Ramaswami Chettiar* v. *Oppilamani Chetti* (11). In this view it is clear that this decision does not support the respondent. Further, in the present case, the respondent has not obtained possession of the properties in execution of his decree. The decision in *Srinivasa Ayyangar* v. *Kanthimathi* (4) followed *Kaliappan Servaikaran* v. *Varadarajulu* (3) and does not require further comment.

In *Gnanambal Ammal* v. *Veerasami Chetty* (2), the case just referred to:

"where a creditor of the estate ignorant of the true state of affairs, sued the widow in possession and the illegitimate son who would have been the legal representative but for a will left by the debtor under which defendant 1 was constituted executor and the plaintiff a legatee and obtained a decree and in execution, the property in possession of the widow was purchased by the plaintiff, it was held that the sale was binding against the plaintiff."

In that case the suit itself was instituted against the alleged legal representative of the deceased person and that legal representative, his widow, was in

(12) A. I. R. 1925 All. 479=87 I. C. 793=47 All. 466.

possession of one item of his properties. The question was whether the decree obtained against the widow which related to this item was binding on the true heir. The learned Judges relied upon *Ramaswami Chettiar* v. *Oppilamani Chetty* (11) and the decision of the Privy Council in *Generai Manager of the Raj Durbhanga* v. *Ramaput Singh* (7) in support of their conclusion that the sale was binding against him and in doing so they referred to the "broad principle" of the decision in *Ramaswami Chettiar* v. *Oppilamans Chetty* (11) already referred to. They also rely on the definition of the term "legal representative" in the new Code of Civil Procedure. I am mentioning this circumstance to show that the decision in that case was based not solely on the ground that the widow was a legal representative of the deceased person as being in possession of the item of properties involved in the suit but was based also upon the broad principle that if the wrong heir is sued bona fide and the decree is not tainted with fraud and collusion, then the true heir is also bound by that decree.

The words "I would further remark" in para. 2 at p. 703 would show that the definition of "legal representative" in the new Civil Procedure Code was relied on only as an additional reason in support of the conclusion arrived at by applying the general principle enunciated in *Ramaswami Chettiar* v. *Oppilamani Chetty* (11) and *General Manager of the Raj Darbhanga* v. *Ramaput Singh* (7). This decision was referred to in *Bachu Soorayya* v. *Chinna Anjaneyulu* (5) to which also Sadasiva Ayyar, J., was a party. The judgment in this case also makes it clear that the new definition of the legal representative was relied on only as a supplemental ground in support of the conclusion arrived at in *Gnanambal Ammal* v. *Veeraswami Chetti* (2). These two cases *Gnanambal Ammal* v. *Veeraswami Chetti* (2) and *Bachu Soorayya* v. *Chinna Anjaneyulu* (5) do not in my view support the proposition contended for by the respondent's counsel that if the decree in question can be held to be binding, it will be binding only with respect to items 3 and 4 which are in the possession of the widow, for these cases approve the broad principle stated in *Ramaswami Chettiar* v. *Oppilamani Chetty* (11) and *General Manager of the Raj Darbhanga* v. *Ramaput Singh* (7) which do not limit the application of the principle in the way contended for by the respondent.

The decision in *Madavarayudu* v. *Subbamma* (1) is the case strongly relied on by the respondent in support of his plea that the decree passed against the wrong heir of the deceased will not in any circumstance be effective against the true heir. If that decision lays down that proposition, then certainly the decision is opposed to the prior decisions of this Court ; but an examination of that case will show that it is perfectly consistent with the prior decisions of this Court and that it does not support the appellant. In that case when the defendant mortgagor against whom the suit was instituted died, his divided brother's son was brought on the record as his legal representative while the true legal representative was his daughter. No reason was assigned as to why she was ignored. The person brought on record as the legal representative was practically a stranger. In the circumstances the learned Judges held that the decree obtained against such a person cannot be binding on the true legal representative. In the course of their judgment, the learned Judges after referring to *General Manager of the Raj Darbhanga* v. *Ramaput Singh* (7) make the following observation :

> "In any case the widow against whom the proceedings were continued had a present interest to protect and consequently that decision is within the principle enunciated in *Ramaswami Chettiar* v. *Oppilamani Chetty* (11)."

This shows that they approved of the decision in *Ramaswami Chettiar* v. *Oppilamani Chetti* (11), which lays down the broad principle I have already referred to. The decision in *Madavarayudu* v. *Subbamma* (1) must be read with reference to its special facts. So long as the daughter, the true legal representative, was alive, the person who was actually made legal representative in the suit had no interest in the property and no reason was given as to why the daughter, the real legal representative, was overlooked by the plaintiff, prima facie a decree obtained against a person in such circumstances can never be described as a

decree obtained bona fide and without fraud or collusion between the parties to the suit. The decision in *Mallappa* v. *Kare Gowd* (6) does not go further than *Madavarayudu* v. *Subbamma* (1) and must be read with special reference to the facts of the case. Attention may be drawn to the observations of Srinivasa Iyengar, J., about this decision in *Kolaremathu Ammah* v. *Madavi Amma* (13). If a person who is practically in the position of an absolute stranger and who has no sort of right to represent the deceased is made a party to a suit, and a decree is obtained against him as representing the deceased, such a decree, however bona fide the suit may be, cannot bind the real heir. This is all what the decisions in *Madavarayudu* v. *Subbamma* (1), *Mallappa* v. *Kare Gowd* (6) mean. These decisions cannot possibly apply to the case of a widow who, in the absence of a will, is the legal representative of her deceased husband and against whom a decree has been obtained bona fide by the creditor.

Many of the above decisions have been fully considered in a recent decision of this Court in *Sanna Govappa* v. *Rodda Sanna Govappa* (14) in which the learned Judges have enumerated all the circumstances in which a decree obtained against the wrong heir of a deceased person can be considered effective against the true heir who was not made a party to the suit : see pp. 783 and 784 (*of* 30 *M. L. W*). Various decisions of single Judges of this Court and a few decisions of other Courts : *Gangaraju* v. *P. Somanna* (15) ; *Narasimaiah* v. *Jawantharaj Sawcar*, *A. I. R.* 1928 *Mad.* 159; *Abdulla Sahib* v. *Vageer Beevi Ammal*, *A.I.R.* 1928 *Mad.* 1199; *S. A. No.* 210 *of* 1924, *S. A. No.* 1155 *of* 1924 and *S.A.No.* 757 *of* 1925; *Lalsa Rai* v. *Udit Rai* (16), *Premraj* v. *Javarmal* (17) *Pukharaj* v. *Jamsetji*, *A. I. R.* 1927 *Bom.* 63 and *Jagarnath* v. *Mt. BibiAmir-un-nissa*, *A. I. R.* 1928 *Patna* 197 were brought to our notice. But having regard to the cases above discussed, which are decisions of this Court by Benches of two Judges, I do not think it is necessary to examine them. Now to sum up: the widow who was sued as the legal representative in C. S. 81 of 1921 was but for the will the true legal representative of the deceased ; she was also in possession of at least two items of his properties. Her interests in defending the suit were identical with those of the plaintiff-respondent. The suit was instituted without any fraud or collusion between the parties. No more sum than was properly due from the deceased was claimed in that suit and, as we have now found, the decree was obtained bona fide and without any fraud or collusion. In these circumstances it must be held that according to the decisions of this Court the widow sufficiently represented the estate of the deceased in C. S. 81 of 1921 and that the decree obtained in it and the execution proceedings are binding on the plaintiff in respect of all the four items of property involved in the present suit.

It was lastly argued that with reference to S. 52, T. P. Act., the attachment and sale of the properties in execution of the decree in C. S. 81 of 1921 should not be given effect to having regard to the fact that the suit was decided during the pendency of O. S. 65 of 1921 instituted by the plaintiff. This point was not raised in the lower Court and does not seem to have been ever raised in any of the cases discussed above. In my view the argument is clearly untenable. If as we have found the widow was properly sued as the legal representative of the deceased Parthasarathi in C.S. 81 of 1921 and if she sufficiently represented his estate it is clear that the decision in that suit cannot affect the rights of the present plaintiffs in any way for he claims the property only as the legal representative of the deceased Parthasarathi and the interests of both the widow and himself are identical as regards the subject-matter of the litigation in C. S. 81 of 1921. The decision in that suit being in effect a decision against the plaintiff himself it is difficult to see how that decision can affect his rights as the legal heir of the deceased as declared in O. S. No. 65 of 1921. In the result both the appeals are allowed with costs here and in the lower Court. In the circumstances of this case I hold that the next friend shall also be liable with the plaintiff for costs.

(13) A. I. R. 1928 Mad. 243=108 I. C. 403.
(14) A. I. R. 1929 Mad. 482=120 I. C. 65.
(15) A. I. R. 1927 Mad. 197=98 I. C. 613.
(16) A. I. R. 1924 Mad. 717=75 I. C. 114=46 All. 767.
(17) [1913] 18 I. C. 381.

Reilly, J.—This appears to me a vexatious suit. It is admitted that the principal of the debt for which the firm called defendant 1 in this suit got a decree in C. S. 81 of 1921 on the file of the High Court was due from the estate of Parthasarathi Mudali. I agree that we have no sufficient reason to differ from the findings of the learned Subordinate Judge that the interest included in that decree was also due from Parthasarathi and that the part of Parthasarathi's property which was sold in execution of that decree was not sold for an inadequate price. The result is that for Parthasarathi's debt, not excessive part of Parthasarathi's estate has been sold in execution. That can have done no harm to the plaintiff who is Parthasarathi's residuary legatee. But the plaintiff is trying to upset the execution sale and to escape the payment of the debt on the ground that defendant 1 in C. S. 81 of 1921 did not implead Parthasarathi's proper representative as he impleaded Parthasarathi's widow Sengalani Ammal instead of the plaintiff.

The learned Subordinate Judge has found that defendant 1 was guilty of no fraud nor collusion in the matter and indeed though fraud and collusion were alleged in the plaint, they were not properly pleaded and the allegations in that respect might well have been ignored. The learned Subordinate Judge has also found that defendant 1, when the firm brought the suit did not know that Parthasarathi had left a will. Nevertheless he has found that the firm did not bring the suit against the widow as Parthasarathi's legal representative in good faith because they did not make sufficient inquiry before doing so. I agree that that finding is wrong. Wills are not yet so common among the country people of this Presidency that a creditor whose debtor dies can be expected to inquire whether the debtor has left a will and what its dispositions are if no one gives him information that a will has been made. In this case the creditor found that the debtor had left a widow but no children; that the widow was in possession of the debtor's shop and its contents and that she made several part payments towards the debt. The will, which was eventually found to have been validly made by Parthasarathi, was not mentioned in any Court until six months after Parthasarathi died and was not then brought to defendant 1's notice. In the circumstances defendant 1 appears to have acted in good faith in making the widow Parthasarathi's representative in C. S. 81 of 1921, and the extravagant suggestions which have been made before us that defendant 1, a firm of very wealthy Guzarati merchants in Madras, had a motive for suing a wrong representative appear to me baseless. And, if defendant 1 had pushed inquiries further, what would have been discovered? It would have been found that six months after Parthasarathi's death the minor plaintiff's father on his behalf had asserted in answer to the widow's application to the District Court of North Arcot for a succession certificate that Parthasarthi had left a will but had made no application for letters of administration; the widow had denied the genuineness of the will, and the District Judge had given her a succession certificate to collect accounts due to Parthasarathi's estate. The plaintiff, though his father had then filed a suit, O. S. 65 of 1921 in the Vellore Subordinate Judge's Court, against the widow and two others for a declaration that he was entitled to Parthasarathi's property as residuary legatee under the will and for the recovery of Parthasarathi's property from them. If defendant 1 had known all that, the firm might still reasonably have maintained that pending that litigation the proper person for them to sue was Parthasarathi's widow, to whom the District Judge has issued a succession certificate and such a choice among possible representatives of Parthasarathi could not have been attacked as improper.

But it is urged for the plaintiff that it has turned out subsequently, as he eventually succeeded in O. S. No. 65 of 1921, that the widow was not Parthasarathi's representative and therefore the decree obtained by defendant 1 in the High Court suit is ineffective. I may remark that even now in strictness there is no one who can be sued as completely representing Parthasarathi's estate, as no one has ever applied for letters of administration. But though it has turned out subsequently that the widow has no right to Partha-

sarathi's property she was sued by defendant 1 in good faith, and at that time she had an existing interest to defend that suit; indeed she was quite as much interested to do so as the plaintiff would have been. Then what ground have we for saying that a decree obtained against her as Parthasarathi's representative for a debt due from Parthasarathi is not binding on Parthasarathi's estate? The principle in such cases appears to me to be found in the *Darbhanga* case (7). But as the facts of that case are rather obscurely stated and have often been misunderstood in some particulars, I think it is better to refer to *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (8) with which their Lordships of the Privy Council say in the *Darbhanga* case (7) they entirely agree. In that case a decree was obtained against a Hindu widow for the husband's debt though he had left a son. It was held that the sale of her husband's property in execution of that decree was valid and bound the son. It does not appear that the widow ever set up any right against her son, and the report shows that the plaintiff knew of the son's existence when he chose to sue the widow.

What Peacock, C. J., emphasized in that case was that the debt was her husband's and the property sold was her husband's. The widow was treated as having sufficiently represented her husband's estate. In many later cases the essential question whether the deceased's estate has been sufficiently represented appears to have been obscured by other considerations, and legal representatives have been treated as if it were their own rights and not the rights of the person whom they represent that were in question. I agree with my learned brother that the proper principle is to be found in *Kadir Mohideen Marakkayar* v. *Muthu Krishna Ayyar* (9), *Ramaswami Chettiar* v. *Oppilamani Chetti* (11) and *Gnanambal Ammal* v. *Veeraswami Chetty* (2). I do not think it necessary to discuss cases of the Bombay High Court or other Courts which adopt the view that the crucial question is whether the right heir or successor is on record, not whether the deceased's estate is sufficiently represented. And to my mind the question whether the representative on record is actually in possession of any of the defendant's property is not of importance except as throwing light on the question of the plaintiff's good faith. If a plaintiff in good faith sued a person who appears to him to be the proper legal representative of his deceased debtor and that representative has an existing interest to defend the estate and there is no fraud or collusion in the proceedings, then a decree so obtained is binding on the deceased's estate whoever may be actually entitled to the residue of the estate after the debts have been paid. That appears to me to be both good sense and good law as laid down by the Privy Council.

It has been urged that the change of wording between S. 368, Civil P. C., of 1882 and O. 22, R. 4, of the present Code affects the validity of the old decisions on the subject. That contention appears to me to be entirely mistaken. The words of the Code of 1882 and that of 1859 may perhaps be taken to have given more freedom to plaintiff in bringing on record the representative he chose and the words of the present Code to throw more responsibility in the matter on the Court. But that certainly cannot make a decree obtained after impleading a representative approved by the Court of less effect against the deceased's estate.

It has been suggested for the plaintiff that, as the decree of the High Court in C. S. 81 of 1921 only directed the widow to pay :

" out of the assets of her deceased husband, Parthasarathi Mudali, come to her hands,"

at any rate it cannot be executed against any property not in her possession, and that, as out of the items sold in execution only items 3 and 4 were in her possession, the sale of items 1 and 2 in execution must be invalid. But that form of decree, which is the usual form of decree against executors and administrators, is adopted only to make it clear that the decree is not to be executed against the representative, executor and administrator personally and that he is not directly responsible under the decree for property of the deceased which he has not yet recovered. It does not prevent the decree being executed against property

of the deceased which has not been reduced to possession by the representative, executor or administrator. Items 1 and 2 in this case are admittedly Parthasarathi's property, and in my opinion, they could be validly sold in execution of the decree in C. S. 81 of 1921.

The last contention for the plaintiff is that, as his suit, O. S. 65 of 1921, was instituted before C. S. 81 of 1921, the sale in execution of the decree in C. S. 81 of 1921, is invalidated on the principle of lis pendens. That I agree is mistaken. Although in O. S. No. 65 of 1921 the plaintiff incidentally obtained a decree that the widow and other defendants in that suit should deliver possession of items 3 and 4 to him and an injunction restraining them from interfering with his possession of items 1 and 2, the whole basis of his decree was the declaration for which he sued, that he was the residuary legatee under Parthasarathi's will that is, that he was entitled to the residue of Parthasarathi's estate after the payment of Parthasarathi's debts and the other legacies. The sale of items 1 to 4 in execution in no way affected his right as residuary legatee. The right of Parthasarathi's creditors to the satisfaction of his debts was paramount to the rights of any of the parties to O. S. 65 of 1921 and did not indeed affect their rights.

Finally, I may add that, if I had—as I have not—any reason to doubt the technical validity of the sale of items 1 to 4 in execution of the decree in C. S. 81 of 1921, in my opinion it would still not be proper to make for the plaintiff the declarations which he has sought in this suit that that decree and its execution are null and void against him. The plaintiff is not, as Mr. Viswanatha Ayyar in his argument represented him to be the owner of Parthasarathi's property. He is merely the residuary legatee, entitled to the remainder of Parthasarathi's estate after all Parthasarathi's debts and the other legacies have been satisfied. It is not for him to say what parts of Parthasarathi's property shall go in satisfaction of his debts. By the execution of the decree in C. S. 81 of 1921 Parthasarathi's just debt has been paid out of Parthasarathi's property. The plaintiff's interest in the residue of Parthasarathi's estate has not been affected in any way. If the declarations for which he prays and which the Subordinate Judge has made were allowed to stand, defendant 1's just claim would be most seriously delayed and possibly defeated and the plaintiff would obtain a most unjust advantage. Such declarations would in the circumstances be obviously inequitable, and in my opinion no use of judicial discretion could justify them.

I agree that both these appeals must be allowed and the plaintiff's suit dismissed with costs in both Courts. In my opinion the plaintiff should pay the costs of both defendant 1 and defendant 2 (two sets) in both Courts. As I have said, the suit appears to me entirely vexatious. It is the plaintiff's next friend, his father, who is responsible for it. Instead of straightforwardly propounding Parthasarathi's will and applying for letters of administration, under which he would have been bound to pay Parthasarathi's debts including this debt due to defendant 1, before the plaintiff could touch the estate, he has tried to defeat a creditor by this suit on technical and vexatious grounds. In the circumstances I think the plaintiff's father also should be made personally liable for the costs of defendants 1 and 2 in both Courts. I would suggest that he alone should be made liable for the costs, but for the fact that it is represented that he is a man of small means and thereby the defendants might be prevented from realizing their costs in full.

P.R.S./S.N. *Appeals allowed.*

A. I. R. 1930 Madras 941

RAMESAM, J.

(*Idara*) *Pitchiah*—Defendant 4—Petitioner.

v.

Sree Govinda Krishna Yachendra Varu Bahadur—Plaintiff—Respondent.

Civil Revn. Petn. No. 674 of 1927, Decided on 4th April 1928, from decree of Dist Munsif, Kanigiri, in Sm. C. S. No. 504 of 1926.

(a) Easements Act (5 of 1882), S. 15—Suit by zamindar against inamdar to recover compensation for unauthorized use of his water for second crop on defendant's inam—Water used belonged to zamindar—Inamdar having right to use water for first crop only

—Use of water for second crop without cess makes out easement by prescription.

Where the zamindar sues the inamdar to recover compensation for the alleged unauthorized use by the inamdar of the water of the zamindar's tank for the second crop on the inamdar's inam and where it is admitted that the tank water alleged to be so used belonged to the zamindar and that the inamdar was entitled to use the water for the first crop only the right so admitted and claimed is a right of easement and enjoyment of water by the inamdar for more than 20 years without payment of second crop cist makes out an easement by prescriptive right: 6 *Cal.* 394, *Ref.* [P 943 C 1]

(b) Irrigation Cess Act (7 of 1865)—Applicability.

In deciding the case between the zamindars and inamdars, the Court has nothing to do with the Act or analogies drawn from it. [P 942 C 2]

K. Kuppuswami—for Petitioner.

S. Krishnaswami Ayyar—for Respondent.

Judgment.—This revision petition is against the decree passed by the District Munsif of Kanigiri in S. C. S. No. 504 of 1926. This small cause suit and a number of others were filed by the Rajah of Venkatagiri against several inamdars to recover compensation for the alleged unauthorized use by the defendants of the water of the plaintiff's tank for the second crop on the defendant's inams. Such compensation was claimed in the shape of water rate or price for the use of water said to be unauthorizedly used.

The defendants are the inamdars. The plaintiff is the zamindar. There is no privity of contract between the plaintiff and the defendants. It is admitted that the tank water, which was said to be used by the defendants belongs to the plaintiff. If the defendants used the water of the tank without having a right to do so they would be committing trespass and would be legally liable to pay damages to the plaintiff. But the defendants say that they are entitled to use the water of the tank for their lands. The question therefore to be decided in the case is whether the defendants have any right to use the water of the plaintiff's tank for their lands.

Now the plaint admits that the defendants are entitled to use the water of the tank for the first crop but not for their second crop. The right so admitted by the plaintiff and claimed by the defendants, obviously is a right of easement. The only question is what is the extent of that right? Is it limited to the first crop, or does it extend to the use of water for all the crops that can be raised by the cultivation of the inams so long as there is water in the tank? The District Munsif has found that there is no evidence on either side as to whether second crops were raised at the time of the grant. If the matter rests there, it would perhaps be a nice question of burden of proof on the pleadings. The District Munsif has considered other circumstances in the case. He first of all referred to the liability to pay water cess in Government villages. In this connexion he referred to the Standing Order No. 64 of the Standing Orders of the Board of Revenue. The liability of the inamdars to pay water rate to Government is governed by statute, namely the Irrigation Cess Act 7 of 1865, and the nonliability to pay depends upon whether there is an engagement to pay at the time of the grant within the meaning of Act 7 of 1865. In deciding the case between the zamindars and inamdars, I do not think, we have anything to do with the Irrigation Cess Act or analogies based on it.

The District Munsif next refers to the decision in *Midnapore Zamindari Co.* v. *Muthappudayan* (1). That is a case of landlord and tenant. The question in that case was whether the additional assessment can be claimed by a landlord in respect of a second crop of paddy raised with the landlord's water by the tenant on his wet holding and the decision of the point depended upon whether any usage disentitled the landlord to the same. It was held that the burden of proof was on the tenant. I do not think that case has anything to do with our case. At the same time I do not mean to decide any question of burden of proof and the Munsif has referred to that case merely for showing that the burden of proof is on the inamdar, just as it lay on the tenant in that case. I do not think it is necessary to decide the question of burden of proof in this case.

The next point that the District Munsif has adverted to is usage. He begins this portion of his judgment thus:

"As regards usage, it is admitted by the plaintiff's witness that second crop cist was never

(1) A. I. R. 1921 Mad. 195=62 I. C. 337=44 Mad. 534.

collected, or claimed by the plaintiff, for inam wet lands before fasli 1332. But except as regards one land, Survey No. 496/4 the subject-matter of S. C. S. No. 504 of 1926, there is no evidence as to how long there has been second crop cultivation on the lands."

P. W. 2 is the karnam of the village. He states in cross-examination:

"Second crop is being raised on the land comprised in S. C. S. No. 504 of 1926 every year for the last 20 years to my knowledge. Second crop was being raised on the other inams also now and then before fasli 1332. Second crop cist was never claimed or collected for in lands before fasli 1332."

I may here observe that the District Munsif obviously accepts the karnam's evidence. The District Munsif then says in his judgment:

"Only one witness has been examined on behalf of the defendants. He is defendant 4 in S. C. S. No. 504 of 1926, and he speaks only about his land, i. e., S. No. 496/4. He deposes that second crop is being raised on that land for the last 25 years to his knowledge. He says that second crop was being raised on the land by his ancestors also but his evidence in this respect is at best hearsay and is therefore valueless."

Here I may observe that the District Munsif accepts the witness's evidence as to 25 years which is not hearsay but only rejects it for the period beyond it. This is also clear from the next sentence which runs thus:

"Assuming that second crop was being raised on the land for about 20 years before fasli 1332, the mere abstention of the plaintiff from claiming water rate during that period cannot disentitle him from claiming it now. The evidence is very meagre and insufficient to establish the alleged custom or usage."

This sentence shows that the District Munsif accepts not only the karnam's evidence but the evidence of D.W. 1 relating to 25 years which is not hearsay, for only in this way, can we have evidence for 20 years prior to fasli 1332. As I already pointed out, the question in the case is not one of custom or usage but one of easement. If it is one of custom or usage, I am bound by the District Munsif's finding of fact. But 20 years' enjoyment of the water certainly makes out an easement by prescriptive right as enjoyment has gone up to the end of fasli 1334 vide plaint. It is unnecessary in this case to distinguish easement by grant and easement by prescription. The facts justify the finding of the easement by either method: vide *Rajrup Koer* v. *Abdul Hossein* (2). On the facts found by the District Munsif, the defendant in S. C. S. No. 504 of 1926 has established a right of easement to use the water of the plaintiff's tank for two crops. I may incidentally observe that the defendants in the other lands have not established such an easement. The result is while all the decisions of the District Munsif are correct, only the decision in this case is erroneous and has to be set aside.

Apparently the land, S. No. 496/4, belongs to defendants 1, 2 and 4. Anyhow the karnam's evidence relates to all the lands comprised in S. C. S. No. 504 of 1926. Relying on O. 41, R. 4, that is, on the ground that the whole decree is now questioned before me and that the finding of fact relates to all the defendants, I set aside the whole decree and dismiss the suit against all the defendants, with costs of defendant 4 only throughout.

P.R.S./P.N. *Decree set aside.*

(2) [1881] 6 Cal. 394=7 I. A. 240=4 Sar. 199 (P.C.).

A. I. R. 1930 Madras 943

WALLACE AND ANANTAKRISHNA AYYAR, JJ.

(*Avasarala*) *Venkatarama Row*—Defendant 2—Appellant.

v.

Maharajah of Pittapuram and *another*—Plaintiff and Defendant 1—Respondents.

Second Appeals Nos. 821 and 823 of 1925, Decided on 4th April 1930, from decree of Sub-Judge, Cocanada, in Appeal Suit No. 109 of 1924.

Madras Land Revenue Assessment Act (1 of 1876), S. 1—Act 1 of 1876 applies even where person becomes owner of property by adverse possession.

In spite of words alienation by sale or otherwise in the preamble, Act 1 of 1876 applies not only to cases of transfer inter vivos but also to cases where a person has become owner of property by virtue of adverse possession for the statutory period : 55 *I. C.* 703 and *A. I. R.* 1927 *Mad.* 714, *Foll.*; *A. I. R.* 1923 *Mad.* 368; 13 *Mad.* 512 and *A. I. R.* 1929 *P. C.* 50, *Ref.*

[P 944 C 2]

C. Rama Rao—for Appellant.

Advocate-General—for Respondents.

Judgment. — This second appeal arises out of a suit filed by the Maharaja of Pittapuram against the Secretary of State for India in Council as defendant 1, and Avasarala Venkatarama Row of Panduru as defendant 2 for separate registration of the lands situated in the village of Panduru al-

leged to be within the zamindari of Pittapuram. Prior to the suit the plaintiff applied to the Deputy Collector, under the provisions of Madras Act 1 of 1876, for such separate registration. Defendant 2 having raised an objection the Deputy Collector declined to order separate registration, with the result that the Maharaja of Pittapuram filed the suit from which this second appeal has arisen.

The main pleas raised by defendant 2 were : (1) that there was no "alienation" in the present case, within the meaning of Act 1 of 1876; and (2) that, on the merits, the plaintiff was not entitled to separate registration since these lands were not included within the assets of the zamindari at the time of the permanent settlement. Both the lower Courts overruled the first contention raised by defendant 2 and held that, if on the merits the plaintiff proved that the suit lands were included within the assets of the zamindari, the plaintiff would be entitled to have separate registration as prayed for. On the merits the trial Court found against the plaintiff and accordingly dismissed the suit. On the plaintiff's appeal, the learned Subordinate Judge held, for reasons given in para. 10 of his judgment, that the suit lands must be taken to have been included in the assets of the zamindari, and he passed a decree for separate registration as prayed by plaintiff. This second appeal has accordingly been preferred by defendant 2 in the case.

On his behalf, his learned advocate argued two points: one relating to the preliminary question whether Act 1 of 1876 applies to this case, and the other to the merits. Taking the first question about the applicability of the provisions of Act 1 of 1876, it was argued for the appellant that the Act deals only with cases of lands "alienated by sale or otherwise." It being common ground that the Maharaja is not able to point out to any particular act of "alienation inter vivos" the finding of the lower appellate Court was that defendant 2 has acquired ownership of this property by virtue of adverse possession for over the statutory period. The learned advocate argued that such a case could not be said to come within Act 1 of 1876. He argued that the words "alienation by sale or otherwise" imply cases of transfer inter vivos. On behalf of the respondent it was argued that the word "alienation" is wider than the word "transfer" and that all that the Act contemplates is that there should be a separation from the main estate of the land in question in such a way that the ownership of the land in question becomes vested in the other person as owner. We think that the contention raised by the respondent should be upheld. It must be noticed that the wording in question occurs in an Act passed as early as 1876, and that the exact question that we are now called upon to decide has come before this Court, at least twice, as reported cases show.

In *P. Peda Brahmaji* v. *Krishnamachariar* (1), Oldfield and Krishnan, JJ., decided this very point against the contention raised by the appellant before us. Later on, in the case reported in *Subba Rao* v. *Rajah of Pittapur* (2), the same question arose before Waller and Madhavan Nair, JJ., and the learned Judges, as we understand their judgment, followed the decision in *Peda Brahmaji* v. *Krishnamachariar* (1) and were not prepared to have the question reopened. If the learned Judges in *Subba Rao* v. *Raja of Pittapur* (2) doubted the correctness of the decision in *Peda Brahmaji* v. *Krishnamachariar* (1) they would not have sent the case back for enquiry on the merits (which would have been unnecessary if the appellant's contention was right). In addition to the two direct decisions on the point in question, there is also an observation in *Gopala Rao* v. *Venkatasurya Rao* (3), where it is stated that all that was necessary to bring a case under Madras Act 1 of 1876 is that the land in question should be fully owned by a person other than the zamindar proprietor. Though the preamble to the Act speaks of "alienation of portions of permanently settled estates by sale or otherwise," when we go to S. 2 which speaks of the exact nature of the enquiry to be conducted by the Collector, we find the following words :

(1) [1920] 55 I. C. 703.
(2) A. I. R. 1927 Mad. 714=101 I. C. 613.
(3) A. I. R. 1923 Mad. 368=71 I. C. 200.

"The Collector shall thereupon hold an inquiry as to who is the present owner of the property in respect of which the application is made."

A person could become "owner" of property as much by transfer inter vivos as by the effect of adverse possession for the statutory period. As mentioned by this Court in *Sambasiva* v. *Raghava* (4), at p. 515:

"It is hardly necessary to observe that it has been repeatedly held that the title acquired by adverse possession for 12 years is only equivalent to that given by a parliamentary grant of the interest vesting in the party affected by the adverse possession."

We may also refer to a recent decision of the Privy Council in the case reported in *Krishna Promada Dasi* v. *Dhirendra Nath Ghosh* (5). No doubt the Privy Council had there to consider a case that arose in Bengal. This is what their Lordships say:

"The owner of a part of a revenue paying estate obtaining his title by adverse possession remains liable for land revenue fixed on the estate under S. 37, Land Revenue Sales Act. *He may, if he so desires, have the portion of the estate which passed to him by adverse possession, separately assessed to land revenue*; but, if he omits to do so, it continues to form part of the security for the whole land revenue of the estate and to be liable to be sold under the regulation in respect of any arrears due."

(The italics are ours). From this it is clear that it is ordinarily open to any person who has become owner of land by virtue of adverse possession to apply to have separate registration of the same in his name to avoid the risk of the land being sold to recover arrears due, not properly upon it but upon the whole estate of which it was a part. It therefore seems to us that Act 1 of 1876 applies not only to cases of transfer inter vivos but also to cases where a person has become owner of property by virtue of adverse possession for the statutory period. We therefore follow the two rulings of this Court mentioned above, and overrule the contention raised by the appellant.

On the merits we find that both the lower Courts refer to D. C. B. accounts and amarakam accounts as having been filed as evidence in the case. By reference however to the list of witnesses examined and documents filed, we are not able to find any such documents having been exhibited. It is possible, since it is clear that these suits were tried along with other suits, that there was some sort of agreement between the parties that these documents should be taken as exhibited and treated as evidence in these cases also; but as the record now stands, we are not able to state definitely what exactly happened. As we should like to know more about these documents before we dispose of these appeals, we call upon the lower appellate Court to procure and forward to this Court copies of amarakam and D. C. B. accounts referred to in the lower Court's judgment. It will also submit a copy of the judgment in O. S. No. 29 of 1923 with all the records, (including the B Diary), filed in that suit. It will be open to either party to apply for the printing of any portion of the record so received, leaving it to the Court to decide upon any matters regarding the admissibility of the same in evidence in these second appeals at the time of the final hearing of these cases.

Second Appeal No. 823 *of* 1925.

This case follows our judgment in S. A. No. 821 of 1925.

P.R.S./S.N. *Case remanded.*

(4) [1890] 13 Mad. 512.

(5) A. I. R. 1929 P. C. 50=113 I. C. 465 = 56 I. A. 74=56 Cal. 813.

A. I. R. 1930 Madras 945

KUMARASWAMI SASTRI AND REILLY, JJ.

T. R. Appasami Ayyangar—Plaintiff 2—Appellant.

v.

Narayanaswami Iyer and *others*—Defendants—Respondents.

Appeals Nos. 183 and 184 of 1925, Decided on 28th March 1930, from decree of Sub-Judge, Tanjore, in Original Suit No. 5 of 1924.

Contract Act (1872), S. 65—Minor fraudulently representing himself as major inducing innocent person to purchase his property—Decree entitling recovery of property cannot be passed except on condition of refund of purchaser's money — Specific Relief Act (1877), S. 41.

Where a minor fraudulently representing himself as major, induces an innocent person to purchase property from him, and then sues for the recovery of that property on the ground that, owing to his minority, the transaction was void ab initio, his case is covered by S. 65, Contract Act. Hence under that section and under S. 41, Specific Relief Act, as well as under general principles of equity, a decree entitling the minor to the recovery of that property cannot be passed except on condition that he should refund the purchase money: 30 *Cal.* 539 (*P. C.*) and *A. I. R.* 1922 *P. C.* 403, *Expl.*; *A. I. R.* 1928 *Lah.* 609; 32 *I.C.*

288; 43 *I. C.* 908; *A. I. R.* 1926 *Mad.* 607 and *A. I. R.* 1921 *All.* 326, *Foll.*; *A. I. R.* 1928 *Cal.* 537, *Dist.*, (*Further case law discussed*).

[P 951 C 1; P 954 C 1. 2]

Bhashyam Ayyangar; *C. A. Seshagiri Sastri* and *B. R. Vijayaraghava Chariar* —for Appellant.

S. Varadachariar and *M. S. Venkatasami Ayyangar* —for Respondents.

Kumaraswami Sastri, J.—These appeals arise out of a suit filed by plaintiff 1 Yamuna Raja Ammani for a declaration that the sale deed executed by her in favour of defendant 1 on 13th August 1913 whereby she conveyed the lands mentioned in the plaint to defendant 1 for a consideration of Rs. 16,250 obtained from her when she was a minor and that consequently the deed is invalid and confers no rights on defendants 1 to 3, for possession of the properties, for division of the properties if necessary and in the alternative if the Court should hold that the plaintiff is estopped from impeaching the sale deed, for payment to her of Rs. 16,250, the consideration and interest thereon, and for costs and other reliefs.

The facts leading to this appeal are shortly these: The plaintiff is related to the royal family of Tanjore and Ramakumara Sahiba, who was the Dowager Rani of Tanjore and owned certain immovable properties, made a deed of settlement whereby she gave properties to the plaintiff and to other donees by a deed dated 10th August 1907, which has been filed in the suit as Ex. A. Under that deed the plaintiff was entitled to a third share, another third belonged to her elder sister Rajanna Ammani and the remaining third to one Swaminatha Rao who was the husband of another sister of hers. Plaintiff 1 was married to one Sanguram Jathav who died in 1913. According to her she was a minor about 15 years of age at the time when this sale deed was executed by her. She says that this sale deed is not binding on her and that it was executed by her without receiving any consideration, that Dasarathi Sahib, her husband's brother and defendant 1 in collusion got her to execute the sale deed. She denies she entered into any agreement to sell the property, received any advance or got the consideration under the sale deed. Defendant 1 is the purchaser, defendants 2 and 3, are undivided sons of defendant 1, defendants 4, 5 and 6 are the legal representatives of Dasarathi Sahib who died before the suit was instituted. So far as the claim against them is concerned she gave up the claim on the ground that she has compromised the matter with them. As regards the alternative claim for getting back Rs. 16,250, that was also given up in the course of the trial.

The case for the contesting defendant 1 is that she was a major at the time of the sale, being about 19 years old, that he wanted to buy all the three shares and did not want to take only one or two shares, that Rajanna Ammani, the elder sister of the plaintiff, Swaminatha Rao, the husband of her other sister, agreed to sell their third shares, that Dasarathi and her other relations brought about the sale of plaintiff's third share, that it was represented that Yamuna also would sell the property and that she was a major, that he arranged with the vendors and also spoke to her husband, the transaction was put through with the knowledge of these people, that he was never informed that she was a minor, that an advance of Rs. 2,500 was paid under Exs. 4 and 5 before the sale deed was executed, the balance of Rs. 13,000 odd which was due to the plaintiff was paid before the Sub-Registrar, that he got possession of this land and has been in possession ever since the sale. The Subordinate Judge believed the evidence of the plaintiff's witnesses and the documents filed by her to show that she was a minor at the date of the transaction. He found that she was born on 12th November 1898 and that the sale and the agreements to sell are therefore not binding. He however disbelieved her case as to the agreements, Exs. 4 and 5, and the advance paid under those agreements as also her case that the balance was not paid to her at the time of registration. In this view she received the money and she made the representation made before the Registrar that she was 20 years old and the defendant in ignorance of her minority actually paid the whole consideration. He was also of opinion that the price was fair, and as the transaction was not in other ways open to question he held that the plaintiff was bound to repay Rs. 16,250 before she

could get possession of the properties on the ground that the sale deed was void. He passed a decree directing that on payment of this sum possession should be handed over to the plaintiff.

Although the suit was originally filed by Yamuna Bai as sole plaintiff, when the proceedings were pending in the lower Court, she assigned her rights to plaintiff 2 by a deed dated 2nd August 1923, and plaintiff 2 wanted to come on record as the assignee pendente lite. This application was dismissed by the Subordinate Judge on the ground that it was merely traffic in litigation and it was not a bona fide transaction. But on appeal in C. M. A. No. 258 of 1923 the High Court held that he should be brought on record as plaintiff 2 as the deed of assignment was there and plaintiff 1 did not object. Plaintiff 2 therefore came in after the order of the High Court on 21st November 1923. Against the decree of the Subordinate Judge defendants 1 to 3 filed the appeal 184 in so far as it held that plaintiff was a minor and that the sale deed was void and possession was decreed. As against the portion of the decree which directed the plaintiff to pay into Court Rs. 16,250 plaintiff 2 has filed appeal 183 of 1925. Both these appeals have been tried together.

The only questions in these appeals are whether the Subordinate Judge was right in coming to the conclusion that the plaintiff was a minor at the date of sale, Ex. 3, and if so, whether he was right in passing a decree for possession on payment of the consideration which he found to have been received by plaintiff 1. (Here his Lordship discussed the evidence and proceeded.)

So that we find there are three versions of the age. According to both plaintiff 1 and defendant 1 Chitrai of Jaya is wrong. I have already given my reason for holding that Ex. X could not relate to the plaintiff who was the last child. No doubt, if there was no motive to give a wrong age, the age given by relations is certainly very valuable evidence as regards the age of a person whose age is in question. But here, having regard to this fact, namely that plaintiff 1 was entitled to one of the three shares, the purchaser according to his own evidence and the evidence of the broker was not willing to buy a fractional share, two-thirds, but wanted to buy the whole property or not at all. There can be little doubt that plaintiff 1's elder sister and Swaminatha Rao were anxious to sell their shares. In this case it is not pretended that there was any necessity for the sale such as would justify a guardian selling the property. They could not have put in any recital therefore which would satisfy a purchaser that the sale was binding on the minor and under these circumstances, having regard to the anxiety of the other two sharers to sell the property, there was a strong motive for making the plaintiff appear as a major, so that there might be no trouble in the matter. We find there are three documents almost contemporaneously executed conveying all this property. If the Sub-Registrar had not asked about the age there would have been no difficulty in getting the document registered. Evidently they did not want to put a false age in the document; so no age was given when it was presented for registration.

The difficulty arose when the Registrar to whom the document was presented for registration wanted to be satisfied about it and therefore there was a strong motive to make her just a major. Even according to their own version she would just attain majority three months before. Then there is the evidence of the Hammannee who is usually present in such cases when the person executing a document is a gosha lady behind the parda. She was a lady whose services were requisitioned ad hoc for purposes of registration. She says plaintiff looked to her 20, but it is not pretended that she was an expert as regards age; and if the plaintiff was a well-developed girl of 15 she might have made a mistake in saying she looked like 20. It is therefore a case where, having regard to all the circumstances, it cannot be said that the age given before the Registrar by two relations should be taken as sufficient in the face of the other evidence which is very strong to show that she was born in 1898, especially as the age given before him was not the correct age. They go to particulars, they give the month and year; it is not merely an approximate statement of age. Having regard to all these facts, I agree in holding that the plaintiff was a minor

at the date of the execution of the sale deed. Appeal 184 must therefore be dismissed.

Turning to Appeal 183. As I said before, the position is this : there is a sale deed executed by a minor which is void in law. She comes to Court to set aside the sale and to get back possession of the properties. The Subordinate Judge has come to the conclusion that she did receive this money; she knew what she was doing and that although she was a minor she fraudulently gave a false age. Defendant 1 was an innocent purchaser and on these findings of fact he thought it was a case where he should make her at least pay back the money which she actually received as consideration. The first question is whether we agree with him on the facts. (His Lordship, after discussing the facts and agreeing with the finding of the lower Court, proceeded as follows.)

On these facts the question is whether the Subordinate Judge was right in making the plaintiff pay back the money which she received; and in this connexion we have to see what the rights of the parties are. The suit itself is not a suit by defendant 1 to recover possession of the property in which case it may be said that the plaintiff was protecting the title which she had. It is a case where a fraudulent plaintiff being a minor at the time of the transaction wishes to set aside the transaction merely on the ground of minority. According to the law as it now stands the contract of a minor is void and there can be no estoppel. But I can see no reason why on these facts a plaintiff who comes to the Court seeking equity being done to her may not also do equity, that is to give back what she got. Otherwise it would enable the fraudulent plaintiff to get an advantage by getting not only the money but also the property itself. The relevant sections are S. 65, Contract Act and S. 41, Specific Relief Act. S. 65, Contract Act, enacts :

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

In this case, the contract is void. The plaintiff comes to Court saying that she understands that the contract is void and she wants to set it aside. S. 65, Contract Act, in my opinion, refers to cases where a contract is ab initio void as in the case of a minor's contract or becomes subsequently void for some reason. S. 39, Specific Relief Act, runs as follows :

"Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may in its discretion so adjudge it and order it to be delivered up and cancelled."

Then S. 41 runs as follows :

"On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

On S.65, Contract Act, we have the latest pronouncement of their Lordships of the Privy Council in cases where the contract is void from its inception. In *Harnath Kunwar* v. *Indar Bahadur Singh* (1), there was a sale of spes successionis, the right of a reversioner, which is void under the Transfer of Property Act. The Subordinate Judge held that the vendor had merely a right of expectancy in the estate at the date of the deed and that no property passed under it. As regards the claim to recover money, he held that it is barred by limitation. Then there was an appeal which was also dismissed. The matter was taken to the Privy Council and their Lordships directed that the sale should be set aside on payment of Rs. 25,000 which was found by the Courts to have been paid by the purchaser. They also gave interest on the sum. As regards the plea that the contract being void there can be no repayment this is what their Lordships say at p. 184: "Before this Board, the claim has been based on S. 65, Contract Act." Then they set out that section. They then proceed to state as follows: "So framed, the plaintiff's claim to compensation rests, not on any principle or formula of English law, but on the words of this section and it has to be seen whether the facts of this case come within its scope. The section deals with: (a) agreements and (b) contracts. The distinction between them is apparent from S. 2. By Cl. (e) every promise and every set of promises forming the consideration for each other is an agreement, and by Cl. (h) an agreement enforceable by law is a

(1) A. I. R. 1922 P. C. 403=71 I. C. 629=50 I. A. 69=45 All. 179 (P. C.).

contract. S. 65 therefore deals with (a) agreements enforeable by law and (b) with agreements not so enforceable. By Cl. (g) an agreement not enforceable by law is said to be void. An agreement therefore discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception, as distinct from a contract that becomes void. The agreement here was manifestly void from its inception and it was void because its subject matter was incapable of being bound in the manner stipulated. Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of 2nd January 1880, and that the true nature of those rights was not discovered by the plaintiff Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation. It was thus that the agreement was discovered to be void, and the discovery, in their Lordships' view was one within the words and the meaning of S. 65, Contract Act. The plaintiff therefore, though not entitled to recover possession of the villages is entitled to recover compensation, and in assessing that compensation their Lordships consider it should include the sum of Rs. 25,000 found by both Courts to have been paid to Indar Singh and also in the circumstances of this case, interest, not at the rate or for the period claimed by the plaintiff, but at 6 per cent from the date of the institution of this suit."

I set out the judgment in detail because the argument was sought to be founded by Mr. Bhashyam Ayyangar on the decision of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (2). This was a case where a minor sued to set aside a deed of mortgage and it was found that the mortgagee had notice of the minority of the plaintiff. The question arose as to whether there was an estoppel by reason of the representation of the minor and their Lordships held that S. 115, Evidence Act, did not apply where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. They held that a false representation made to a person who knows it to be false is not such a fraud so as to take away the privileges of infancy. Then arose the question of construction of S. 65, Contract Act. There is an observation of their Lordships of the Privy Council that S. 65, Contract Act, being based on the footing of an agreement or contract between competent parties could not apply to a contract, by a minor which is void. Dealing with S. 41, Specific Relief Act, their Lordships observed as follows:

"Another enactment relied upon as a reason why the mortgage money should be returned, is S. 41, Specific Relief Act 1 of 1877."

Referring to S. 38 their Lordships observed:

"Section 38 provides in similar terms for a case of rescission of a contract. These sections no doubt do give a discretion to the Court but the Court of first instance and subsequently the appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy and their Lordships see no reason for interfering with the discretion so exercised."

Pausing here for a moment it may be said that this passage shows that their Lordships were of opinion that if the mortgagee had not notice of this minority, a case would arise under S. 41 for relief. Their Lordships after dealing with the general argument that one who seeks equity must do equity observed as follows:

"But this is the last point over again and does not require further notice except by referring to a recent decision of the Court of Appeal in *Thurstan* v. *Nottingham Permanent Benefit Building Society* (3)."

Then they cite the passage of Romer, L. J., to the effect that a Court of equity cannot be said to be equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature had declared to be void. They therefore refused to give relief for the return of

(2) [1903] 20 Cal. 539=30 I. A. 114=8 Sar. 374 (P.C.).

(3) [1902] 1 Ch. 1=71 L.J.Ch. 83=50 W.R. 179=86 L.T. 35=18 T.L.R. 135.

the money. In this case the finding accepted by their Lordships of the Privy Council was that the mortgagee had notice of the minority. But if he had no notice I do not think that this is an authority for the view that under S. 41 he can get no relief. This case has been referred to by Coutts-Trotter, J., in *M. Raghavayya* v. *M. Subbayya* (4). It was held in that case that a minor is entitled to have a sale executed by him during his minority set aside without repayment in the absence of proof that he deliberately misled the purchaser into buying by a false representation that he was of age. It was also held that in case of false representation S. 41, Specific Relief Act, gives the Court power to direct the refund of the consideration received by the minor before the Court grants the cancellation of the deed. Coutts-Trotter, J., in referring to the case in *Nottingham Permanent Benefit Building Society* v. *Thurstan* (5) and *Mohori Bibee* v. *Dharmodas Ghose* (2), observed thus:

"It is clear that in this country we have a statutory right to impose conditions by S. 41, Specific Relief Act, and that right is clearly recognized in *Mohori Bibee* v. *Dharmodas Ghose* (2)."

Having regard to the pronouncement of their Lordships of the Privy Council in the case in *Harnath Kunwar* v. *Indar Bahadur Singh* (1), already referred to, I do not think that the case in *Mohori Bibee* v. *Dharamadas Ghose* (2) is the authority for holding that, where a contract or an agreement is void from its inception, we cannot order restitution. *Harnath Kunwar* v. *Indar Bahadur* (1) is a case where a transfer was void from its inception, and their Lordships of the Privy Council deal with the various clauses of S. 65, Contract Act, and make the buyer get back the purchase money. As far as English cases are concerned the question as to whether a fraudulent minor plaintiff who induced another person to enter into a transaction and received consideration therefor is protected has been dealt with by Lawrence, J., in *Leslie Limited* v. *Sheill* (6), where at p. 626, he observes as follows:

"There are no doubt many cases in which equity will give relief against frauds perpetrated by infants. Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner. But I think that it is incorrect to say that he can be made to repay money which he has spent, merely because he received it under a contract induced by his fraud."

Then he refers to various authorities on the subject. I have not been referred to any case where it has been held that in spite of fraudulent representation by a minor he is still entitled to protection. All the cases in India are the other way. I have already referred to *Raghavayya* v. *Subbayya* (4). I may refer to the decision in *Koduri Venkataramayya* v. *T. Ramayya* (7), where *Raghavayya* v. *Subbayya* (4) was followed, and in that case there was misrepresentation by the minor. Reference was made to *Fuli Bibi* v. *Kokai Mondal* (8), where the question as to repayment of the money was considered. In that case the Judge expressly states that the defendant did not allege any fraudulent misrepresentation. That case therefore proceeded on the ground that there being no proof of fraudulent misrepresentation there can be no equity to direct the money to be paid. *Fuli Bibi* v. *Khokai Mondal* (8) is therefore no authority for the view that even if there is fraudulent misrepresentation by a minor he can still retain both the proceeds as also the property which he seeks to recover. In *Khan Gul* v. *Lakha Singh* (9), the same question was decided by a Full Bench of the Lahore High Court. It was there held that

"a minor, who by falsely representing himself to be a major has induced a person to enter into a contract, is not estopped from pleading his minority to avoid the contract, but that he may in equity be required to return the benefit he has received by making a false representation as to his age whether he be a defendant or plaintiff."

It is clear from the authorities that, if he is a plaintiff, he is bound to give back the money. In this case all the authorities are discussed in detail by the learned Judges. The Bombay High Court thinks that there is an estoppel in the case of a minor who seeks relief on

(4) [1918] 43 I.C. 908.
(5) [1903] A.C. 6=72 L.J.Ch. 134=87 L.T. 529=51 W.R. 273=67 J.P. 129.
(6) [1914] 3 K.B. 607=83 L.J.K.B. 1145=111 L.T. 106=58 S.J. 453=30 T.L.R. 460.
(7) A.I.R. 1926 Mad. 607=94 I.C. 853.
(8) A.I.R. 1928 Cal. 537=111 I.C. 349=55 Cal. 712.
(9) A.I.R. 1928 Lah. 609=111 I.C. 175=9 Lah. 701 (F.B.).

a false representation and on that ground they treat the whole transaction as valid. In Calcutta the view is taken, that though there may be no estoppel misrepresentation by a minor may give a right to restitution: *Golam Abdin Sarkar* v. *Hemchandra Majumdar* (10). Having regard to the current of authority in India, which is one way at least in cases where a minor who sues as a plaintiff makes a fraudulent misrepresentation and induces an innocent person to enter into a transaction otherwise legal and validly enforceable, I am of opinion that plaintiff 1 is bound to restore the benefit she has received. I think the Subordinate Judge was perfectly right in passing a decree for plaintiff for recovery of possession of the suit properties after depositing into Court the consideration for the sale deed (Ex. 3). In my opinion the appeal fails and is dismissed. The amount should be paid by 15th July. As each party has succeeded and failed, each party will bear his own costs in both the appeals.

Reilly, J.—I agree that we should not be justified in this case in differing from the learned Subordinate Judge's finding that plaintiff 1 was a minor at the date of her sale deed, Ex. 3, and that the sale is therefore void. I agree also in the findings that defendant 1 paid the full purchase money and that plaintiff 1 represented herself to be a major in the transaction, though she must have known that that representation was false; and I also agree that it is not shown that defendant 1 knew that plaintiff 1 was a minor. On these facts it is clear that plaintiff 1 is entitled to a decree for recovery of the property. The question remains whether that decree should be made conditional on payment of the purchase money, as the learned Subordinate Judge has made it. On the face of it, S. 65, Contract Act, appears to cover the case. That section runs:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

It will be seen that that section provides for two distinct classes of cases. It first provides for agreements which, are discovered to be void, that is agreements which, when they were made, were supposed to be valid—which were supposed by one at least of the parties to be valid—but which are afterwards discovered to have been always unenforceable or void. The second class of cases provided for are contracts which become void, that is contracts which were quite good and valid when they were made but become void through some subsequent event. Now on the facts which we have found this is a case which falls within the first class. We have found that defendant 1 did not know that plaintiff 1 was a minor at the time of the sale deed; so far as he was aware, it was a valid sale deed. But it has been established and discovered in these proceedings that at the time of that deed she was a minor, and therefore the sale was void. On the face of it therefore this case comes within the first class of cases provided for by S. 65, Contract Act. But Mr. Bhashyam Ayyangar for the appellant here has strongly urged before us that S. 65 must not be taken in its plain meaning but that because it has been so interpreted by their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (2) it must be understood as restricted in a way not mentioned in the section—that is the agreements and the contracts referred to in the section must be understood to be agreements and contracts made by persons competent to contract and by no others. In that case a minor had mortgaged some property. The mortgagee knew that the mortgagor was a minor. After executing the mortgage deed and receiving the money the minor by his next friend sued for the cancellation of the mortgage deed under S. 41, Specific Relief Act. When that case came before the Privy Council, it was urged that S. 65, Contract Act, applied to it. Their Lordships dismissed that contention very summarily. In their words:

"It is sufficient to say that this section (S. 65, Contract Act), like S. 64, starts from the basis of there being an agreement or contract between competent parties and has no application to a case in which there never was, and never could have been, any contract."

Now from the facts I have mentioned it will be seen that it was not necessary for their Lordships for the purpose of that case to make a statement so wide as to apply to the whole of S. 65. The first part of S. 65 was clearly inapplica-

(10) [1916] 32 I.C. 388.

ble to that case. There was no agreement discovered to be void by anyone because on the facts found the mortgage in that case was known to be a minor's mortgage, so known to both parties, at the time the mortgage deed was executed. So their Lordships had not to consider the first part of the section at all. What they had to consider must have been an argument that the second part of the section applied, and what they said was that it was inapplicable. That was clearly so. But the words which their Lordships used were, it must be admitted, so wide as in their grammatical sense to cover the whole section, the first part as well as the second part. However, as has been pointed out, that section has been considered by the Privy Council again in a later case, *Harnath Kunwar* v. *Indar Bahadur Singh* (1). That was a suit brought by a purchaser for possession of an estate sold by a Hindu widow's reversioner before the reversion fell in or for the return of the purchase money. It was found that the sale was void ; but it was also found that through misapprehension the parties did not know that at the time of the sale, but discovered it afterwards. In that case the Privy Council decided that the vendor must give compensation to the purchaser. They directed that he must pay the purchase money with interest. They arrived at that result by applying S. 65, Contract Act, to the case. There it will be seen the sale was void from its inception, but it was only discovered to be so subsequently. That was clearly a case to which the first part of S. 65, Contract Act applied. But it will be noticed, in the words of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmadas Ghose* (2), that was also clearly a case where there never was, and never could have been, a contract ; and yet in spite of those words in *Mohori Bibee* v. *Dharmodas Ghose* (2) their Lordships said that S. 65, Contract Act, was applicable. I think that clearly shows that in *Mohori Bibee* v. *Dharmodas Ghose* (2) their Lordships' remarks were confined to the second part of S. 65. That was the only part which I gather the appellant asked should be applied in that case, if we understand the remarks of their Lordships in *Mohori Bibee* v. *Dharmodas Ghose* (2); otherwise, there is an obvious contradiction between the two cases ; and in disposing of the later case their Lordships do not appear to have had an idea that they were saying anything contradictory to what had been said in the earlier case. In my opinion it is clear that in no part of what they said in *Mohori Bibee* v. *Dharmodas Ghose* (2) were their Lordships considering the first part of S. 65, Contract Act. They were not in that case laying down what would have been a very surprising doctrine, and certainly unnecessary for the case before them, that agreements discovered to be void under S. 65 meant only agreements made by persons competent to contract. In fact their words :

"the section has no application to a case in which there never was, and never could have been, any contract,"

would, if I may say so with respect, not be an interpretation of the first part of S. 65, Contract Act, but in direct conflict with it. So, when we examine those two cases, I think it is clear that S. 65, Contract Act, is applicable to a case like this and has been applied by their Lordships to a similar case in *Harnath Kunwar* v. *Indar Bahadur Singh* (1). On that basis it is clear that plaintiff 1 in this case, if she is to get back the property, must repay the purchase money.

But quite apart from that we have S. 41, Specific Relief Act. In *Mohori Bibee* v. *Dharmadas Ghose* (2) the Privy Council indicated that that section was applicable to the minor in that suit, who there sued for cancellation of the mortgage deed. They said that the lower Courts had discretion to make relief conditional on compensation under S. 41, Specific Relief Act in that case, though as a matter of fact the Courts did not make such an order. In this case plaintiff 1 has prayed that her sale deed Ex. 3 might be declared void and for recovery of possession of the property. S. 41, Specific Relief Act, appears to me to be applicable to such a case. That that section can be applied in such a case was decided in *Raghavayya* v. *Subbayya* (4) which I myself followed in *Kodure Venkataramayya* v. *Thumulur Punnayya* (7), and it was also decided in *Lila Dhar* v. *Piarey Lal* (11). In *Khan Gul* v. *Lakha Singh* (9) a purchaser sued a minor vendor, who had misre-

(11) A. I. R. 1921 All. 326=62 I. C. 258.

presented his age, for possession of the property sold or for return of the purchase money. A Full Bench of the Lahore High Court were of the opinion that in such circumstances the minor must return the benefit received whether he was a plaintiff or defendant. Mr. Bhashyam Ayyangar has suggested that in this case S. 41, Specific Relief Act, cannot be applied because plaintiff 1 need not have included any prayer for a declaration that her sale deed was void in the plaint. As he puts it, she could have ignored the sale deed and could have brought the suit solely for recovery of possession; in that way S. 41 might have been avoided. But I do not think that manoeuvre would really alter the position. If plaintiff 1 has simply brought her suit for possession, defendant 1 would have met her with her sale deed. Then the Court would have had to consider the very same question whether that was a valid sale deed, whether it was a sale deed which the Court should declare void, as has been declared here, and, when the Court considered the matter in that way, it would have been proper to apply the principle of S. 41, Specific Relief Act.

Mr. Bhashyam Ayyangar referred to *Thurstan* v. *Nottingham Permanent Benefit Society* (5), a case which was decided by the Court of appeal, the decision being confirmed by the House of Lords. That was an interesting case in which a minor Mrs. Thurstan, had mortgaged some land. She had made no misrepresentation about her age; but the mortgagee society had supposed that she was a major. On attaining majority the ex-minor sued to set the mortgage aside and to recover possession of the property. The Court of appeal found that she was entitled to succeed without repaying the mortgage money. Romer, L. J., in that case said:

"A Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person the legislature has declared to be void."

Now, so far as that goes, it appears to be of assistance to plaintiff 1. As I understand it Romer, L. J., was stating a limitation, a qualification to the general rule that he who seeks equity must do equity. But, we must remember that that does not affect the statutory provisions of S. 41, Specific Relief Act, in this country. In *Mohori Bibee* v. *Dharmodas Ghose* (2) the Privy Council draws that distinction I think very clearly. They quote Romer, L. J's remarks and say that it was applicable to that case and that the general rule that he who seeks equity must do equity did not apply in that case. But they had already said that S. 41, Specific Relief Act, did apply. So it is clear that, although the general principle of equity may be limited in that particular way, that limitation has no effect on the principles of S. 41, Specific Relief Act, by which we have to be guided in this country. I may mention also that Romer, L. J. in that case also said that different considerations would arise if the infant had been guilty of fraud. In this case we have the fact that plaintiff 1 was guilty of fraudulent misrepresentation of her age.

Mr. Bhashyam Ayyangar also referred to *Leslie Limited* v. *Sheill* (6). There the plaintiff had lent money to the defendant, a minor who had represented himself to be a major. The lender sued for relief against the minor. But the defendant's plea of infancy was found good, and it was held that the defendant was under no legal or equitable liability at all to the plaintiff. It will be seen that the plaintiff in that case could not sue upon his contract. That was admitted. The question was whether he could get any relief in law or equity against the defendant. The answer of the Ccurt was that no decree could be made against the minor or ex-minor at all in that matter. But that appears to me to have no application to this case, where an ex-minor is suing for relief. There is however an interesting passage in that case, which has already been quoted in the judgment of Lawrence, J., who was sitting in the Court of appeal on that occasion. He said:

"Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud, he will be made to restore it to its former owner."

The first of these sentences expresses a principle which we have to remember in this case. Mr. Bhashyam Ayyangar drew our attention to the succeeding sentence:

"But I think that it is incorrect to say that he can be made to repay money which he has spent, merely because he received it under a contract induced by his fraud."

Mr. Bhashyam Ayyangar contended that the learned Judge meant that restitution might be required in the shape of property, or perhaps in the shape of a fund which could be traced, but that no order for repayment of money could be made. I think that is to misunderstand the learned Judge's statement. What he was referring to in the last sentence quoted, I think, was the impossibility of making a decree against the minor for repayment, a decree which could be executed against him. Where the minor or ex-minor is the plaintiff there is no reason why restitution should not be in money as well as in kind. The contract between ordering restitution when the minoror ex-minor is the plaintiff and making an executable decree for repayment against him as defendant is not a question of coin or money. The contract is between making a decree against him for repayment of money and making an order in his favour conditional on restitution in money or otherwise. There is a very important difference between enforcing in any way, direct or indirect, a minor's void agreement and giving a minor conditional relief when he applies for relief in respect of a void agreement.

And I think we must remember that apart from the special provisions of law, to which I have referred, there is a general principle that we must never allow the Court to be made by a plaintiff an instrument of fraud. That applies just as much to a minor plaintiff as to any other plaintiff. We have no right to be tender to a minor in that matter. If a minor were allowed to misrepresent his age to a purchaser, to sell property to the purchaser so deceived, to deliver the property to him, to collect the purchase money and then to come to Court at once and recover the property without being made to give up the purchase money, that would be making the Court an instrument of very gross fraud, which we could never tolerate. In my opinion, under the provisions of S. 65, Contract Act, under the provisions of S. 41, Specific Relief Act, and on the general principles which I have mentioned we cannot make the decree to which the plaintiffs are entitled for the recovery of the property except on condition that they refund the purchase money. I agree that both these appeals should be dismissed with costs.

P.R.S./S.N. *Appeals dismissed.*

A. I. R. 1930 Madras 954

RAMESAM, J.

T. S. Venkataramana Iyer and *another*—Petitioners.

v.

Kuppuswami Iyengar and *another*—Respondents.

Civil Revn. Petn. No. 828 of 1929, Decided on 26th March 1930, from order of Dist. Judge, Salem, D/- 20th April 1929.

Local Boards Act, S. 51 (4)—Want of fresh electoral roll does not render election invalid.

Where objection was taken to the election, held in the year 1929, of a member of a Union, which was dissolved by Government notification under S. 45, on the ground that the eleotoral roll on the basis of which the election was conducted was the roll prepared for the year 1923-24 and no other later roll was prepared, and that the old roll contained names of persons who were dead and of persons who were unfit to be voters and did not contain the names of persons who were fit to be voters,

Held: that under S. 51 (4) an electoral roll published in any year remains in force till the publication of a fresh electoral roll and that the want of a fresh electoral roll did not render an election invalid: *A. I. R.* 1927 *Mad.* 462, *Dist.* [P 955 C 1; P 956 C 1]

T. M. Krishnaswami Iyer and *K. V. Ramachandra Iyer*—for Petitioners.

Advocate-General, T. V. Muthukrishna Ayyar and *B. V. Viswanatha Iyer*—for Respondents.

Judgment.—This is a revision petition against the order of the District Judge of Salem setting aside the election of the petitioner before me for the first ward of the Union of Trichengode, Salem District. The facts of the case are as follows: The Madras Government dissolved the Trichengode Union under S. 45, Local Boards Act, and passed an order that another Board should be reconstituted. They appointed an officer immediately to exercise the powers of the Board and he was directed to re-constitute a Union Board by arranging for elections in respect of such members as have got to be elected and they directed also the Taluk Board of Sankari to nominate the members that have got to be nominated after the

elections are over. All this is to be done as soon as possible. Accordingly the Special Officer appointed proceeded with making arrangements for the election of members for the first ward among other elections. In this election the petitioners before me were elected. The respondent before me filed the petition O. P. No. 27 of 1929 for the purpose of setting aside the election on the ground that the electoral roll on the basis of which the election was conducted was the roll prepared for the year 1923-24 and no other later roll was prepared. It is said that the old electoral roll contains names of persons who are dead and of persons who are unfit to be voters and does not contain persons who are fit to be voters. It was contended on behalf of the petitioners that that does not matter. Under S. 51 (4) an electoral roll published in any year shall remain in force till the publication of a fresh electoral roll. The District Judge disallowed this contention of the petitioners before me holding that S. 51 (4) applies only to cases happening in the interval between April and July of any year. The rules prescribe that tentative list will be published on 30th April of each year and after hearing objections if any, the final list should be published on 1st July.

The District Judge thinks that only in the case of elections between 30th April and 1st July, Cl. 4, S. 51, operates and that in all other cases where the rules are broken the election is bad because it is based on an electoral roll not prepared according to the rules under the Act. But if this were the object of the section, Cl. 4, S. 51, would not have been worded in the very wide language in which it is framed. The learned Advocate General, who appears for the respondent and supports the order of the District Judge, does not in fact contend for the very narrow construction of the learned District Judge. He contends that the object is to provide for delays in the preparation of electoral rolls when one is being prepared to carry out the obvious intentions of the Act, and it does not apply to a case where the directions of the Act are openly disregarded and no efforts are made to prepare electoral rolls for a period of five or six years. There is something to be said in favour of such a construction. At any rate it is reasonable. But where the section is worded in such a way that it gives no scope to make such distinctions, its obvious effect must be carried out. It may be that the legislature never contemplated such flagrant disobedience of the directions of the Act, as it has happened in Trichengode. We do not know why they did not contemplate such disobedience. Either the legislature might have thought that some higher authority would have set it right or such instances would not happen.

In the present case, I am informed that the Trichengode Union was not dissolved for its failure to carry out the provisions of the Act in this matter, but really for some other delinquency, so that, but for the delinquency in some other directions, the Union Board would have gone on disregarding the provisions of the Act, for many many years without anybody finding fault with it. But we are not concerned with all these things. The Act says that the electoral roll published in any year shall remain in force till the publication of a fresh electoral roll. If it is intended that such a provision should apply only during the course of the year, there is nothing to prevent the legislature from saying so, that is, "shall remain in force till the termination of that year." The learned Advocate-General suggested that there may be some delay in the preparation of the roll for the next year. If it is intended that the provision should operate until the termination of the next year, then there is nothing to prevent the legislature from saying so; that is, from saying,

"shall remain in force till the publication in the next following year."

Once we begin to make distinctions of this kind, we do not know where the line is to be drawn. Until the legislature makes its intention plainer, my plain duty is to give effect to the clause of the Act. Moreover, having regard to S. 45 (1) of the Government notification, the policy of the legislature is that no time should be lost in the reconstruction of another Union Board. If one is to wait for a proper electoral roll and then only to proceed with the

election of the members of the Board, the Board will not be constituted immediately. Rules relating to the electoral roll say that a tentative list should be published on 30th of April and the final list on 1st July. In the present case the Special Officer was appointed in November 1928. He has to wait till July 1929. Then there are nominations to be made. The constitution of the Board would be delayed much longer than is contemplated by the term "immediately" in S. 45 or in the G. O.

Apparently the policy of the Act is that the old electoral roll should continue in order to avoid delays of several kinds, namely, accidental delay for a few months or for a year, delay due to deliberate disobedience to the superior authorities, or gross incompetency on the part of the Union Board, etc. That is the intention of the legislature and there is no use of complaining against it. To proceed upon an antiquated electoral roll is really to deprive several voters of their votes. This may be so or may not be so; it is my duty to give effect to the section. The learned Advocate-General relied on a decision in *Singaram Chettiar* v. *Srinivasa Iyengar* (1) (at p. 732 *of* 50 *Mad.*). That case refers to election of members to a temple committee constituted under the Hindu Religious Endowments Act. That Act directs a register to be kept. It appears from the facts of that case that for eight years no register has been revised and my brothers Kumaraswami Sastriar and Curgenven, JJ., held that the election was not proper. But in that Act there is no section like S. 51 (4), Local Boards Act. The conclusion in that case can only apply to cases where there is no such section. This is clear from the judgment of Curgenven, J., at p. 731 where he says:

"Unless there is some provision to the contrary, the validity of the election depends upon the regularity of the procedure according to which it is held . . . ."

Here we have got an express provision that one kind of irregularity, however gross, will not render an election invalid, namely, the want of a fresh electoral roll. For these reasons, I do not see any reason to limit the operation of S. 51 (4), Local Board's Act. I set aside the order of the District Judge holding that the election of the petitioners is perfectly valid and dismiss respondent 1's petition in the Court below with costs of the petitioners both here and in the Court below. I also set aside the order of the District Judge directing the holding of a fresh election after the preparation of a new electoral roll.

P.R.S./K.N. *Revision allowed.*

(1) A. I. R. 1927 Mad. 462=102 I. C. 270=50 Mad. 726.

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* A. I. R. 1930 Madras 956

RAMESAM AND CORNISH, JJ.

(*N*) *Namberumal Chetti* — Plaintiff—Appellant.

v.

Veeraperumal Pillai and *others*—Defendants—Respondents.

Original Side Appeals Nos. 66 and 125 of 1928, Decided on 28th February 1930, from decrees of Beasley, J., D/- 25th September 1928.

*** (a) Succession Act (39 of 1925), (as amended by Act 37 of 1926), S. 57 — Probate need not be taken where disposition does not relate to immovable property in Madras—Will giving some property to *S* and residue to *V*— Subsequent letter from testator to *V* from outside Madras giving Rs. 15,000 to his wife—(Per *Ramesam, J.*) Letter held to be independent will and hence no probate was required—(*Cornish, J.* contra—)Will—Construction.**

A executed a will under which he demised some of his property to *S* and the rest to *V* whom he named as executor to the will. Later on from Guindy outside Madras, he addressed a letter to *V* as follows: "If I should depart this life you will pay to my beloved second wife M. Aparanji Ammal the sum of Rs. 15,000 and you will take the whole of my property both moveable and immovable. I am possessed of."

Held: (Per *Ramesam, J.*)—that the letter was a complete and independent will by itself and not supplemental to any other will. That so far as the legacy of Rs. 15,000 was concerned, it was not necessary to take probate of the letter (will) by *A* as the disposition did not relate to immovable property in Madras.

Per *Cornish, J.*—That the letter was codicil to the former will and was to be regarded as an instrument in relation to a will and adding to its disposition. [P 959 C 1, P 961 C 2]

(b) Evidence Act, S. 115—Person entering on duties as executor after securing order for probate but not taking it is estopped from denying obligation as executor.

A person actually entering upon his duties as executor after securing an order of probate in his favour, but for some reasons not taking out a probate is estopped from saying that he is not under any obligation as executor: 34 *Mad.* 211 and 34, *Mad.* 257 (*P. C.*), *Rel. on.* [P 959 C 1]

(c) Succession Act (1925), S. 307—Alienee from executor knowing that he is using his

powers for his own purposes is not protected.

Under S. 307 the executor has power to dispose of his property for all purposes binding upon the estate and, even where the executor deals with the property for purposes not strictly binding on the estate, the alienations such as a sale or mortgage cannot be questioned so as to defeat the alienee who had no notice of the fact that the executor was using his powers for purposes not binding upon the estate. But an alienee from the executor with notice of the fact that the executor was using his p wers for his own purposes will not be protected: 33 *Bom.* 1 (*P. C.*), *Rel. on*; *Henson in re Chestor* v. *Henson*, (1908) 2 *Ch.* 356, *Dist.* [P 959 C 1]

(d) Contract Act (1872), S. 25— Past immoral cohabitation with woman is good consideration.

Per *Ramesam, J.*—In Indian law past consideration is good consideration. There is nothing immoral in remunerating a woman for past cohabitation. The consideration though for past immoral sevices is good : 13 ; *M. L. J.* 7, *Foll.*; *A. I. R.* 1930 *Mad.* 239, *Diss. from.* [P 960 C 1]

(e) Succession Act (1925), Ss. 177 and 179 —Where Ss. 177 aad 179 are inapplicable, general principles contained in them may be applied.

Where Ss. 177 and 179 are found to be inapplicable to a will, the principles of the sections as embodying the general equitable principles can be applied: 37 *Bom.* 211, *Rel. on.* [P 960 C 2]

V. Masilamani Pillai, *C. Krishnamachariar* and *T. S. Venkatesa Iyer*— for Appellant.

V. Radhakrishnayya — for Respondents.

Ramesam, J.— These appeals arise out of a suit C. S. No. 300 of 1927, filed by one Namberumal Chettiar against four defendants. Defendant 1 is Veeraperumal Pillai, nephew and executor of the estate of P. Appasami Pillai who died on 4th October 1921. Defendant 2 is Kanthammal, the illegitimate daughter of Appaswami Pillai. Defendant 3 is the Official Assignee in whom the property of defendant 1 is now vested on account of insolvency. Defendant 4 is Mr. S. G. Satagopa Mudaliar, an advocate of this Court, who was in 1923 the receiver of another estate which was the subject of a litigation, and who in the capacity of such receiver advanced a loan of 2½ lakhs to defendant 1, executor, on a deed of mortgage dated 10th April 1923; and he is impleaded in this suit as such mortgagee.

The suit was for the administration of the estate of the deceased Appaswami Pillai and for the recovery of the balance of legacy of Rs. 15,000 with further interest, and of a sum of Rupees 15,000 due on a promissory note with further interest. The suit came on for trial before Beasley, J., as he then was and he dismissed the suit for the legacy, but gave a decree for the balance of the money due on the promissory note after crediting the admitted payments towards that note, the decree being executable against the assets, if any, of the deceased Appaswami Pillai now in the hands of defendant 1 and against defendant 1 personally. The plaintiff files these two appeals separately: one in respect of the legacy and the other in respect of the promissory note.

The further facts necessary for understanding the points arising in these appeals are as follows:

Appaswami Pillai was for nearly 30 years before his death keeping one Aparanji Ammal and she was living with him in his house as his wife. He had by her a daughter Kanthammal, defendant 2, already mentioned. On 11th August 1915 he executed a will. Ex. A-5 under which he devised two of his properties (Items 9 and 10) to his elder brother's son-in-law, Srinivasa Pillai and all the rest of his properties to his elder brother's son Veeraperumal Pillai, defendant 1 in the suit, whom he named as executor of the will. About a year before his death, that is on 19th October 1920 he addressed to his nephew (defendant 1) a letter Ex. A-6 containing testamentary dispositions. This letter shows that it was written at his residence known as "Winning Post" near the Guindy Race Course, Guindy, outside the original side jurisdiction of Madras. In this letter he says:

"If I should depart this life you will pay to my beloved second wife M. Aparanji Ammal the sum of Rs. 15,000 and you will take the whole of my property both moveable and immovable I am possessed of."

Three days afterwards, that is, on 22nd October, he and the executor, that is defendant 1, executed a promissory note, Ex. A-1 for Rs. 15,000 in favour of the said Aparanji Ammal with interest at 4 per cent per annum. He died, as I have already mentioned, on 21st October. In 21st December the executor applied for a probate of the will Ex. A-5 and of Ex. A-6. This application was numbered as T. O. S. 1 of 1922, the affidavit of assets filed with it dated 1st December 1921 being Ex. A-4. A

brother of defendant 1 named Sethurama Pillai filed a caveat; but probate was ordered. There was an appeal by Sethurama Pillai (O. S. A. 67 of 1922) The matter was compromised. Defendant 1 promised to pay Rs. 50,000 to Sethurama Pillai and the latter withdrew his appeal. Soon after the withdrawal defendant 1 applied for a loan of 2½ lakhs to defendant 4. Ex. A-3 is the deed of mortgage for the amount. It recites that the purpose of the mortgage was to pay off the following sums of money: (1) a sum of Rs. 29,015 due to Sha Agachand Manmal on two mortgage deeds of 1921, executed by the testator and renewed by defendant 1 after his death; (2) a sum of Rs. 41,600 due to the Secretary of the Sri Madhava Mohanji temple on a mortgage executed by the testator;(3) a sum of Rs. 15,000 directed to be paid to Aparanji Ammal under the will, (4) the cost of taking out probate, etc. estimated at Rs. 15,000; (5) a sum of Rs. 38,773-14-6 due from defendant to Messrs. Gillanders Arbuthnot & Co., in connexion with his timber trade; (6) a sum of Rs. 1,05,000 due to Kanhialal on a deed of mortgage dated 2nd March 1922 executed by defendant 1 himself and on behalf of his minor son. The total of these items comes to about Rs. 2,44,000. It will be seen from the above description that two of the items amounting to about Rs. 1,43,000 representing the private and personal debts of the mortgagors, defendant 1 and his son, and the small balance of Rs. 6,000 was also utilized by them personally. The other four items amounting to Rs. 1,00,615 represent debts for purposes binding on the estate. It will be observed that defendant 1 in executing the above mortgage apparently thought that the will Ex. 5 and the letter Ex. A-6 both refer to the same sum of Rs. 15,000 and that he has only to pay a sum of Rs. 15,000 to Aparanji Ammal.

It is true that he does not say so in so many words. But as he does not provide for the payment of Rs. 30,000 to Aparanji Ammal, that must have been his understanding of the transactions. The probate was never taken. Some years afterwards defendant 1 became an insolvent. Immediately after the mortgage Rs. 2,000 was paid to Aparanji Ammal. Five months afterwards another Rs. 1,000 was paid. In 24th September a sum of Rs. 1,000 was paid. In 24th September a sum of Rs. 600 and in 25th June another Rs. 400 were paid to Kanthammal, daughter of Aparanji Ammal who must have died some time before 24th September. Kanthammal, who succeeded to Aparanji Ammal's right to the legacy and in the promissory note as her daughter, assigned her right to the present plaintiff, Namberumal Chetti. He filed the suit on 30th May 1927. The learned trial Judge held that, as no probate was actually taken of Exs. A-5 and A-6 the plaintiff's claim to the legacy fails, that the consideration for the promissory note was 30 years' past cohabitation of Aparanji Ammal with the testator, it was not illegal and bad consideration as it was for past immoral services. He therefore gave judgment for the balance due on the promissory note.

One of the questions argued in appeal is whether Ex. A-6 should be called a will or codicil, and whether the plaintiff's claim cannot be established unless a probate is taken out for it. As will be seen the first part of this question is really immaterial. It matters little whether you call Ex. A-6 an independent will or codicil. Seeing that, between Ex. A-5 and Ex. A-6, items 9 and 10 originally mentioned in Ex. A-5 have ceased to be the testator's property, there could be no legacy of these items to Srinivasa Pillai; and as the disposition of the rest of the property to defendant 1 was repeated in Ex. A-6, it seems to me that Ex. A-6 is a complete and independent will by itself. The only need to refer to Ex. A-5 is to find out the executor of the deceased's estate. Ex. A-6 may therefore be regarded as a complete will and not supplemental to some other will which it adds to or modifies. But it is unnecessary to pursue this question any further. As to which or any of these two documents requires a probate, the law is contained in Ss. 57 and 213, Succession Act 39 of 1925, as amended by Act 37 of 1926. The provisions of Part 6, that is from S. 57 to S. 191, apply (1) to all Hindu wills executed in Bengal and within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and

Bombay; and (2) to all wills and codicils made outside these territories and limits so far as relates to immovable property situate within those territories or limits. When we remember that S. 57 is a re-enactment of the Hindu Wills Act of 1870, S. 57 (1) shows that in the case of wills executed outside Madras, probate must be taken of them only in so far as they relate to immovable properties situated within Madras. Ex. A-6 was written at Guindy, that is outside Madras; and, though part of it relates to immovable property situated within Madras, so far as the legacy of Rs. 15,000 given to Aparanji Ammal is concerned, that disposition does not relate to immovable property within Madras. To that extent Part 6, Succession Act, does not apply to the will and therefore no probate has to be taken. Cl. 2, S. 57, shows that even in respect of such Hindu wills, the provisions of S. 63 apply showing that in the case of wills executed outside Madras, some provisions of Part 6 do not apply. If the contention of Mr. Radhakrishnayya for the respondent that probate must be taken for the whole of Ex. A-6 is correct, sub-Cl. (b) would have been worded

"to all wills and codicils made outside those territories containing any disposition of immovable property situated within those limits."

The words "so far as" are limiting words, cutting down what is indefinite to definite limits. I am of opinion that in so far as the plaintiff has got to establish a right to the legacy of Rs. 15,000 no probate need be taken of Ex. A-6 whether we regard it as a separate or independent will or whether it be regarded as a codicil supplementary to the will Ex. A-5. In either case, to the extent that the plaintiff's right to the legacy is sought to be established, no probate need be taken of it. From the point of view of the executor, what is now sought is not to establish any right of his but only to fix an obligation on him: vide Williams on Executors, p. 219. It must be remembered that defendant 1 actually entered upon his duties as executor, applied for probate and got an order in his favour, but for some reasons did not actually take out a probate. He would now be estopped from saying that he is not under any obligation as executor: vide *Muniswami Chetti* v. *Maruthammal* (1) which applies the principle of *Srinivasa Moorthy* v. *Venkatavarada Aiyangar* (2).

The next question is whether the plaintiff has any rights over the estate of the deceased Appaswami Pillai. On this part of the case the contesting defendant is defendant 4. He has got a mortgage for 2½ lakhs and he claims priority in respect of his mortgage over the plaintiff's legacy. It must be observed that the mortgage was, as already pointed out, so far as the items binding on the estate and amounting to Rs. 1,00,615 are concerned, is a mortgage properly executed by the executor and binding on the estate and therefore binding on the legatees also. The question is, whether in respect of the other items the mortgagee has got priority over the plaintiff's legacy. It is true that under S. 307 of the Act an executor has power to dispose of the property for all purposes binding upon the estate and, even where the executor deals with the property for purposes not strictly binding on the estate the alienations such as a sale or mortgage cannot be questioned so as to defeat the bona fide alienee who had no notice of the fact that the executor was using his powers for purposes not binding upon the estate. This principle has been well established and it is clear from Lord Thurlow's oft-quoted dictum: vide Williams on Executors, pp. 697 and 698; but where the alienation is made for purposes not binding on the estate and the alienee has notice of the fact, the principle does not apply: see Foot-note N in Williams on Executors p. 697 and *Bank of Bombay* v. *Suleman Somiji* (3). In this last case their Lordships of the Privy Council, after distinguishing the English cases of *Graham* v. *Drummond* (4) and *Taylor* v. *Hawkins* (5), held that an alienee with notice of the fact that the executor was using it for his own purposes will not be protected. We think that that decision applies to the present case. The decision in *Henson*

(1) [1911] 34 Mad. 211=7 I. C. 176.
(2) [1911] 34 Mad. 257=11 I. C. 447=38 I. A. 129 (P. C.).
(3) [1909] 33 Bom. 1=1 I. C. 369=35 I. A. 130 (P. C.).
(4) [1896] 1 Ch. 968=65 L. J. Ch. 472=44 W. R. 596=74 L. T. 417.
(5) 8 Ves. 209.

In re Chestor v. *Henson* (6) does not help the respondent. That decision only shows that the purchaser or mortgagee is not bound to see to the application of the mortgage money and that the executor need not expressly describe himself as executor in the instrument. This is perfectly true; but in this case the purpose for which the document was executed was partly not for the benefit of the estate, and on the face of the document this was known to the mortgagee. I am therefore of opinion that the plaintiff is entitled to recover the amount of the legacy from the estate subject to the mortgage Ex. A-3 to the extent of Rs. 1,00,615 and its interest and without being subject to the mortgage for the rest of the amount.

The next question that arises is whether the plaintiff can recover any amount on the promissory note. It is said that the promissory note is for an immoral consideration. On this point I am inclined to agree with the view of the trial Judge and not with the Bombay cases such as *Hussainali* v. *Dinbai* (7) and *Kisondas* v. *Dhondu* (8), relied on by Mr. Radhakrishnayya. In the English law past immoral consideration is good consideration if the document is under seal but is not good consideration if the document is not under seal not because of the immorality, but because in English law past consideration is no consideration. In Indian law past consideration is good consideration, and as there is nothing immoral in remunerating a woman who has rendered services, for such past services the consideration is good: vide *Lakshminarayana Reddiyar* v. *Subhadri Ammal* (9) per Bhashyam Ayyangar, J., with whose judgment I agree. I am unable to agree with the judgment of Sundaram Chetti, J., in *Ganapathy Chetti* v. *Sundararaja Pillai* (10). Whether such consideration can act as a motive both for legacy and for any number of promises may perhaps be doubted; but it is unnecessary to pursue this matter further as I am of opinion that in the circumstances of this case that the promissory note was not intended to give an additional snm of Rs. 15,000 besides the sum of Rs. 15,000 given by the letter Ex. A-6. Mr. Varadachariar, the learned advocate for the appellant, relied on *Horlock* v. *Wiggins*, *Wiggins* v. *Horlock* (11). In that case the first deed was recited in the will as the argument of Mr. Stokes shows. The facts of the present case are different. It looks as if the promissory note was executed by the testator with a view to make the executor also a consenting party so that he might not afterwards throw obstacles in the way of the legatee. The whole evidence shows that defendant 1 never borrowed any money from Aparanji Ammal. Para. 3 of the written statement raised the question that the promissory note has no consideration and issue 2 though it is clumsily framed, relates to this point. It cannot be said therefore that the question was not raised. The evidence is very clear and in the circumstances I think that the promissory note was not intended to give an additional sum of Rs. 15,000. It is true that Ss. 177 and 179 do not apply to this will but the principles of these sections as embodying the general equitable principles may apply: vide *Hasanally* v. *Popatlal Parbhudas* (12). But even if so, we have nothing to do with S. 177 in this case, nor can S. 179 help the appellant for nobody suggests that the bequest is adeemed. It is contended that the legacy stands. The only question is whether the promissory note is valid as for another additional sum. On the facts we find that it has no consideration and from the surrounding circumstances we think it refers to the same sum as the legacy. So that, even if Ss. 177 and 179 are actually applicable they do not help the appellant.

The result is that in modification of the decree the plaintiff's suit so far as it relates to the promissory note and Appeal No. 125 of 1928 are dismissed as against defendant 4 with his proportionate costs but the decree as against defendant 1 and Official Assignee will stand as it has not been appealed against. In Appeal No. 66 of 1928 a decree will be given as indicated above with interest at 6 per cent which is the

(6) [1908] 2 Ch. 356=77 L. J. Ch. 598=99 L. T. 336.
(7) A. I. R. 1924 Bom. 135=86 I. C. 240.
(8) [1920] 44 Bom. 542=57 I. C. 472.
(9) [1903] 13 M. L. J. 7.
(10) A. I. R. 1930 Mad. 239=124 I. C. 153.
(11) [1889] 39 Ch. D. 142=58 L. J. Ch. 46=59 L. T. 710.
(12) [1913] 37 Bom. 211=17 I. C. 17.

interest provided for in the Act. The plaintiff will have proportionate costs in the suit and in appeal on the amount decreed.

In A. S. No. 66, there will be a preliminary decree for administration on the above lines and this Court will as far as possible try to satisfy the claim of plaintiff out of properties not included in the mortgage of defendant 4.

Cornish, J.—There can, I think, be no doubt that the letter, Ex. A-6, is a testamentary instrument. It says:

"My dear Doray, My present state of health seems to me uncertain; if I should depart this life you will pay to my beloved second wife M. Aparanji Ammal the sum of rupees fifteen thousand and you will take the whole of my property both moveable and immovable I am possessed of."

The words are informal, but they clearly express the writer's wishes as to the disposal of his property on the event of his death. It has been contended that as the testator gives the whole of his property to defendant 1, the "Doray" to whom Ex.A-6 is written, the direction with regard to the payment of Rs. 15,000 to Aparanji Ammal cannot be read as giving her a legacy. But if the testator's intention was to make a bequest to her, as I think it was, it cannot signify whether the testator instead of giving the bequest of Rs. 15,000 directly to Aparanji directed the defendant, his executor, to pay this sum to her. The question, then, is whether Ex. A-6 is to be regarded as a codicil to the earlier will Ex. A-5 which the testator made in Madras on 11th August 1915, and of which defendant 1 was the executor and residuary legatee. "Codicil" is defined by S. 2 (b), Succession Act, as meaning

"an instrument made in relation to a will and explaining, altering or adding to its disposition and is considered as forming an additional part of the will."

Ex. A-6 does not in terms refer to the will, but is addressed to the person who was appointed executor of the will; it directs him to pay a legacy which had not been given by the will, and it confirms the residuary bequest made to him by the will. It revokes nothing in the will. The legacy given to M. Sreenivasa Pillai by the earlier will appears to have been adeemed; at all events, the properties bequeathed to Sreenivasa Pillai no longer formed part of the testator's estate at the time of his death. In these circumstances I am of opinion that Ex. A-6 must be regarded as "an instrument made in relation to a will and adding to its disposition" and consequently a codicil to the will. It is also to be noted that the testator's signature to the document is attested by two witnesses in conformity with the requirements of a valid will governed by the Succession Act.

The codicil was made at Guindy, outside the limits of the High Court's original civil jurisdiction, and, in addition to the pecuniary legacy given to Aparanji it confirmed by repetition the residuary bequest given to defendant 1 by the will comprising immovable property within the High Court limits. The executor (defendant 1) applied for probate of the will and codicil, and a grant was ordered, but no grant has been issued because the executor has not paid the appropriate court-fee for the grant. Does the failure to produce probate prevent the plaintiff, who derives his title to the legacy as administrator of Aparanji's estate, from establishing his claim to the legacy?

Section 213 (1), Succession Act, of 1925 says:

"No right as legatee can be established in any Court of justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed."

But sub-S. 2 provides:

"This section shall only apply in the case of wills made by any Hindu where such wills are of the class specified in sub-S. (1), S. 57."

Now, the class of the will specified in S. 57 (1) comprises: (a) all wills and codicils made by any Hindu on or after 1st September 1870 within the local limits of the High Court's ordinary original civil jurisdiction and (b) all such wills and codicils made outside those limits "so far as relates to immovable property situate within those limits." The classification is taken from the Hindu Wills Act 21 of 1870 now repealed. This Act applied to these classes of wills and codicils certain sections of the Indian Succession Act of 1865 corresponding to the sections set out in Sch. 3, Succession Act of 1925 which have now been made applicable to such wills and codicils.

The purpose, as explained in the preamble to the Hindu Wills Act, was :

"to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the wills of Hindus within the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay."

By a later amendment of Act 21 of 1870, S. 187 of the 1865 Act (which corresponds with S. 213 (1) of the 1925 Act, was made applicable to these classes of wills and codicils. S. 187 adopts the English rule that the probate is the only legal evidence of the will in any question respecting a right to property under the will, or, as it has been said, it is only when the will has been proved that the Court has the legal optics through which to look at it: *Johnson* v. *Warwick* (13). As a general rule, no doubt, if probate of a will is necessary, any codicil must be included in the probate because the codicil is part of the will. But it is obvious from the classification of wills and codicils in S. 57 (1), Cls. (a) and (b), that a will and a codicil may have to be treated as separate instruments for the purpose of the application of S. 213 (1) and the other relevant sections of the Succession Act. A will or a codicil made within the prescribed limits comes within Cl. (a) and is governed by the applied sections of the Succession Act but a will or a codicil made outside the prescribed limits comes within Cl. (b) and is governed by those sections "so far as relates to immovable property situate within those limits." The plain meaning of these words is that in respect of a will or of a codicil coming within Cl. (b), S. 213 (1) applies only to the extent of the will or codicil disposing of immovable property within the prescribed limits, but does not otherwise apply to the instrument. There is nothing very strange in such an exception being made when it is remembered that in England formerly the Court of probate had no jurisdiction to authenticate a will so far as it related to real estate and that the probate was no evidence at all of the validity or contents of a will as to such property: see Williams on Executors Vol. 1, p. 440 (Edn. 10) and Burn's Ecclesiastical Laws, Vol. 4, pp. 332, 335. Upon this construction, probate of will or of a codicil within the category of S. 57 (1) Cl. (b), Succession Act is not required as evidence of the will or codicil so far as any right to moveable property is concerned. It follows that the plaintiff's claim to the pecuniary legacy under the codicil was maintainable without probate.

The next question is whether the plaintiff can claim, in addition to the legacy, a sum of Rs. 15,000 due under a promissory note jointly executed in favour of Aparanji by the testator and the executor. The date of the codicil is 19th October 1920, and the date of the pronote is the 22nd October 1920. The two instruments are therefore practically contemporaneous. Reference has been made to *Horlock* v. *Wiggins* (11) where a husband by a separation deed dated 7th September covenanted that his executors and administrators should on his decease, pay to his wife £100 if she survived him and by his will executed on the 9th September he gave his wife £100 after payment of all his just debts. In holding that there was no presumption that one gift was intended to be in satisfaction of the other Cotton, L. J. said :

"In my opinion no such presumption arises in this case. The direction to pay the legacy is given after payment of all the testator's just debts, and the instrument creating an obligation to pay the £100 which would be a debt, is so nearly connected in point of time with the execution of the will that they must be treated as contemporaneous. I do not say that in no case can a presumption of satisfaction arise where the documents are contemporaneous."

And Bowen, L. J. said :

"Then, again the two documents as regarded the testator's mind were contemporaneous, which is a circumstance to be considered, for the presumption arises not on the will but on the circumstances of the case."

Looking at the circumstances in which the pronote was executed and particularly to the fact that the note was executed by the testator and his executor, the latter being under no obligation of any sort of Aparanji when he executed the note, it seems to me that the proper inference is that the note was intended to be no more than an additional security to Aparanji for the payment of the legacy, and the testator did not intend her to have both the legacy and the amount covered by the pronote. In this view it becomes

(13) [1864] 17 C. B. 516=25 L. J. C. P. 102.

unnecessary to consider the question whether the note is supported by consideration. The result is the same as that arrived at by the learned trial Judge except that the plaintiff is entitled to the balance of Rs. 15,000 as legacy and not as payable under the pronote. The rate of interest payable on a legacy when the testator is a Hindu is fixed by S. 353, Succession Act, at 6 per cent and under S. 351 interest begins to run from the expiration of one year from the testator's death. I agree, for the reasons given by my learned brother that the mortgage in favour of defendant 4, to the extent to which it was raised for paying off the testator's liabilities has priority over payment of the legacy, but that the legacy has priority over the mortgage to the extent of the amount borrowed by defendant 1 for the satisfaction of his present debts.

P.R.S./R.M. *Order accordingly.*

A. I. R. 1930 Madras 963

RAMESAM, J.

on difference between

ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

Gunepally Thammayya and *others*—Defendants—Appellants.

v.

Sri Rajah Tyadapusapati Khandendu Dora and *another*—Plaintiffs—Respondents.

Second Appeals Nos. 2107 and 2118 of 1927, Decided on 17th March 1930, from decrees of Agent to Govr., Vizagapatam, in Appeal Suits Nos. 8 to 19 of 1926.

(a) Vizagapatam Agency Rules, Rr. 2 to 56—Heading "Civil Justice" is used as opposed to Criminal—Rr. 2 to 56 apply to persons exercising powers of revenue Courts.

The heading "Civil Justice" on rules from R. 2 onwards is used as opposed to Criminal justice only.

Therefore, Rr. 2 to 56 apply to the Agents and Agency Divisional Officers exercising the power of revenue Court, i. e., these rules apply to revenue Courts. [P 967 C 1, 2]

(b) Interpretation of Statutes—Later statute generally repeals earlier but not so if earlier statute is special Act—When each statute is special in some particular sense earlier statutes should not be held to have been repealed unless it is absolutely clear that operation of first Act has to be curtailed by subsequent Act — Speciality in respect of locality has greater importance than in respect of subject-matters.

The later statute repeals the earlier if both are equally general, but if the later Act is a general Act, but the earlier Act is a special Act, the earlier Act is generally not repealed by the later Act. When there is a conflict between two special Acts, each of which may be described as special in some particular sense, the Court should lean against the repeal of the earlier Act by implication and unless it is absolutely clear that the operation of the first Act has to be curtailed by the later Act, the previous Act should be held to continue in force even though the later Act may be regarded as special in some other sense. Speciality in respect of locality is given greater importance rather than speciality in respect of subject matter, otherwise it would be impossible to compare the degree of speciality : 15 *B.L.R.* 60 *N.* and *Seward* v. *Vera Cruz*, 10 *A. C.* 59 and *other English Cases referred.* [P 968 C 2]

(c) Madras Estates Land Act, S. 191—Provision in S. 191 is general provision and not special.

Though the Estates Land Act may be regarded as a special Act from one point of view (as relating to relationship between landlords and tenants), the provision in S. 191 providing 30 days for first appeals is really a very general provision and not in the nature of a special provision. [P 970 C 1]

(d) Scheduled Districts Act (14 of 1874), S. 6—Restriction in S. 6 applies to area,

The word "restriction" in S. 6 is necessary to cover the case of an area and restriction in S. 6 applies to area. [P 971 C 1, 2]

(e) Vizagapatam Agency Rules, R. 56—R. 56 is not ultra vires as it does not restrict the operation but only modifies—Madras Estates Land Act, S. 91—Scheduled District Act (14 of 1874), Ss. 5-A and 6.

Rule 56 of the Vizagapatam Agency Rules, as it changes the period of limitation under S. 191, Madras Estates Land Act, is a provision substituting one period, namely six weeks, (which was thought to be more proper) for another, and is therefore a modification.

Rule 56 therefore is not ultra vires not being a rule restricting the operation of S. 191, Madras Estates Land Act, but only modifying it. [P 966 C 2]

Per *Curgenven, J.* (contra)—R. 56 of the Vizagapatam Agency Rules offends against the provisions of S. 191, Madras Estates Land Act, and if deemed to prevail upon it restricts the operation of the Act and is therefore ultra vires. [P 966 C 2]

V. Govindarajachari—for Appellants.

Y. Suryanarayana—for Respondents.

Anantakrishna Ayyar, J. — The Zamindar of Pachipenta filed a batch of suits in the Court of the Special Assistant agent at Koraput under S. 77, Madras Estates Land Act, against the defendants therein, who are ryots of Sunki village, to recover rent due for faslis 1332 to 1334. The defendants denied the plaintiff's right to rent, and alleged that there was no relation of landlord and tenant existing between the parties, that the lands belonged to some mokhasadars of Sunki to whom they

have been paying rent. They further pleaded that the suit kadapa was not valid and binding on the defendants. The trial Court found against the contentions of the defendants and decreed the suits in plaintiff's favour. The defendants preferred appeals to the Court of the Agent to the Governor, Vizagapatam. The learned Agent to the Governor, Vizagapatam, dismissed the appeals on the preliminary ground that the appeals were filed after the expiry of 30 days prescribed by S. 191, Madras Estates Land Act. He held that the time allowed for preferring an appeal under the Estates Land Act was 30 days, and not six weeks as provided for by R. 56, Vizagapatam Agency Rules. The defendants have preferred these second appeals.

The learned advocate for the appellants argued that the special period of limitation prescribed by the Agency Rules, which are in force in the Scheduled Districts, governs the case, and not the general period of limitation prescribed by S. 191, Estates Land Act, which he submitted, is the general law regulating the relationship between the landlord and tenant in the Presidency. He submitted that regard should be had to the well-known maxim of law that the general law must give way to the special law applicable, and he contended that having regard to the local conditions (of which difficulty of communication is one), the Agency Rules have prescribed a special period of limitation for appeals to be preferred in the Agency Tracts to the Government Agent. The learned advocates are agreed that if the period of limitation applicable to those appeals be six weeks, then the appeals were not barred by limitation, but that if the period of limitation be only 30 days, then the appeals were barred.

During the argument, the learned advocate for the respondent contended that under S. 6, Scheduled Districts Act (14 of 1874), the Local Government may from time to time regulate the procedure of the officers appointed under the Act to administer civil and criminal justice, etc.,

"but not so as to restrict the operation of any enactment for the time being in force in any of the said districts."

He argued that R. 56, Vizagapatam Agency Rules, prescribing six weeks for appeals, if taken to be applicable to appeals, under the Estates Land Act, would restrict the operation of the Estates Land Act which is in force in the Scheduled Districts, and as such, would be ultra vires.

I am unable to agree with that contention. The Local Government has got power under Act 14 of 1874 to regulate "the procedure" of the officers appointed under that Act: Statute of Limitation is part of law of "procedure." This proposition was, in fact, not contested before us, and it is only necessary to quote the following passage from the judgment of the Privy Council in the case reported in *Ruckmabaye* v. *Lallubay Mottichand* (1) at p. 265. The Privy Council observed:

"In truth, it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomination, is a law relating to procedure having reference only to the lex fori."

Therefore, the Local Government has got power to provide periods of limitation applicable to various proceedings before such officers. The real question, therefore, is whether R. 56, Vizagapatam Agency Rules, "restricts the operation" of the Madras Estates Land Act. As far as I could see, the "operation" of the Act could be restricted either with reference to particular classes of people, or with reference to any local area, or with reference to the time from which the Act is to have operation. If the rule in question does not restrict the operation of the Act in any of those, or similar, respects, I think it should be taken that the rule does not "restrict the operation" of any enactment, within the meaning of S. 6 of the Act. It may, of course, be said that any rule in any way (to however slight a degree) varying the substantial or the adjectival law contained in the Estates Land Act "restrict" the Act, in one sense; but I do not think that that is the meaning to be attached to the expression "restrict the operation of any enactment" occurring in the section.

The learned advocates who argued the case were able to trace a similar rule, prescribing six weeks for appeal from the year 1840; it is well known that even now as regards facilities of

(1) [1854] 5 M. I. A. 234=8 Moore P. C. 4=1 Sar. 423 (P.C.).

communication, people in the Agency Tracts work under a very great disadvantage when compared with the people of other parts of the Presidency in general. One can therefore well understand why a comparatively long period of six weeks was fixed, as the period of filing appeals by R. 56, though in the other parts of the Presidency the period for preferring appeals has been for many years only 30 days, and is so even at present.

On the whole I have come to the conclusion that the rule in question is not ultra vires.

As regards the further question, I have no doubt that the Estates Land Act which applies to the whole of the Presidency should, in this respect, when considered in connexion with the Agency Rules, be taken as a general law, whereas the Agency Rules should be taken as a special law, applicable to the Agency Tracts. The Agency Rules have been framed to provide for the exceptional circumstances existing in that part of the Presidency. If the rules be not ultra vires, I think it is clear from them that the legislature considered the special case of the Agency Tracts, and provided a special period of limitation in respect of appeals to be presented to the Agent to the Governor. The maxim that the special rule must be applied in preference to the general rule should, in my opinion, govern the present case. Various passages from Maxwell on "Interpretation of Statutes," Beal on "Cardinal Rules of Legal Interpretation" and Craies on "Statute Law" were quoted before us. I do not think it necessary to refer to them in detail. At page 470 of Beal's book, the rule is considered with reference to "prior general and subsequent special statutes." It is there stated

"where there are provisions in a special statute which are clearly inconsistent with the provisions of a prior general statute, the provisions of the general statute must yield to those of the special statute. If the special statute gives in itself a complete rule on the subject, the expression of that rule will undoubtedly amount to an exception of the subject matter of the rule out of the general Act."

Various authorities are quoted in support of the proposition, at pages 470 and 471.

As in my opinion Agency Rule 56 is not ultra vires, I would allow these appeals reverse the decrees of the appellate Court and remand the appeals to the lower appellate Court for fresh disposal according to law. Costs here and in the lower appellate Court will abide the result. Court-fee paid on the second appeal memorandum will be refunded to the appellants.

Curgenven, J.—I regret that I find myself in disagreement with my learned brother as to the meaning to be attached to the words "so as to restrict the operation of any enactment" occurring in Cl. (b), S. 6 of the Schedule District Act.

Section 5 empowers the Local Government to extend to any of the Scheduled Districts, or any part of any such district, any enactment which is in force in any part of British India, at the date of such extension. S. 5-A provides that, in so extending an enactment to a Scheduled District or part thereof, the Local Government may declare the operation of the enactment to be "subject to such restrictions and modifications" as it thinks fit.

In construing the words "restrict the operation" in S. 6 we may I think consider what meaning should be attached to the grammatical variant of the same phrase occurring in the next preceding section, "the operation to be subject to such restrictions." Does it mean, or mean only, that the Local Government may restrict the operation of the enactment as a whole to a particular area, or a particular class or a particular time? Clearly not to a particular area, because the section elsewhere provides for this by permitting the enactment to be extended to a Scheduled District "or part thereof." The extension of an enactment to a particular class, where, but for such a restriction, it would apply more generally, would be so rarely called for that I cannot believe that the legislature had in view any such object in drafting the section; nor do I think, if the Act intended to confer upon the Local Government power to withdraw an enactment once extended, it would not have conferred it in more express terms. Let us then see what powers it was clearly expedient to give to the Local Government in extending an enactment to an area hitherto not

"brought within ..... the operation of the general Acts and the jurisdiction of the ordinary Courts of judicature."

Among those powers it was surely advisable to include: (a) a power to exelude certain provisions of the enactment; and (b) a power to substitute for any provision a provision deemed more appropriate to the circumstances prevailing in the area. It appears to me that these two classes of powers are intended to be conferred when it is said that the

"Local Government may declare the operation of the enactment to be subject to such restrictions and modifications as that Government thinks fit."

Deny to the word "restrictions" the meaning I seek to attach to it and it becomes very doubtful whether the Local Government by force merely of the word "modifications" would be competent to omit without replacement any provision of an enactment which it was extending.

Turning now to the meaning of the same phrase in S. 6, we must I think endeavour to give it a construction if possible in keeping with the circumstances likely to arise and therefore in contemplation when the section was framed. Of the two meanings which the phrase may bear should we choose that which would proivde that by a regulation of procedure the Local Government may not withdraw the operation of the enactment from any area or class, or limit it to any period ; or should we adopt the alternative construction which forbids the Government to override a statutory provision by prescribing a rule of procedure? I cannot myself easily conceive of any circumstances in which a Local Government might be tempted to secure a result of the former sort by a regulation of procedure, nor do I think that any such misuse of rule-making power can have been in contemplation when the section was framed. On the other hand, in arranging to provide the Scheduled Districts with a body of law and of rules having the force of law, and, for the latter part of that purpose, in investing the Local Government with power to make rules, one would expect to find included in the enabling Act an interdiction against any rule that would conflict with the terms of, and thereby restrict the operation of, any enactment.

In the present case the conflict has arisen with regard to two rules of limitation : one laid down by statute, the other prescribed by rule. Something has been said before us as to the superior appropriateness of the period fixed by the latter means to the special conditions of the Agency Tracts ; but the answer may perhaps be that it was open to the Local Government by virtue of S. 5-A to exclude statutory provisions relating to limitation if it wished to apply a six weeks' rule to all cases.

My view accordingly is that the rule of limitation contained in R. 56 of the Agency Rules would, if applied to the appeals before us, offend against the terms of S. 191, Madras Estates Land Act, and, if deemed to prevail over that section, would pro tanto "restrict the operation of the Act." It is therefore ultra vires. I would therefore confirm the decrees of the lower appellate Court and dismiss the second appeals with costs.

Result.—As we are divided in opinion as to the decision to be given on the question

"whether the period of limitation applicable to appeals preferred to the Agent to the Governor of Vizagapatam from decrees passed by Special Assistant Agent (Vizagapatam Agency) in suits for rent instituted under S. 77, Estates Land Act, is six weeks as provided for by R. 56, Vizagapatam Agency Rules, or 30 days as provided for by S. 191, Madras Estates Land Act,"

the matter will be placed before the learned Chief Justice so that the case may be heard by one or more of the other Judges of this Court as his Lordship may direct.

(The case was then put up before a third Judge who gave the following judgment).

Ramesam, J.—These second appeals have been referred to me by my Lord the Chief Justice on account of difference of opinion between my brothers Anantakrishna Ayyar and Curgenven, JJ., who first heard them. They are filed under the Agency Rules applying to the Scheduled Districts.

The Zamindar of Pachipenta filed suits for rents under S. 77, Madras Estates Land Act, against his ryots and they were decreed by the Assistant Agent. The ryots filed appeals to the Agent to the Governor at Vizagapatam. These appeals were filed more than 30 days

but within six weeks after the decrees. The time prescribed for appealing against a decree for rent to the District Collector is 30 days under S. 191, Madras Estates Land Act, and six weeks under R. 56 of the Agency Rules. The Collector dismissed the appeals on the ground that they were barred by limitation applying S. 191, Madras Estates Land Act. The ryots filed these second appeals against those decrees. The question is, which rule ought to be applied.

The first point argued by the learned advocate for the respondent is that R. 56 of the Agency Rules does not apply at all to appeals under the Estates Land Act, and only S. 191 of the Act applies, and there is no question of conflict between the two sections. This argument does not seem to have been addressed before the learned Judges, or at any rate, if it was, they apparently have not agreed with this contention. The contention is based on the fact that R. 1 defines the power of the agents and Assistant Agents followed by the heading "Civil Justice," which is the heading of the rules from R. 2 onwards. The learned advocate contends that "Civil Justice" excludes judicial matters in revenue Courts, that is, he takes the words "Civil Justice" in a narrow sense, namely administration of justice before ordinary civil Courts of the land, such as the District Munsif, Subordinate Judge, District Judge and the High Court and Courts corresponding to them. But of course, the word "civil" has two senses, the narrow sense contended for by the advocate and a large sense, that is, as opposed to criminal only.

In the Agency Rules of 1860 which were superseded by the present Agency Rules which were passed in 1924, the first six rules related to criminal justice and from R. 7 onwards they related to civil justice including revenue Courts : vide R. 10. When the Criminal Procedure Code of 1862 was passed the first six rules were repealed as the Code applied to the agency tracts. But the rules from R. 7 onwards remained in force up to 1924 when they were superseded by the present rule ; and a perusal of the present rules shows that they are based on the former rules from R. 7 onwards. This comparison leads one to the view that the heading "Civil Justice" is used in the larger sense. But the same conclusion can be reached without an examination of the former Agency Rules. R. 1, sub-Cl. (2) says that the Agent to the Governor will have the same powers as are vested in the Districts and revenue Courts in the ordinary districts and the Agency Divisional Officers will have the same powers as the Subordinate and revenue Courts, for the trial and determination of suits. That means that for revenue suits also, the Agents and the Agency Divisional Officers were constituted Courts under whatever enactment the revenue litigation may arise. This paragraph is not confined to the Estates Land Act. Then the section says that these powers are vested : "subject to the modifications contained in these rules,"

that is, the powers conferred upon the District, Subordinate and revenue Courts under the enactment under which the litigation may arise are conferred upon the Agents and Agency Divisional Officers, but subject to the modifications contained in the Agency Rules, that is, rules from R. 2 onwards to the end. By the express language of these rules therefore Rr. 2 to 56 apply to the agents and Agency Divisional Officers exercising the powers of revenue Courts. Whether this provision is valid or is ultra vires is of course another matter. But on the face of the rules, R. 56 applies to the revenue Courts.

The next question is whether R. 56 prevails over or otherwise stands in the place of S. 191, Estates Land Act ; and this question was considered by the learned Judges who first heard the second appeals from the point of view whether the rule is ultra vires. Before I address myself to this point of view, I wish to approach the question from another point of view, namely, that perhaps such a question, viz. whether R. 56 is ultra vires does not arise at all. For this purpose I proceed to refer to the old Agency Rules which were passed in 1860. In 1898 there was a notification of the Government extending the Rent Recovery Act (the Act repealed by the Madras Estates Land Act) to the Agency tracts. But under that Act there were no suits for rent but suits to cancel distraints lay before a Collector and appeals against the decrees of the Collector lay to the District Collector, in lieu

of whom we have got the Agent to the Governor in the Agency Tracts. The question might have arisen whether the time for the appeal is the 30 days provided in the Rent Recovery Act or the six weeks provided by the then Agency Rules. I am not aware of any case in which the point has actually arisen and to discuss it now is unnecessary. Matters continued like this up to 1908 when the Rent Recovery Act was repealed and the Estates Land Act was passed, and it applied also to the Agency tracts. S. 208 of that Act contains a provision somewhat similar to R. 1, sub-Cl. (2) of the present Agency Rules, that is, the Agent would be the District Collector or the District Judge and the Agency Divisional Officer would be the Collector for the purpose of the Estates Land Act. Under R. 16 of the old Agency Rules, the time allowed for an appeal to the Agent was six weeks. I now proceed to discuss the question whether in 1908 when the Estates Land Act was passed, S. 191, Estates Land Act, superseded R. 16 of the old Agency Rules for the purpose of appeals to the Agent under that Act or whether R. 16 continued to be in force unaffected by S. 191.

At first sight it may appear as if it is the same question as to the question whether R. 56 of the present Agency Rules should prevail over S. 191, Estates Land Act. But it is not the same question. In 1908, when the Estates Land Act was passed, it came after the Agency Rules. In 1924, when the new Agency Rules were made, they came after the Estates Land Act, and from the point of view of the question whether the Agency Rules are ultra vires this makes a considerable difference. So it is not the same question ; and as, if it can be answered in a particular way with reference to the old Agency Rules, the other question does not arise at all, I proceed to discuss it.

Both R. 16 and S. 191 have got statutory force. One is an actual section of an Act and the other is a rule passed under statutory powers. The general rule is the later statute repeals the earlier statute if both are equally general. But this rule is subject to an exception that, if the later Act is a general Act, but the earlier Act is a special Act, the earlier Act is generally not repealed by the later Act : vide Craies on Statute Law, p. 316, citing *Seward* v. *Vera Cruz* (2). In the present case, undoubtedly from one point of view, the Agency Rules are special and the Estates Land Act is general. The Agency Rules apply only to a small area, Ganjam, Vizagapatam and Godaveri, i.e., they are similar to a Local Act, whereas the Estates Land Act applies to the whole Presidency. But it is suggested by the learned Advocate for the respondent that the Estates Land Act is special and the Agency Rules are general from another point of view, that is, the Estates Land Act relates to the relationship between the landlords and the tenants, but the Agency Rules do not relate to any particular class of suits, but generally to all suits within the Agency Tracts of whatever nature they may be. In this sense, no doubt, the Agency Rules are general and the Estates Land Act is special. But in this sense, unless all the statute law of a country is contained only in one Code, most Acts are special even if they refer to a very large area ; for instance, the Contract Act, the Specific Relief Act and the Transfer of Property Act, though they apply to the whole of India, are all special Acts because they relate only to certain branches of the law of the country.

The question then arises, when there is a conflict between two such special Acts each of which may be described as special in some particular sense, how far the later Act should prevail over the earlier Act. In such cases, it would seem that the rule is that the Court should lean against repeal of the earlier Act by implication and, unless it is absolutely clear that the operation of the first Act has to be curtailed by the later Act, the previous Act should be held to continue in force, even though the later Act may be regarded as special in some other sense. Illustrations of this are afforded by the decisions cited by the learned advocate for the respondent. For instance, in *Seward* v. *Vera Cruz* (2), first we had Lord Campbell's Act relating to claims for damages for loss of life by reason of a tort, and later on the Admiralty Court Act of 1861 was passed giving jurisdic-

(2) [1885] 10 A. C. 59=33 W. R. 477=52 L. T. 474=54 L. J. P. 9=5 A. S. P. M. C. 386=49 J. P. 324.

tion over any claim for damages done by any ship. In this case it may be said that each Act is a special Act from one point of view, but general from the other point of view. It was held that the jurisdiction under Lord Campbell's Act was not affected and the Admiralty Court Act had no jurisdiction under the second Act. At p. 68 Lord Selborne says :

"Now if anything be certain it is this ; that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

And he refers to the case of *Hawkins* v. *Gathercole* (3). I may observe that he starts by saying : "Where there are general words in a later Act." He does not refer to the nature of the later Act, general or special. As I will presently show, though the Estates Land Act may be regarded as a special Act from one point of view, the provision in S. 191 providing thirty days for first appeals is really a very general provision and not in the nature of a special provision. In *Kutner* v. *Phillips* (4), first we had the City of London Court Act giving jurisdiction over defendants who had employment within the city, though they did not dwell or carry on business there; and then came the County Courts Act, 1888. It was held that the first Act was unaffected by the second one. In *In re Smith's Estate Clements* v. *Ward* (5), an earlier Act 43, Geo. 3, giving power to all persons to settle or devise lands or goods for any church, provided it was three months before death, was held not to be affected by the Married Women's Property Act, 1882, which gave absolute power to married women to dispose of property by will. Here the later Act is a special Act in the sense that it applied to married women and not to all persons, but the first Act is special in the sense that it dealt with property given to church, whereas the Married Women's Property Act dealt with all kinds of settlements and devises. The general principle of a special Act not being repealed by a later Act was recognized by the Privy Council in a case from India in *Unnoda Persaud* v. *Kristo Coomar* (6). There their Lordships held that the rule of limitation under the Bengal Tenancy Act 10 of 1859, was not affected by the rule of limitation in Act 14 of 1859 which is a general limitation Act. Now in that case, the first Act of course was a special Act as it related to the relation between the landholders and tenants in the Bengal Presidency but from another point of view it may be said that the second Act is also a special Act because it relates only to one particular question of procedure, viz. limitation of action and does not deal with any substantial rights whereas the earlier Bengal Tenancy Act deals not only with a question of procedure but with questions of substantial rights also relating to landlords and tenants. But from the point of view of the area to which the Act applied, undoubtedly the first was special and the second was not. Their Lordships after relying on the general rule as laid down in *Fitzgerald* v. *Champneys* (7), refer with approval to the Full Bench decision in *Poulson* v. *Madhusudan Pal Choudhury* (8). In that case the learned Judges laid stress on the fact that the earlier Act was an Act applying to a smaller area and the later Act applied to a larger area. In *Thorpe* v. *Adams* (9) Willes, J. said :

"The good sense of the law as laid down by my Lord is quite obvious because, if a bill had been brought into Parliament to repeal the local Act, it never would have been allowed to pass into a law etc. . . . Where as, a general provision in a public Act is discussed with reference to general policy."

Thus it looks as if speciality in respect of locality is given greater importance rather than speciality in respect of the subject-matter, otherwise it would be impossible to compare the degree of speciality. *Khan Gul* v. *Lakka Singh* (10) discusses a question of conflict

(3) [1855] 6 D. C. G. M. & G. 1=3 E. Q. R. 348=3 W. R. 194=24 L. J. Ch. 332=1 Jur (n. s.) 481.
(4) [1891] 2 Q. B. D. 267=64 L. T. 628=56 J. P. 54=39 W. R. 526=60 L. J. Q. B. 505.
(5) [1887] 35 Ch. D. 589=56 L. T. 850=51 J. P. 692=35 W.R. 514=56 L. J. Ch. 726.
(6) 15 B. L. R. 60n=19 W. R. 5 (P. C.).
(7) [1861] 30 L. J. Ch. 777=9 W. R. 850=5 L. T. 233=7 Jur. (n. s.) 1006.
(8) B. L. R. Sup. Vol. 101=2 W. R. 21 (F. B.).
(9) [1871] 6 C. P. 125=40 L. J. M. C. 52=19 W. R, 352=23 L. T. 810.
(10) A. I. R. 1928 Lah. 609=111 I. C. 175=9 Lah. 701 (F. B.).

between the Contract Act and the Evidence Act with reference to applying the rule of estoppel against a minor and it was said that that construction which avoids repugnancy and if possible gives effect to both enactments should be adopted. It seems to me therefore that S. 191, Estates Land Act, unless it expressly says so, ought not to be held to have affected R. 16 of the old Agency Rules. The same matter may also be put in another way. The 30 days rule of limitation in S. 191 is not a special provision. It is really a general provision. That is the rule under the Limitation Act for all first appeals, and the whole of the Limitation Act was adopted in the Estates Land Act except a few sections with which we are not concerned: vide S. 211.

Cl. (2), S. 211 brought in the whole part of the Limitation Act relating to appeals. So it looks as if the Estates Land Act has adopted wholesale the general provisions of the Limitation Act. But because the article relating to appeals apply only to appeals under the Civil Procedure Code and therefore these articles in terms will not apply to some appeals under the Estates Land Act because there is a change of Courts, it enacted S. 191 so as to make the 30 days rule applicable also to appeals from Collectors to District Collectors as well as to District Judges. So that we have a very general provision simply adopted and repeated for the purpose of the Estates Land Act and not a special provision modifying a general provision being specially adopted in a special law. So that even if the Estates Land Act is regarded as a special law, what we have is the general provision for first appeals adopted and repeated in it and not specially modified for its purposes. So that when we look at the specific provision now under discussion the Estates Land Act contains a general provision, whereas the Agency Rules contain special provisions for the tract or area to which they apply. From this point of view also I hold that S. 191 did not affect R. 16 of the old Agency Rules. So that from 1908 up to 1924, S. 191, Estates Land Act, never applied to the Agency Tracts and R. 16 continued to be in force that is, six weeks was the period for first appeals to the Agent. Now in 1924 the new Agency Rules were promulgated. They are merely rules consolidating and repeating the old rules in the Agency tracts. S. 191 never having been in force in the Agency Tracts, the notification issuing the Agency Rules did not seek to restrict the Estates Land Act as it had been prevailing in the Agency Tracts. From this point of view the question discussed by the learned Judges, viz. whether R. 56 of the Agency Rules is ultra vires of the Madras Government, because of S. 6 (b), Scheduled Districts Act, does not arise, and I hold that R. 56 is the only rule that applies to appeals.

Assuming I am wrong in the above conclusion, I have to discuss the question on the footing that S. 191 applied to the Agency Tracts up to 1924. The question will then arise whether the new Agency Rules are ultra vires or not. Anantakrishna Ayyar, J., held that they are not, because R. 56 is not a rule restricting the operation of the Estates Land Act. Curgenven, J., held to the contrary. The phrase "subject to such restrictions and modifications" occurs in S. 5 (a), Scheduled Districts Act. The suggestion of Anantakrishna Ayyar, J., is that the word "restriction" occurring in S. 5 (a) and 6 is properly applicable, to restriction in relation to areas or classes of persons and things of that kind. With reference to this suggestion Curgenven, J., observed that it could not mean restriction as to area because

> "the section (the learned Judge meant the Act) elsewhere provides for this by permitting the enactment to be extended to a Scheduled District or part thereof."

He repeats the same idea lower down where he says :

> "Let us then see what powers it was clearly expedient to give to the Local Government in extending an enactment to an area not hitherto brought within the operation of the general Acts and Regulations."

Section 5 refers to the extension to the Scheduled District or part thereof, an enactment which up to the extension did not apply to the Scheduled Districts. But where we are dealing with an Act, which from the inception applied to the Agency Tracts and it is desired to limit the operation of the Act to a particular area, S. 5 has nothing

to do with such a case; and such limitation to one area and the omission of another area cannot be done under S. 5. The power to do so must be conferred or refused by some other section. But the legislature thought it fit not to confer such power on the Local Government to make such restrictions and the word "restriction" in S. 6 is necessary to cover the case of an area. I therefore do not agree with the reason given by my brother Curgenven, J., that restriction in S. 6 cannct apply to area.

Then again, as to whether the restriction may refer to a particular class, Curgenven J. observes that such a thing would be rarely called for. This is true. But that such a thing may be called for in the Agency Tracts is clear from R. 9 of the old rules relating to the Zamindars, Bissoyees and other feudal chiefs, and R. 10 referring to succession of Hill Zamindars. He then points out that the restriction was intended fcr the case of a power to exclude certain provision in an enactment. I agree that the restriction may include such cases. But I do not agree that it is confined to this particular class. It may include also the cases of area and persons. No doubt the word "modification" will not cover a case where it is intended to modify certain provisions of an enactment and the word "restriction" would be necessary. But where it is a question of substituting one provision by another provision which would be more appropriate certainly the word "modification" will do. Curgenven, J., seems to be of that opinion in the particular paragraph where he deals with the question. But if so, R. 56, on the footing that it is sought to change the period in S. 191, Estates Land Act, is really a provision substituting one period namely six weeks which was thought to be more proper for another period and thereforea modification. After all, some meaning must be given to tho word "modification" whch is mentioned in S. 5-A but omitted in S. 6. I am of opinion that the particular case with whice we are dealing is a case of modification and not restriction. If the whole section is omitted one would perhaps say that it was restriction; but where it was a case of not omitting a section but substituting something for some other thing in it, I am of opinion that it is a modification. I therefore think that even from the second point of view R. 56, Agency Rules, is not ultra vires. I therefore hold that R. 56 applied to the appeals before the Agent and they were not out of time. I therefore reverse the judgment of the lower Court and remand the appeals to be disposed of according to law. The respondent will pay the costs of S. A. No. 2107 to the appellant. No order as costs in the other second appeals. The court-fees in all the second appeals will be refunded.

I may add that, if it were necessary, I would excuse the delay committed by the appellants before the Agents' Court under S. 4, Limitation Act which certainly to the Estates Land Act. But of course it is desirable to decide the point as excusing delay may not be available hereafter.

R.M./R.K. *Appeal remanded.*

A. I. R. 1930 Madras 971

PANDALAI, J.

Union Board, Ayyampet—Complainant—Petitioner.

v.

Ramachandra Aiyar—Accused—Respondent.

Criminal Revn. No. 996 of 1929, and Criminal Revn. Petn. No. 899 of 1929, Decided on 27th March 1930, from judgment of First Class Sub-Divl. Mag., Mayavaram, D/- 26th July 1929, in Criminal Appeal No. 24 of 1929.

Madras Local Boards Act (1920), S. 159—Occupier of premises failing to remove encroachment though notice given — He found guilty but acquitted in appeal because he was tried on same facts in previous case—Previous case brought by District Board—He being acquitted in that case because encroachment was within Union Board's and not District Board's jurisdiction—Present case was not upon same facts and so acquittal was wrong—Criminal P. C. S. 403.

An occupier of premises within the jurisdiction of Union Board failed to remove encroachment of which notice was given to him. He was found guilty but on appeal he was acquitted on the ground that in a previous trial he was tried upon the same facts. The previous case was brought by the District Board in which the accused was acquitted because the encroachment was within jurisdiction of the Union Board and not of the District Board.

Held: that the present case was not upon the same facts as the previous one and so the acquittal was wrong. [P 972 C 1]

K. P. Ramakrishna Ayyar—for Petitioner.

V. Viswanatha Sastry and *Parkat Govinda Menon* for *Public Prosecutor*—for Respondent.

Order.—This is a revision petition against an acquittal and the petitioner is the President of the Union Board, Ayyampet. The charge was against the occupier of premises within the jurisdiction of the Union Board that he failed to remove an encroachment of which notice was given to him under S. 159, Madras Local Boards Act. There appears to be no doubt that the alleged encroachment was an encroachment. The Stationary Sub-Magistrate of Papanasam found the accused guilty and sentenced him to pay a fine of Rs. 10. But in appeal the Sub-Divisional Magistrate of Mayavaram set aside that conviction and acquitted the accused on the ground that he had been tried for the same offence upon the same facts in a previous trial, namely, in C. C. No. 174 of 1927. What happened in C. C. No. 174 of 1927 was that the District Board of Tanjore brought a case against this accused for failing to remove the same encroachment after notice to remove it was given by the District Board. In answer to that charge the accused pleaded that the road was within the jurisdiction of the Ayyampet Union Board and that therefore the District Board was not the authority to cause removal. This was accepted and the accused was acquitted. After that acquittal the Union Board sent a fresh notice under S. 159 (1) to the accused to remove the encroachment, and it was for failure to do so that this case was brought. The present case was not upon the same facts as C. C. No. 174 of 1927 and the acquittal was therefore wrong. I have now to decide whether it is worth while ordering a retrial of this accused for this offence. I do not think it is necessary in the interests of the Union Board or of public justice that there should be a retrial of this particular accused for this particular offence. He is only a tenant of the premises. The owner of the premises has, it appears, addressed the Union Board accepting responsibility for the encroachment, and it will be quite enough for the Union Board, if they are so advised, to take steps if necessary against the owner. With these remarks the petition is dismissed.

P.R.S./S.N. *Revision dismissed.*

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* A. I. R. 1930 Madras 972

WALLACE AND ANANTAKRISHNA AYYAR, JJ.

Kolanda Nayakan—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 134 of 1930, Decided on 8th April 1930, from judgment of Sess. Judge, Coimbatore, in Sessions Trial No. 4 of 1930.

(a) Penal Code (1860), S. 302—Murder.

A person who inflicts on the deceased fatal wounds with a knife intends nothing short of inflicting death and so the offence in the absence of extenuating circumstances, is murder. [P 973 C 1]

*** (b) Penal Code (1860), S. 302—Where murder by juvenile is not wholly deliberate and cold-blooded, and there is certain amount of legitimate provocation, capital sentence may not be appropriate.**

In cases where the murder has been deliberately planned and is essentially of a cold-blooded and contemptible nature, the death sentence is appropriate whatever be the age of the accused, provided his case does not come under S. 22, Madras Children Act 4 of 1920. But where the murder by a juvenile cannot be said to be wholly deliberate and cold-blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance, the capital sentence might in certain cases not be the appropriate one.

[P 973 C 1, 2]

V. L. Ethiraj and *N. Somasundaram*—for Appellant.

Public Prosecutor—for the Crown.

Judgment.—The accused has been convicted by the learned Sessions Judge of Coimbatore of the offence of murder and sentenced to death. The charge against him was that at about 11 o'clock on 20th October last he stabbed one Abdur Muthu in the streets of Tiruppur and inflicted upon him seven incised wounds three of which were fatal. The man after running for some distance collapsed and died practically on the spot. The eyewitnesses to the attack are P. Ws. 2, 3, 4, 5 and 12. That it was the accused who so attacked the deceased has not been seriously disputed by the learned counsel for the accused, although he would suggest that the series of blows occurred in quicker succession than the eyewitnesses would

say, and perhaps it may be allowed that on the medical evidence it is a little difficult to imagine how the deceased was able to run about 180 yards after receiving the blows which the medical certificate describes and it may be that the attack was something more rapid and not quite so deliberate as the eye-witnesses would make out. The offence prima facie is clearly murder. There can be no doubt that the person who inflicted with a knife such fatal wounds on the deceased certainly intended nothing short of inflicting death. We cannot find any extenuating circumstances which would bring the offence to anything less than murder. There is no question of self defence raised nor is there any such case appearing in the prosecution evidence. It had been suggested that the accused had a certain amount of provocation, but the only provocation that has been spoken of by prosecution witnesses occurred a couple of hours earlier than the offence and cannot therefore easily be described as grave and sudden. The only defence put forward by the accused is that the case is a false one and has been got up by his enemies. But there is really no motive elicited why the eyewitnesses should lend themselves to a false case against the accused. There can be no doubt that the learned Sessions Judge is correct in convicting the accused of the offence of murder and the only question which remains is whether the capital sentence in the circumstances was an appropriate one.

The accused is stated to be aged about 15. Both the committing Court and the Sessions Judge say that he looks more; that he looks about 18; so far as the records show it may be taken that he is about 15 years of age, but his age has not been definitely determined. A plea has been put forward that in the case of a youth the capital sentence is inappropriate. To the proposition put thus broadly we cannot assent. Beyond the provisions of Ss.82 and 83, the Penal Code does not say anything about there being any age limit for the capital sentence; and in cases where the murder has been deliberately planned and is essentially of a cold-blooded and contemptible nature we think that usually whatever the age of the accused might be, provided his case does not come under S. 22, Madras Children Act 4 of 1920, the death sentence would be the appropriate one.

This Court has, for example, in cases where the accused had been convicted of decoying away children and cutting their throats, or drowning them, or putting them away, in order to possess themselves of a few rupees worth of jewels, held that, in spite of the murderers being youths (about 18 years old) the capital sentence would be the only appropriate sentence. But where the murder cannot be said to be wholly deliberate and cold-blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance, we think that the capital sentence might in certain cases not be the appropriate one. In the present case, apart from the question whether accused is entitled to the benefit of the provisions of S. 22, Madras Children Act, we have evidence that, within about a couple of hours before the occurrence the accused and the deceased had been quarrelling, and that the deceased, who is described by the prosecution witnesses themselves as a bully and the terror of the village, had assaulted this boy and had given him several blows; about two hours later the accused retaliated by stabbing the deceased in the manner described. There is therefore in the present case this amount of recent provocation which justifies us as in describing the murder as not deliberately cold-blooded and inherently vicious. In these circumstances we think that the adequate sentence will be the lesser sentence of transportation for life. We therefore reduce the capital sentence to one of transportation for life.

P.R.S./S.N. *Sentence reduced.*

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* A. I. R. 1930 Madras 973

PANDALAI, J.

Rudraraju Ramaraju — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 57 of 1930 and Criminal Revn. Petn. No. 54 of 1930, Decided on 18th July 1930, from judgment of Joint and First Class Magistrate, Narasapur, in Criminal Appeal No. 59 of 1929.

* Penal Code (1860), S. 425—**Owner of land throwing earth upon land used for passage by others—Use becoming impossible—It does not amount to mischief.**

If the owner of land over which another or a body of others have a right either of passage or other use throws earth upon that land so that the use becomes either disadvantageous or impossible that does not amount to mischief within S. 425: 8 *Bom.* 295, *Rel.on.* [P 974 C 2]

V. Govindarajachari—for Petitioner.

N. S. Mani for *Ag. Public Prosecutor*—for the Crown.

Order.—The petitioner has been convicted of the offence of mischief and sentenced to pay a fine of Rs. 30. The mischief complained of was that he dumped a hundred cartloads of earth upon a portion of survey No. 113 in the zamindari village of Kalagumpudi which is included in the Peddamamidipalli estate. The prosecution was launched by the Revenue Inspector upon the footing that the survey number on which the earth was dumped was Government land, that the said land was used as a thoroughfare and that the dumping of earth upon it had diminished its utility as a thoroughfare. But by the evidence given by the accused it was clearly shown that the land was not Government land and it is not now disputed that it is part of a zamindari of which the proprietor is D.W. 1. But the Courts below have held that even so the land is what is called a 'puntha' (a thoroughfare for men and cattle), and that the unauthorized dumping of earth upon it amounts to mischief and therefore the petitioner is guilty. There can be no doubt and it is not denied that the petitioner dumped some earth upon some portion of this survey number. The portion so covered now by earth is said to be 26 cents in extent, but that it is only some portion of the survey number is also clear because the 'puntha' is described by the Revenue Inspector as 80 links broad in some places and in others 100 links broad. There is no plan in the case and nothing from which I am able to say what portion of the entire area has been covered by the earth newly thrown upon it, nor in what way the act of the accused has interfered with the use of the land, if it was so used, as a thoroughfare by men and cattle of the village of Kalagampudi. The proprietor denies that the land is a 'puntha' at all. But there are some revenue accounts in which the land is entered as a puntha and the prosecution evidence at its best shows that the survey number is classified in the revenue accounts as a puntha.

The question is, assuming that it is a thoroughfare over which the villagers had a right of user either for passing or for stopping and assuming that the accused's throwing earth upon some portion of it has in some way interfered with the use of that portion in the way in which it had been accustomed to be used, whether those facts which are the utmost that can be said to have been proved by the prosecution amount to the offence of mischief of which the petitioner has been convicted. So far as any consent may make any difference, the proprietor, D.W. 1, says that he has no objection at all to the earth being where it was thrown and therefore the question for decision is the same as if the proprietor had either by himself or others had with his consent thrown the earth where it is. I find it impossible to say that, if the owner of land over which another or a body of others have a right either of passage or other use throws earth upon that land so that the use becomes either disadvantageous or impossible, that amounts to mischief within S. 425, I. P. C. The only direct decision upon the point referred to in the argument is an unreported decision entitled *Keru* (1888) of the Bombay High Court which is referred to in all the commentaries upon the Penal Code, namely, those of Ratanlal, Gour and Nandalal. It was to the effect that, where the accused with intent to cause wrongful loss to the complainant who had a right of way along a flight of steps, caused the destruction of those steps, that act did not amount to mischief for the reason that property under S. 425 means tangible property capable of being forcibly destroyed but does not include an easement. Somewhat to the same effect is the better known decision of the same High Court in *Queen-Empress* v. *Govinda Punja* (1), where it was held that where the owner of an animal buries the carcass after its death, he is not guilty of mischief or any other offence although he does so with the express object of preventing the Mahars of his village from taking its skin according to the custom of the country.

(1) [1884] 8 Bom. 295.

What has happened in this case is that a villager has thrown earth upon a plot of land over which others are said to have a right of use as a thoroughfare. The only value which is diminished or utility which is destroyed is that of the right of thoroughfare because there is nothing to show that the land itself has lost either its value or its utility or is in any way affected injuriously.

I must hold therefore that the act of the accused taken in the best light for the prosecution did not amount to mischief and therefore the conviction was wrong. Whether it amounted to some other offence it is not now necessary to say because the dispute really appears to be between the owner of the land, the zamindar and certain officers of Government who at one time thought that it belonged to Government. The fine, if paid, will be refunded.

P.R.S./S.N. *Conviction set aside.*

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* A. I. R. 1930 Madras 975

PANDALAI, J.

(*Thoomulur*) *Anantapadmanabhiah* — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 516 of 1930 and Crim. Revn. Petn. No. 479 of 1930, Decided on 22nd September 1930, from order of Sub-Divl. Magistrate, Nellore, D/- 26th July 1930, in Misc. Case No. 39 of 1930.

*** (a) Criminal P. C. (1898), S. 112—Scope.**

A Magistrate acting under S. 112 is a Court : 39 *Cal.* 953, *Foll.* [P 976 C 2]

*** (b) Criminal P. C. (1898), Ss. 107, 112 and 548—Person asked to show cause under S. 107 is not entitled to copy of written information by police on which the order is based, as it does not form part of record.**

The record in proceedings under S. 107 is the magisterial record and begins usually with the order under S. 112 except where a Magistrate not empowered under S. 107 wishes to have proceedings taken under it and issues a warrant under Cl. (3), S. 107. The information which leads to action under S. 107 may be of the most varied kind. It may be oral, sworn or not sworn, and need not be in writing. It may be from any source official or unofficial, formal or informal. It may be derived from the Magistrate's own knowledge. He is not bound to disclose the same in respect of the information received. [P 976 C 2]

A person against whom a Magistrate has drawn up an order under S. 112 asking him to show cause why he should not be bound over to keep peace under S. 107 is not therefore entitled to obtain a copy of the written information given by the police on which the order is based, as it does not form part of the record within the meaning of S. 548 : 43 *Mad.* 450; *A. I. R.* 1925 *Mad.* 189 and 20 *Mad.* 189, *Ref.* [P 977 C 1]

C. Rama Rao Saheb for *G. Sivaramakrishna Sastri*—for Petitioner.

N. S. Mani for *Public Prosecutor*—for the Crown.

Order.—The question raised in this case is whether a person against whom a Magistrate has drawn up an order under S. 112, Criminal P. C., asking him to show cause why he should not be bound over to keep the peace under S. 107 is entitled to obtain a copy of the written information given by the police on which the order is based: The Magistrate refused to grant the copy holding that it is not a charge sheet, as the petitioner described it in his application. That it is not a report under S. 173, Criminal P. C., copy of which under Cl. 4 of that section be furnished on application and payment to the accused, is clear enough, because the section is in terms confined to reports made on investigation under Chap. 14 of the Code. But this does not dispose of the matter. S. 548 (leaving out the immaterial words) provides that if any person affected by an order passed by a criminal Court desires to have a copy of. . . . "other part of the record" he shall on applying for such a copy be furnished therewith. The petitioner was clearly affected by the order under S. 112 requiring him to show cause. If the information by the police on which the Magistrate founded his order can be brought within the words "part of the record" he is entitled to a copy. No direct decision on the point has been brought to my notice. But there are observations of more or less indirect application. In *Ranga Reddi* v. *Emperor* (1), where the point for decision was whether and to what extent the order under S. 112 should set out particulars of the information and whether evidence of repute was admissible on a charge under S. 110, Cl. (f), Seshagiri Iyer, J., after pointing out that it is of the utmost importance that the information communicated to the accused under S. 112 should be clear and specific, says at p. 451:

"The accused is to be put on his trial on information received behind his back. In the case of a complaint the accused may be entitled to a copy, if he applied for it, but in the case of an information of this kind, which ex

(1) [1920] 43 Mad. 450=21 Cr. L. J. 354=55 I. C. 722.

necessite is a confidential one, the accused is entitled to be told the nature and extent of the information on which the Magistrate intends to take the action against him."

This passage is cited by Madhavan Nair,J., in *Kutti Goundan, In re*(2) at 692 (of 47 *M. L. J.*) in another similar case where the question for decision was whether the order under S. 112 contained sufficient particulars to enable the accused to prepare for his defence and to summon witnesses on his side before the actual enquiry commences. In both cases the learned Judges assumed that the accused is not entitled to copy of the information to the Magistrate and it may also be pointed out that the insistence on particulars in the order under S. 112 would to a great extent be superfluous if the accused were entitled to obtain copies of the information on which that order is based. At the same time it cannot be denied that in neither case was S. 548 under consideration, nor were the learned Judges considering whether the report of the police on which the order under S. 112 is based is part of the record in which that order is made.

On the other side there are observations of at least three learned Judges in a contrary sense in the well-known Full Bench decision in *Queen Empress* v. *Arumugham* (3). That case was decided in 1896 before the amendment of S. 173 enabled accused persons to get copies of charge sheets under Chap. 14. The question related to copies of police reports under Ss. 157, 168 and 173 of the then Code. Of the four learned Judges who constituted the Court three held that reports under Ss. 157 and 168 were not public documents and consequently the accused were not entitled to copies of them. The Court was equally divided as to reports under S. 173, two Judges holding that they were and the other two that they were not public documents of which the accused could get copies. The two referring Judges at p. 192 say with reference to the argument founded on S. 548 that if an order has been made or a police occurrence report or charge sheet affecting the person accused such as an order for his arrest or for his remand to custody, he is ipso facto entitled to a copy of that document under the express terms of S. 548, Criminal P. C. At p. 206 Benson, J., refers to the argument based on S. 548. He was of opinion that the argument would succeed if the Magistrate making the order is at the time a criminal Court. He rejected the argument as he thought that a Magistrate is not a Court when enquiring into offences which he is not empowered to try. This distinction between Magistrates and Courts is no longer valid after the decision of the Privy Council in *Clarke* v. *Brajendra Kishore Roy Chowdhry* (4), at p. 966 and there can be no doubt that a Magistrate acting under S. 112 is a Court. It would therefore seem that but for this distinction which did not exist, Benson, J., would have upheld the view of the referring Judges as to S. 548. There is however no denying the fact that these were observations, not decisions, and that they were made with respect to police reports made under Chap. 14 and not to police reports or information to a Magistrate with a view to his taking action under Chap. 8.

In this state of authority, I have to decide the point before me on a consideration of the words of S. 548 and such considerations as may be based on the nature of proceedings under S. 107, Criminal P. C. In brief, what is meant by "the record" and when does "the record" begin in proceedings under S. 107? On the best consideration I can give to the matter, I think the record intended is the magisterial record and such record in proceedings under S. 107 begins usually with the order under S. 112, except where a Magistrate not empowered under S. 107 wishes to have proceedings taken under it and issues a warrant under Cl. (3) of that section. The information which leads to action under S. 107 may be of the most varied kind. It may be oral, sworn or not sworn, and need not be in writing. It may be from any source, official or unofficial, formal or informal. It may be derived from the Magistrate's own knowledge. He is not bound to disclose the source or the nature of the information received: *In the matter of the Petition of Mithu Khan* (5). I am

(2) A. I. R. 1925 Mad. 189=86 I. C. 49=26 Cr. L. J. 673.
(3) [1897] 20 Mad. 189=7 M.L.J. 167 (F.B.).
(4) [1912] 39 Cal. 953=13 Cr. L. J. 693=15 I. C. 501=39 I. A. 163 (P.C.).
(5) [1904] 27 All. 172=(1904) A. W. N. 206=1 A. L. J. 685.

therefore of opinion that the information or report of the police in this case was not part of the record within the meaning of S. 548, Criminal P. C., and that the petitioner is not entitled to a copy of it. The petition must be dismissed.

P.R.S /R.M. *Petition dismissed.*

A. I. R. 1930 Madras 977

PANDALAI, J.

Janardhanam —Accused— Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 436 of 1930 and Criminal Revn. Petn. No. 403 of 1930, Decided on 18th July 1930, from judgment of Presy. Magistrate, George Town, in Criminal Case No. 12675 of 1930.

Criminal P. C. (1898), S. 256—Magistrate putting to accused, on same day he was charged, question whether he would further cross-examine prosecution witnesses after recording reasons—There is no illegality.

There is no illegality if a Magistrate puts to the accused on the same day as he was charged the question whether he wants to further cross-examine the prosecution witnesses, provided he records his reasons in writing for doing so. Whether the reasons given are sufficient or not entirely depends upon the circumstances of each case.

A Magistrate put the accused the question on the same day as he was charged and recorded as reason "the accused is undefended."

Held: that what the Magistrate meant by saying the accused was undefended was that he never engaged a pleader and did not appear to want to engage one, and this was sufficient reason for the Magistrate to put the question on the same day: *A. I. R.* 1927 *Mad.* 78, *Expl.* [P 978 C 1]

K. Venkataraghavachariar—for Petitioner.

Order.—This is an application to revise the conviction of the petitioner by the Third Presidency Magistrate for an offence under S. 408, I. P. C., for which he was sentenced to three months' rigorous imprisonment. The ground alleged is that the trial before the Magistrate is vitiated by the illegality that after the charge was framed and the accused had pleaded "not guilty," the question whether he wished to further cross-examine the prosecution witnesses was put to him on the same day and that because the petitioner was undefended this was an illegality which could not be cured.

The facts are that after the prosecution witnesses were examined on 5th June 1930 the accused was charged and he pleaded "not guilty." The Magistrate's record then contains the folfowing:

"He (the accused) wants to further cross-examine the prosecution witnesses. The accused is undefended. I therefore have not adjourned the case to another date to put this question."

The case was accordingly adjourned to a subsequent date on which date the prosecution witnesses were admittedly further cross-examined by the petitioner himself, he not having engaged any lawyer. He called no evidence, and on the evidence before the Court he was convicted and sentenced to three months' rigorous imprisonment.

The learned advocate for the petitioner relies upon a decision of Jackson, J., in *Raju Achari, In re* (1) for his argument that on the above facts the trial was illegal because the question was put to the petitioner whether he wished to further cross-examine the prosecution witnesses on the same day the charge was framed. The decision cited is not an authority for this case. In that case the original papers of which I have called for and examined, a Bench of Honorary Magistrates after framing a charge under Ss. 323 and 114 questioned the accused whether he wished to further cross-examine the prosecution witnesses, and he said "No." He had no vakil. The Bench recorded no reasons for putting the question the same day. Upon these facts the learned Judge held that the trial was vitiated by illegality and that it was one which could not be cured. In that case the Court recorded no reasons whatever for asking an undefended accused whether he wished to further cross-examine the prosecution witnesses on the same day that he was charged, whereas S. 256 explicitly lays down that where the Magistrate wishes to put that question the same day, he must record in writing the reasons for it. The omission to record reasons was thus clearly an illegality. In this case there is no such illegality because the Third Presidency Magistrate was clearly aware of what his duties were under S. 256, and he says that the accused was undefended and that he therefore did not adjourn the case to another date to put the ques-

(1) A. I. R. 1927 Mad. 78=99 I. C. 44=28 Cr. L. J. 12=50 Mad. 740.

tion. But Mr. Venkataraghavachariar says that it is no reason at all. Whether that be a good reason or not, to which I will refer presently, there is no illegality in this case of failure to record reasons, and the decision of Jackson, J., is therefore not applicable. Whether the reason recorded is or is not sufficient, the decision cited does not say, nor could it possibly say, that in no circumstances can the question be put to an undefended accused on the same day as he is charged. On the contrary all that the decision says, and here it is merely carrying out the clear words of the section, is that where the question is put on the same day the Court must record the reason for so doing, and this is so whether the accused has a vakil or has no vakil. All that I understand Jackson, J., to say is that where the accused has a vakil there may usually be less likelihood of his being prejudiced if the question is put on the same day. But he has clearly recognized that even where the accused has no vakil all that is required is that the Magistrate must have a reason for putting the question the same day and also record it. Whether the reason given by the Magistrate in thiscase was itself sufficient or not, that was a matter entirely dependent upon the circumstances.

The Magistrate says that the accused was undefended and therefore it was that he put the question the same day. The meaning of that I consider to be that the man had never engaged a vakil and did not appear to want to do so and it would purely be a waste of time for him, that is the accused, to ask him to come again to answer a question which he was prepared to answer at once without consulting any vakil because he had no intention of engaging one. That this was the case is shown by the fact that the accused did not answer that he did not want to further cross-examine; on the contrary he said that he did want to further cross-examine, and by the fact that, when on the subsequent date the prosecution witnesses appeared again, they were re-cross-examined by the petitioner himself. In these circumstances, I think the Magistrate was perfectly justified in thinking that the petitioner not having a vakil, and not wanting to have one, was a perfectly good reason why the question might, without any prejudice to him, be put the same day. I therefore think that there has been no illegality in the case, and therefore it does not arise to decide whether, if there had been one, it would have been curable. Mr. Venkataraghavachariar urges that in the circumstances of the case the sentence imposed is too severe. The petitioner is a young man. The sum involved is small. He has already been in jail for six weeks. The sentence is reduced to the period already undergone.

P.R.S./S.N. *Sentence reduced.*

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* A. I. R. 1930 Madras 978

PANDALAI, J.

(*Seemakurti*) *Kanakayya*—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 122 of 1930 and Criminal Revn. Petn. No. 114 of 1930, Decided on 12th August 1930.

*** Criminal P. C. (1898), Ss. 222 (2) and 561-A—S. 222 allows large number of separate charges to be tried for purpose of convenience—But separate charges can be framed in respect of separate amounts misappropriated on specific dates.**

Section 222 (2) is an enabling provision which permits what otherwise would be a large number of separate charges to be joined together for the purpose of convenience. Nowhere is it prescribed that separate charges in respect of separate amounts misappropriated shall not be resorted to and that if an accused has misappropriated several sums within a year they all should be added together and made into one gross sum and tried as one charge. [P 980 C 1]

A who was *B's* clerk and sold rice for him was charged with having received Rs. 60 on 10th August 1928 and two other sums on 24th September 1928 and having misappropriated the same without properly bringing them to account and was convicted. A similar complaint was subsequently filed in respect of an amount collected on 14th August 1928. It was contended that *A* having been previously convicted for criminal breach of trust in respect of sums collected on 10th and 24th September 1928 could not again be tried in respect of an amount collected on an intermediate date 14th August 1928.

Held: that the trial was not illegal. The former case against *A* was not for a gross sum misappropriated within two dates but was for misappropriation of specific sums of money received on specific dates and S. 222 (2) did not come into operation. The charge pending against *A* could therefore be heard. [P 1195 C 2]

Held also: that the trial could not be stopped under S. 561-A unless it was shown that there was an abuse of process of the Court: 32 *I. C.* 158, *Dist. A. I. R.* 1929 *Cal.* 457 and 5 *I. C.* 970, *Ref.* [P 980 C 1, 2]

P. V. Rajamannar for *P. Venkataramana Rao*—for Petitioner.

N. S. Mani for *Ag. Public Prosecutor*—for the Crown.

Order.—The only point argued in this petition is that the petitioner against whom charges under Ss. 408 and 477-A have been framed in C. C. 82 of 1929 now pending against him cannot be tried or convicted for those offences because the petitioner was in a previous case filed by the same complainant namely C. C. 84 of 1928 tried and convicted for criminal breach of trust in respect of sums collected within the same period as that covered by the alleged offences in this case.

The facts are as follows: The petiticner was a clerk under the complainant who is a trader in paddy and rice. The duty of the accused was to sell rice, collect the price from his customer and pay the amounts collected to the complainant and keep correct accounts of all receipts. In C. C. 84 of 1928 the petitioner was charged with having received sums of money on two days namely Rs. 60 on 10th August 1928 and two sums of Rs. 16-12-0 and Rs. 54-4-9 on 24th September 1928and misappropriated the same without properly bringing them into account. For this he was tried and convicted in that case.The present complaint which was subsequently filed and and which is pending was in respect of three amounts namely Rs. 20 collected on 14th August 1928, Rs. 21 collected on 5th March 1928 and Rs. 5 collected on 22nd March 1928. Although the charge was framed originally in respect of the three above amounts, it appears that the charge in respect of amount collected on 5th March 1928 and 22nd March 1928 have been struck out, so that the only charge now pending against the petitioner is that in respect of money collected on 14th August 1928. The petitioner's argument is that he having been previously convicted for criminal breach of trust in respect of amounts collected on 10th August and 24th September 1928 cannot now be tried again for criminal breach of trust in respect of an amount collected on an intermediate date, namely 14th August 1928. This argument is sought to be based on S. 403, read with S. 222 (2), Criminal P. C. Reliance was also placed upon a decision of this Court reported in *In re Appadurai. Ayyar* (1) and a decision of the Calcutta High Court in *Sidh Nath Awasthi* v. *Emperor* (2). The public Prosecutor on the contrary relies upon the case in *Nagendra Nath Bose* v. *Emperor* (3) following the decision in *Emperor* v. *Kashinath Bagaji* (4). If the decision of this Court in *In re Appadurai Ayyar* (1) is applicable I am bound by it. But it seems to me that it is not applicable to the facts of this case. From the report it seems that in that case there was a previous trial of the same accused for misappropriation of a gross sum between two dates. The accused was thereafter charged for misappropriation of another gross amount not included in the first amount but misappropriated on dates within the same period. In those circumstances the Court held that the intention of the legislature in enacting S. 222, Criminal P. C., is that where there is to be a trial for misappropriation of a gross sum there should be only one trial for all such offences committed within the period covered by the defalcation. The charge in the previous case in such circumstances should be taken to include all the items misappropriated by the accused during that period and therefore the accused cannot be put on trial in a subsequent case for other amounts alleged to have been misappropriated during the same period. That decision has no bearing on this case because the former case against this petitioner was not for misappropriation of a gross sum misappropriated within two dates but was for misappropriation of specific sums of money received on specific dates. Where that is the case S. 222 (2), Criminal P. C., does not come into play at all. All that the section in my opinion says is that instead of .charging the accused under separate counts for defalcation of each particular amount separately received and misappropriated which is the general rule laid down in S. 234; an exception is made necessitated by convenience that all the defalcations within a year may be joined together and the total amount of defalcation and

(1) [1916] 17 Cr. L. J. 30=32 I. C. 158.
(2) A. I. R. 1929 Cal. 457=1929 Cr. C. 91=124 I. C. 824=31 Cr. L. J. 747=57 Cal. 17.
(3) A. I. R. 1923 Cal. 654=76 I. C. 300=25 Cr. L. J. 156=50 Cal. 632.
(4) [1910] 11 Cr. L. J. 337=5 I. C. 970.

the dates within which the defalcations took place need alone be mentioned in the charge, and a charge so framed is to be deemed to be a charge for one offence within the meaning of S. 234. This does not mean that if that is more convenient separate counts should not be charged for separate amounts misappropriated on different dates. In other words, S. 222 (2) is an enabling provision which permits what otherwise would be a large number of separate charges to be joined together for the purpose of convenience. Nowhere is it prescribed that separate charges in respect of separate amounts misappropriated shall not be resorted to and that if an accused has misappropriated several sums within a year they all should be added together and made into one gross sum and tried as one charge. All that the decision in *In re Appadurai Ayyar* (1) means is that where a trial of misappropriation of a gross sum within an interval of time has already taken place the prosecution cannot be heard to say that certain items of misappropriation were left out from the gross sums first charged or to bring fresh cases on those omitted amounts. As the learned Judges say in such a case the charge in the previous case should be taken to include all the items misappropriated by him in the course of the same transaction during that period. As that decision has no application to this case I need not further consider it. The decision in *Sidh Nath Awasthi* v. *Emperor* (2) is really against the petitioner's contention. There the prosecution knowing well what was the gross sum in respect of which an accused had committed criminal breach of trust elected to proceed on three separate items and got the accused convicted. Then they picked up three other items and got the accused tried a second time and convicted. The Court said that though S. 403, Criminal P. C., may not strictly apply in terms to a case like this; still there is abundant authority for the view that a second trial in circumstances such as this ought not to have been allowed to be held by which I understand that the High Court would in an appropriate case stop the trial if it was shown to be oppressive or an abuse of the process of the Court. But so far as the legality of the conviction was concerned the Court held that there was nothing illegal in it and contented itself with reducing the sentence. This decision does not support the argument of the petitioner that the trial is illegal. It only says that in an appropriate case this Court has power to stop the trial as oppressive and an abuse of the process of the Court. The decision in *Emperor* v. *Kashinath Bagaji* (4) is a direct authority against the petitioner. There the accused was tried for the offence of criminal breach of trust as a public servant in respect of Rs. 12 odd and was acquitted. He was again tried for the same offence in respect of another sum, Rs. 19, misappropriated during the same period as that to which the Rs. 12 related and was convicted. The Sessions Judge acquitted the accused on the ground that his previous acquittal was a bar to the second trial. The High Court of Bombay reversed the order of acquittal holding that the previous acquittal did not operate as a bar to the accused's conviction at the second trial. This was followed by two learned Judges of the Calcutta High Court in the decision reported in *Nagendra Nath* v. *Emperor* (3). On the authorities there is no ground for the petitioner's contention that having regard to the form of the charge in the former case the charge now pending against him cannot be heard.

Nothing has been urged at the hearing to show that there is a fit case in which the trial should be stopped to prevent the abuse of the process of the Court under S. 561-A. The complaint stated that the complainant did not, when he brought the former case, know that the accused had misappropriated the sum now charged. I have not been shown that this is untrue. I therefore see no reason to interfere and dismiss this petition.

P.R.S./R.M. *Petition dismissed.*

A. I. R. 1930 Madras 980

PANDALAI, J.

Suppiah—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 345 of 1930, and Criminal Revn. No. 560 of 1930, Decided on 20th August 1930.

Penal Code (1860), S. 366—Woman kidnapped having illicit intercourse with accused even before kidnapping—Seduction was committed.

Under S. 366 seduction does not mean surrender or loss of chastity for the first time. Seduction is committed even where the woman had illicit intercourse with the accused before she was kidnapped. [P 981 C 1]

F. Z. Vaz—for Appellant.

Judgment.— It is contended that P. W. 3 had illicit intercourse with the petitioner even before she was kidnapped from P. W. 4's house and that therefore the taking was not in order to seduce her to illicit intercourse. For this the decision in *Rex* v. *Federrick Moon, Rex* v. *Emily Moon* (1), is relied on. That was a decision under the English Children Act 1908 under which it was held that seduction was surrender or loss of chastity for the first time. In my opinion that decision has no application to S. 366, I. P. C., where the substantial offence is kidnapping or abduction. The conviction was therefore right.

As to the sentence the fact that P. W. 3 was not merely a consenting party but perhaps pressed the petitioner to take her away is to be taken into account. The petitioner is young, and on the whole behaved well, except that he broke the law listening to a young woman. The sentence is reduced to one month's simple imprisonment.

P.R.S./S.N. *Sentence reduced.*

(1) [1910] 1 K. B. 818.

* * A. I. R. 1930 Madras 981

WALLACE AND JACKSON, JJ.

Muthu Reddi & another— Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 78 of 1930, Criminal Revn. Petn. No. 73 of 1930, and Criminal Misc. Petn. No. 133 of 1930, Decided on 14th March 1930,

*** * Extradition Act (1903), S. 18—Magistrate in British India handing over persons on demand by French Governor of Pondichery without further inquiry—His order is not illegal— Procedure to be followed in extradition proceedings between British Government and French Possessions in India is that provided in Art. 9 of the Treaty of 1815 which contemplates summary procedure.**

The procedure to be followed in extradition proceedings between the British Government in India and the French Settlements in India is that which is provided in Art. 9 of the Treaty of 1815, the necessary legislative sanction for which is S. 18, Extradition Act. The Indian Dependencies of France were expressly excluded from the Extradition Treaty of 1876 and therefore they are not "Foreign State" as defined in the Extradition Act. They are therefore governed by Chap. 3 of the Act, to which S. 18 applies. Art. 4 of the Treaty of 1815 contemplates a summary procedure, and so where a Magistrate in British India, on demand from the French Governor of Pondicherry, handed over certain persons without further inquiry his order is not illegal: 47 *Cal.* 37, *Rel. on*; *A. I. R.* 1921 *Cal.* 273, *not Appr.* [P 983 C 1]

K. S. Jayarama Ayyar and *K. R. R. Sastri*—for Petitioners.

Advocate General and *K. Venkataraghavachari* for *Public Prosecutor*— for the Crown.

Wallace, J.—The point raised in this criminal revision petition is of considerable importance, namely what is the procedure to be observed in extradition proceedings between the British Government in India and the French Settlements in India. The District Magistrate of South Arcot has on a demand from the Governor of the French Settlement of Pondicherry and on information from him that judicial proceedings are pending in Pondicherry against two British subjects, arrested these two men and proposes to hand them over without further inquiry to the French authorities. The two arrested men have put in this petition alleging that the action of the District Magistrate is illegal, inasmuch as he has under the Extradition Act of 1903 no authority to deliver them up in this summary fashion, but must first hold an inquiry and satisfy himself that there is a prima facie case against them, as provided for in Chap. 2 of that Act. The learned Advocate-General on behalf of the Government contends that Chap. 2 of the Act has no bearing on the case, and that the case is governed by the provisions of and procedure indicated in Art. 9 of the Treaty of 1815, the necessary legislative sanction for which has been provided by S. 18, Extradition Act. The petitioners rejoin that S. 18 has no application to cases where no procedure has been prescribed by the legislature, and that in any case its application is restricted to cases coming under Chap. 3 of the Act. They further urge that the extradition provision in the Treaty of 1815 had been abrogated by the Treaty, of 1876 and by the English Extradition Acts of 1870 and 1873. They argue fur-

ther that any part or dependency of a Foreign State is for the purpose of the Indian Extradition Act a Foreign State to which Chap. 2 and not Chap. 3 will apply.

To take the last point first, a Foreign State is by definition in the Act a State to which the Extradition Acts of 1870 and 1873 apply. Whether or not a part or dependency of a Foreign State is itself a Foreign State need not be decided here, since I am of opinion that in any case the East Indian Dependencies of France were expressly excluded from the Extradition Treaty of 1876, and therefore they are not States or parts of a State to which the Extradition Acts of 1870 and 1873 apply. This is the view taken by a Bench of the Calcutta High Court in *Rahamat Ali* v. *Emperor* (1). In a subsequent case in Calcutta, *In re Celeste Cullington* (2), a single Judge, Buckland, J. differed, holding that Art. 16 of the Treaty of 1876 does not exclude the East Indian Dependencies of France, but was intended to preserve the provisions of the Treaty of 1815, and that the effect of the order in Council of 16th May 1878 was to put into operation as regards these Dependencies S. 25, English Extradition Act of 1870. The learned Judge admitted that he had not then before him the exact terms of the order in Council. That is a matter of regret since, if he had had these terms before him, I doubt, speaking with respect, if he would have differed from *Rahmat Ali* v. *Emperor* (1). The concluding terms of the order in Council are that the Extradition Acts of 1870 and 1873 shall after 31st May 1878 "apply in the case of the said Treaty," that is, the Treaty of 1876, "with the President of the French Republic." So that it is only in respect of that Treaty and not in respect of all Treaties then in force that these Extradition Acts apply; and unless that Treaty abrogated the Treaty of 1815 in respect of French Dependencies in East India the Extradition Acts of 1870 and 1873 do not apply to them and they would therefore not be Foreign States within the meaning of the Indian Extradition Act of 1903.

Article 16 of the Treaty of 1876 sets out

(1) [1920] 47 Cal. 37=20 Cr. L. J. 739=53 I. C. 147.

(2) A. I. R. 1921 Cal. 273=63 I. C. 819=22 Cr. L. J. 691=48 Cal. 328.

"the manner of proceading in the colonies and foreign possessions of the two High Contracting Parties."

and ends up:

"The foregoing stipulations shall not in any way affect the arrangements established in the East Indian Possessions of the two countries by Art. 9 of the Treaty of 7th March 1815."

Now, as petitioners themselves argue, this Art. 9 contains no procedure strictly so called. Therefore what the saving clause at the end preserves and intended to preserve, is the Extradition "arrangements" provided by that article. In other words that Article is in no way affected by Art. 16 of the Treaty of 1876, and extradition in the East Indian possessions of the two countries remains governed by the Treaty of 1815. This is the view which has been taken of this clause both in *Rahmat Ali* v. *Emperor* (1) and *In re Celeste Cullington* (2).

The petitioners urge that, as Art. 9 of the Treaty of 1815 provides no procedure it is in effect unenforceable. This argument I do not follow. If that Treaty provided no procedure such as was provided by the prior Treaty of 1802 or by the subsequent Treaty of 1876, that is clear indication that the High Contracting Parties did not agree upon or intend that there should be any formal procedure for extradition. I do not follow the argument that the Treaty cannot be brought into operation until the legislature has provided and sanctioned a procedure. That would obviously be exceeding its province. The legislature can only sanction a procedure if the Treaty provides for one. The procedure must be found or provided for in the Treaty itself before any legislature of either party can legislate about it. The legislature cannot alter either by addition or subtraction the essentials of a Treaty which is the contract between the High Contracting Parties, or impose upon one party conditions which do not form part of that contract. That would be tantamount to the subjects of one High Contracting Party forcing on its own Government a breach of the Treaty, or making it impossible for its own Government to keep its pledged word with the other party: see *The Queen* v. *Wilson* (3). S. 18, Extradition Act, lays down that nothing in this Chapter, that is Chap. 3, shall derogate from the pro-

(3) [1894] 3 Q. B. D. 42=26 W. R. 44=37 L. T. 354=13 Cox. C. C. 620.

visions of any Treaty. That is, it incorporates in effect the provisions of such Treaty in the Municipal Courts of India. When therefore, the treaty says that offenders shall be extradited on demand, it is not open to a Municipal Court to say that they shall not be delivered up until some form of procedure initiated, prescribed and sanctioned by itself alone and not agreed upon by the High Contracting Parties is satisfied. There is, on this finding, no point here in emphasizing that S. 18, Extradition Act, refers to Chap. 3 alone, since, as already pointed out, the French possessions in India are not a Foreign State, and therefore, Chap. 3 is the only one which would apply to the present case.

Article 9 of the Treaty of 1815 which is therefore, in my view, the provision to be followed contemplates summary delivery at the request of any authority of either High Contracting Party. That is the view which the Local Government itself has taken of its obligations as set out in the Extradition Manual, Chap. 3, S. 2 (a), and I think we may assume that that is the view authorized by the High Contracting Parties from whom this Government derives this authority. The procedure in the Manual, however, seems to be regarded as applicable to the case of "grave" offences, and neither side has been able to point us to any orders of Government under which the general provision of Art. 9 of the Treaty of 1815 has been so restricted. This question, however, does not arise here as theft is a "grave" offence. I find therefore that there is no substance in this petition and it is dismissed. The collateral petition (Criminal M.P. No. 133 of 1930) put in under S. 491, Criminal P. C., must also fail since the detention of the petitioners is not illegal or improper; and it is also dismissed.

Jackson, J.—I agree. Under the Indian Act 15 of 1903, a Foreign State means a State to which the English Extradition Acts of 1870 and 1873 apply. The main Act is that of 1870 (Vol. 1, p. 443, Coll. Stat). As provided in S. 2 of that Act the application of that Act to any Foreign State shall be by order in council. If the order in council has not applied the Act to French Possessions in India, the Act does not apply and these possessions are not a Foreign State as defined in the Indian Act 15 of 1903.

The order in council applied the Act not generally to France, but in a restricted sense "in the case of the Treaty with the President of the French Republic." This is the Treaty of 1876 which in terms does not affect the arrangements in the East Indian possessions of the two countries (Art. 16). Therefore the Extradition Act of 1870 has not been applied to that part of France which is Pondicherry and Pondicherry is not a Foreign State.

Therefore, Chap. 3, Act 15 of 1903, "Surrender in case of States other than Foreign States," applies to Pondicherry. S. 18, falling within Chap. 3, expressly preserves the provisions of any Treaty for the extradition of offenders and its procedure. This makes the provision of the Treaty of 1815 applicable to the present case, and gives statutory sanction to its procedure. There is therefore no room for an argument that the Treaty cannot affect individual rights in the absence of statutory sanction.

Buckland, J., in *In re, Celeste Cullington* (2), (at p. 335 of 48 *Cal.*) says :

"By an order in council, dated 16th May 1878, the Extradition Acts were made applicable to France."

It is here that with all respect I differ from him. I should have agreed, if the order in council stated "in the case of France "instead of" in the case of the said Treaty." I agree that as the Treaty of 1815 practically provides for surrender on demand, a more elaborate procedure cannot be superimposed by the unilateral act of one of the parties,

P.R.S./S.N. *Revsion dismissed.*

A. I. R. 1930 Madras 983

SUNDARAM CHETTY, J.

Ramaswami Tevar — Petitioner.

v.

M. Subban and *others*—Respondents.

Criminal Revn. No. 33 of 1930 and Criminal Revn. Petn. No. 31 of 1930, Decided on 29th July 1930.

Criminal P. C. (1898), S. 350 (1)—Sessions Judge sitting in revision directing further inquiry on same evidence and by same Magistrate—Eventually District Magistrate transferring case to another Magistrate who proceeded to summon witnesses afresh—

Sessions Judge's order is not quite in consonance with S. 436—Magistrate to whom case was transferred could take fresh evidence under S. 350 (1)—Criminal P. C. (1898), S. 436.

The Sessions Judge sitting in revision against an order of discharge directed further inquiry for finding out whether the offence was committed on the evidence already adduced and further directed that the inquiry should be made by the same Magistrate who originally tried the case. Eventually, however, the District Magistrate had to transfer the case to another Magistrate, who proceeded to examine the witnesses afresh.

Held (Obiter) that the order of the Sessions Judge directing inquiry by the same Magistrate was not quite in consonance with S. 436: 10 *Cal.* 207, *Rel. on.* [P 984 C 1]

Held further: that the Magistrate to whom the case was transferred could summon the witnesses afresh in the exercise of the discretion vested in him under S. 350 (1).

[P 984 C 2]

N. Somasundaram—for Petitioner.

K. S. Jayarama Ayyar—for Respondent 2.

Order.—This Criminal Revision Petition has been filed by the complainant against the order of the Sessions Judge of Tinnevelly in Crl. Revn. Petn. 46 of 1929. Against an order of discharge passed by the Special Third Class Magistrate of Tinnevelly, in C. C. 286 of 1929 the Complainant filed Cr. Revn. Petn. 27 of 1929 to the Sessions Judge, who directed a further inquiry into the case, for the purpose of finding out on the evidence already adduced, whether an offence under S. 424, I. P. C., can be brought home to the accused. In ordering a further inquiry for that purpose the learned Sessions Judge specifically directed that it should be made by the Sub-Magistrate of Nanguneri, as he was the person who tried the case originally, when he was the Special Third Class Magistrate, Tinnevelly. Such an order is not quite in consonance with S. 436, of the Code, which does not authorize a Sessions Judge to direct further inquiry by a particular Magistrate subordinate to the District Magistrate. What the Sessions Judge can do is to direct the District Magistrate by himself, or by any of the Magistrates subordinate to him, to make the further inquiry, thus leaving the District Magistrate to exercise a discretion as to the selection of any Magistrate subordinate to him: vide *Chundichurn Bhuttacharjea* v. *Hem Chundar Bannerjea* (1).

Be this as it may, a situation not probably contemplated by the Sessions Judge when ordering further inquiry in that manner, seems to have arisen. This case has since been transferred by the District Magistrate to Second Class Magistrate, Tinnevelly, for disposal. That Magistrate decided to proceed with the examination of the witnesses afresh, for some reasons. That order has been set aside in revision by the learned Sessions Judge, who says, that, in view of his former order, it is not open to the Sub-Magistrate to take evidence afresh, because the evidence already on record was taken by another Magistrate, who ceased to have jurisdiction over the case. Against this order the present revision petition has been filed in the High Court.

The main point for consideration is, whether the Second Class Magistrate of Tinnevelly can now resummon the witnesses and re-commence the inquiry, in the exercise of the discretion vested in him under S. 350 (1) Criminal P. C. By virtue of Cl. (3) of this section, when a case is transferred under the provisions of this Code, from one Magistrate to another, the latter can exercise the powers mentioned in Cl. (1). That being so, the order of the Second Class Magistrate, Tinnevelly, in exercise of the statutory power vested in him, cannot be interfered with by the learned Sessions Judge. Moreover, when further inquiry was ordered to be made in the case, on the evidence already taken the Sessions Judge directed the same to be made, by the very Magistrate who had recorded the evidence. In that case, S. 350 would have no application. Now that another Magistrate has come to have jurisdiction over this case, (which was not contemplated in the original order of the Sessions Judge, directing further inquiry) the restriction placed in that order can no longer hold good nor can the operation of S. 350 (1) of the Code be checked. The order of the learned Sessions Judge is set aside, and the order of the Second Class Magistrate, Tinnevelly is confirmed though not for the reasons mentioned in his order.

P.R.S./S.N. *Order set aside.*

(1) [1884] 10 Cal. 207.

A. I. R. 1930 Madras 985

RAMESAM, J.

Seth Bansiram Jashamal— Plaintiff —Petitioner.

v.

Gunnia Naga Ayyar and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 886 of 1929, Decided on 20th March 1930, from decree of Sub-Judge, Madura, in Original Suit No. 76 of 1928.

Transfer of Property Act (1882), S. 67 (d) —One co-mortgagee suing for his share of mortgage money and praying for sale of entire mortgaged property—He need not pay court-fee on whole mortgage amount—Court-fees Act (1870), S. 7 (ix).

One of the mortgagees sued to recover his share only of the mortgage money and prayed that the whole mortgaged property should be sold. He paid court-fee on his share of the mortgage money only.

Held: that the plaintiff need not be called upon to pay court-fee on the whole of the mortgage amount: 15 *M. L. J.* 496 and *A.I.R.* 1919 *P. C.* 21, *Rel. on.* [P 986 C 2]

T. L. Venkatarama Iyer—for Petitioner.

P. N. Appuswami Iyer, *A. Nagaswami Iyer*, *S. Rangaraja Iyengar*, *K.V. Shesha Iyengar*, *T. R. Ramachandran*, *V. R. Venugopalan*, *P.S. Sarangapani Iyengar* and *S. Sankara Subramani Iyer*—for Respondents.

Judgment.—This revision petition arises out of an order passed by the Subordinate Judge of Madura directing amendment of the plaint in O. S. No. 76 of 1928 and the payment of additional court-fee. He passed this order in consequence of his finding on issue 3 which was argued as a preliminary issue.

The suit was filed by the plaintiff who was one of several mortgagees in a mortgage document Ex. A, for Rs. 34,000. The document recites that the consideration of Rs. 34,000 was made up of the sums due on prior separate documents to the mortgagees, namely the plaintiff and defendants 5 to 10. There is no doubt that the amount of the mortgage money belonged in separate shares to the mortgagees so far as their interest inter se are concerned. But the question now is what is the correct legal position in a suit against the mortgagor when one of the mortgagees wants to sue. S. 67, Cl. (d), T. P. Act, enacts:

"Nothing in this section shall be deemed to authorize a person interested in part only of the mortgage money to institute a suit relating only to a corresponding part of the mortgaged property, unless etc."

This section does not prohibit a person interested in part only of the mortgage money instituting a suit to recover his share of the mortgage money only by framing the suit to relate to the whole of the mortgaged property but not to a corresponding part of the mortgaged property. Once the mortgagee frames his suit praying his relief for sale or for foreclosure so as to operate upon the whole of the mortgaged property, the obstacle of this section disappears. In this case the plaintiff has prayed for sale of the whole of the mortgaged properties. The mischief of the prohibition mentioned in S. 67 does not operate in the present case.

As to the maintainability of the suit by one only of the mortgagees, whether he sues for his portion of the money or for the whole of the debt, that there can be no question. If he sues for his share of the debt only, all that he has to do is to avoid the prohibition in S. 67. But if he sues for the whole of the mortgage debt, if he does so with the consent of the other co-mortgagees either because the other co-mortgagees do not claim any share in the mortgage amount and the whole amount from the beginning belonged to the plaintiff or because there is some private arrangement by which the plaintiff has since become entitled to the whole and the co-mortgagee is not entitled to any portion of the debt now, or because the co-mortgagee only has been paid off his share of the debt but the plaintiff has not been paid off his share of the debt, whatever the reason may be, the suit is certainly maintainable. An illustration of this occurs in *Atchamma* v. *Subbarayudu* (1). In that case the co-mortgagee admitted that he was not entitled to any interest in the mortgage money and the suit was held to be maintainable. The proposition is also clear from the observations of their Lordships of the Privy Council in *Sunitibala Debi* v. *Dhara Sundari* (2). But where there is no consent of the co-mortgagee then the plaintiff must make the co-mortgagee a party defendant and sue for his share of the mortgage debt and must take care to see that he is proceeding against the

(1) [1905] 15 M.L.J. 496.

(2) A.I.R. 1919 P.C. 24=53 I.C. 131=46 I.A. 272=47 Cal. 175.

whole of the mortgaged property. This is also clear from the observations of the Privy Council in the case just mentioned. Thus the real question in all such cases is not one of maintainability of the suit but what is the court-fee to be paid by the plaintiff in such cases and perhaps though the point does not arise now there is also the question of jurisdiction. In such cases, should the plaintiff pay court-fee upon the whole of the mortgage money or only upon his share? It is true that for realizing his share of the mortgage money he has to pray for sale of the whole property. That prayer is already in the plaint in the case before me. Why therefore the Subordinate Judge should direct an amendment of the plaint by adding a prayer in respect of the entire mortgagee's interests I do not see. The plaintiff already asked for a sale of the whole of the mortgaged property. If the whole of the mortgaged property realized more than the amount due on the document to all the mortgagees, the plaintiff will be simply paid his amount and the rest of it will be held by the Court and will not be paid to the other co-mortgagees until they pay their court-fees. The fear that the Government will be deprived of the Government revenue while the whole of the mortgage amount is being realised and only a small amount is being paid as court-fee is therefore illusory.

After the trial of the case and the final decree is passed, the Court will make a provision directing the defendants mortgagees to pay their court-fees within a certain time and if they do not pay the court-fees the amount will be paid to the mortgagors after taking security. In such a case no mortgagee will allow his money to go back to the mortgagor's hands owing to non-payment of court-fees, so that ultimately the Government will get the whole court-fee due upon the whole of the mortgage money. The suit then becomes somewhat analogous to a partition action the plaintiff paying court-fees only on the share due to him; the other sharers will be arrayed as defendants who will pay court-fees on the shares due to them and get decrees in respect of their shares on payment of such court-fees. From this point of view no doubt, the suit really concerns the whole of the mortgage. I do not see why the plaintiff should be called upon to pay the court-fees due on the whole of the mortgage amount. Cases are not infrequent in Courts where as incidental to the relief to be given to the plaintiff an issue has to be determined by the Court which may have consequences much wider than the relief which the plaintiff seeks; for instance, an issue as to adoption in a suit for rent or money due on a bond or promissory note. In such cases the plaintiff is not asked to pay court-fees on all the properties which he gets by reason of the adoption. After all the plaintiff seeks the assistance of Court to get a certain relief and he pays court-fees on that relief. The fact that the Court expresses some opinion on a matter of a large value for giving the relief the plaintiff seeks is no reason why the plaintiff should be made to pay a larger court-fee. In the present case the plaint as framed seems to be correct as already observed. If on sale of the whole of the property the amount realized becomes less than the mortgage amount due on the document, all the mortgagees must suffer rateable diminution, of course, subject to questions of priority raised by the plaintiff, as to which I say nothing now. Apart from such questions of priority rateable diminution seems to be necessary and the plaintiff will get the amount due to him after calculating the proportionate amount.

It is suggested to me by the respondents that there may be further questions arising in the case after the sale of the mortgaged properties such as: (1) personal decree against the mortgagor and his other properties if the sale proceeds are not sufficient to pay the mortgage amount; (2) the right of the mortgagees to proceed against the surety who is defendant 11 in the suit and (3) any such other points that might possibly arise. It is said there is some compromise between the plaintiff and respondents 7 to 10. The whole suit may be tried subject to such terms, whatever they are. If the case proceeds on the footing that the plaintiff and the defendant co-mortgagees all stand somewhat in the position of the plaintiffs as in a partition suit, there is no objection to working out the personal decree and even the rights against the sureties in

this very suit even assuming for a moment that the plaintiff does not care to prosecute those remedies or compromise the matter with the sureties or with the mortgagors. With this understanding the suit can be allowed to proceed without any need for further amendment remembering that the whole of the property sought to be sold is really the entire mortgagee's interests which is after all the point which the Subordinate Judge seems to be particular about. With these observations I hold that no amendment of the plaint is necessary and direct that the suit be permitted to proceed as it is. I make no order as to costs.

P.R.S./S.N. *Case remanded.*

A. I. R. 1930 Madras 987

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

Ramaswamy Chettiar—Appellant.

v.

Roya Kanniappa Mudaliar and *others*—Respondents.

Original Side Appeal No. 35 of 1930, Decided on 6th August 1930, from order of Eddy, J., D/- 17th January 1930, in Application. No. 104 of 1930.

Letters Patent (Madras), Cl. 15—Order adding party is not "judgment."

Order adding a party is not a "judgment" and therefore is not appealable: 35 *Mad.* 1 (*F. B.*) and *A. I. R.* 1926 *Mad.* 554, *Rel. on.*; *A. I. R.* 1927 *Mad.* 816, *Dist.* [P 987 C 2]

S. Doraiswami Aiyar and *K. S. Rajagopala Iyengar*—for Appellant.

T. M. Krishnaswami Iyer and *S. Tyagaraja Aiyar*—for Respondents.

Curgenven, J.—This is an appeal from an order passed by Eddy, J., in Application No. 104 of 1930 in C. S. No. 762 of 1926, adding the three applicants as party defendants to the suit. The plaintiff, a member of a Nattukottai trading family, had sued the other members of his family for partition and an account of the assets and liabilities; and this application was made after a preliminary decree had been passed, the applicants, in their capacity as manager and worshippers respectively of a certain temple, applying to be added as parties to the suit upon the allegation that a sum of Rs. 1,38,000 of the alleged family assets was money to be held in trust for the benefit of the temple. Against the order of Eddy, J., granting the application the plaintiff appeals.

The question is raised whether an appeal from an order of this kind lies, i.e., whether the order amounts to a judgment within the meaning of Cl. 15 of the Letters Patent. An attempt has been made by the appellant to derive from the specific consequences of this order grounds in support of its appealability, but I think it is clear that we must look only to the general nature and effect of the order, and not to the results to which it may eventually lead. An order adding a party is either appealable as a judgment or it is not; and it cannot surely affect the question whether or not it results in the raising of new issues in the suit, or indeed whether or not the Court had jurisdiction to pass it. There is no dispute that the order under reference is both in substance and in form an order under O. 1, R. 10 (2), Civil P. C., and the point for decision is whether an order passed under this rule is appealable as a "judgment."

It is common ground before us that the construction placed upon the word "judgment" by Sir Arnold White, C. J., in the Full Bench case, *Tuljaram Row* v. *Alagappa Chetti* (1), should be adopted here, as indeed it has been adopted in all cases decided in this Court subsequent to that pronouncement. The passage embodying that construction has been often quoted, and it is unnecessary to set it forth again. We have to look to the effect, rather than to the form, of the adjudication. If its effect is to put an end to the suit or proceeding, it is a judgment. If it is in effect nothing more than a step towards a final adjudication, it is not a judgment within the meaning of the Letters Patent.

Judged by this test, I feel no difficulty in deciding that an order adding a party to a suit is not a judgment. It does not put an end to the suit, but is clearly a step towards a final adjudication. It settles no rights other than the right to be heard in the cause. Such an order answers, I think, to the tests proposed by Coutts-Trotter, C. J., in *The Official Assignee of Madras* v. *Ramalingappa* (2), a case which related to an order virtually identical in type,

(1) [1912] 35 Mad. 1=8 I. C. 340 (F. B.).
(2) A. I. R. 1926 Mad. 551=94 I. C. 456 = 49 Mad. 539.

viz. transposing certain defendants as plaintiffs. The effect of the order was no doubt to confer upon the newly transposed parties facilities for the prosecution of the suit, and to put them on the road to an adjudication which they could not have secured as defendants, but it did not settle any substantive rights. The order in the present case is equally initiatory in character. I do not think that any useful purpose will be served by referring to other cases relating to orders less closely similar. They all endeavour to apply the criterion proposed by Arnold White, C. J. Our attention has been specially drawn to a case decided by Coutts-Trotter, C. J., and Wallace, J., *Maharaja of Pittapuram* v. *Rama Row* (3), where it was held that an order granting leave to sue is a judgment if the effect of the order was that it finally shut out the defendant from pleading that the suit should have been dismissed on the point of jurisdiction. I do not deem it necessary to express either agreement with or dissent from this view, because while admittedly the conclusion is a specific deduction from the accepted principles of construction, it relates to an order of a class not now before us. I do not think that it was intended to lay down the broad proposition that all decisions involving an assumption of jurisdiction by the Court, after contest, must necessarily be "judgments" though it may be that, conversely, the denial of jurisdiction, resulting as it must in the termination of the proceedings, does amount to a judgment. I am of opinion that no appeal lies against the learned Judge's order. The appeal is accordingly dismissed with costs. Vakil's fee allowed is Rs. 250.

Bhashyam Ayyangar, J.—I agree.

P.R.S./S.N. *Appeal dismissed.*

(3) A. I. R. 1927 Mad. 846= 105 I. C. 159=50 Mad. 770.

* A. I. R. 1930 Madras 988

WALLACE AND JACKSON, JJ.

A. L. A. R. Arunachalam Chettiar—Appellant.

v.

Ry. Pratapasimha Rajah Sahib—Petitioner—Respondent.

Appeal No. 46 of 1926 and Civil Revn. Petn. No. 48 of 1926, Decided on 18th February 1930, from order of Dist. Judge, West Tanjore, D/- 25th November 1925, in I. A. No. 346 of 1925.

*** (a) Hindu Law — Suit for partition—Final decree—Court can impose charge for adjusting shares—Such charge binds alienees pendente lite.**

In the working out of a preliminary decree which declares certain parties entitled to certain shares, the Court is entitled to employ all reasonable methods in adjusting those shares, especially measures which will entail the least amount of trouble to all concerned, and if the imposition of a charge is, in the opinion of the Court, a suitable alternative to depriving a coparcener of some property in order to adjust the shares, the Court has discretion to impose a charge. The imposition of such a charge being within the scope of the suit and within the jurisdiction of the Court any such charge imposed on the shares of the defendants will bind their alienees who purchased pendente lite: *A. I. R.* 1926 *Mad.* 186 and 26 *Mad.* 686, *Ref.* [P 990 C 1, 2]

(b) Civil P. C., S. 144—Scope.

The principle of S. 144 is not confined exclusively to matters in execution. The power of restitution is inherent in the Court and should be exercised when necessary in order to do justice: *A. I. R.* 1922 *P. C.* 269, *Foll.*; 48 *I. C.* 7, *Ref.* [P 990 C 2, P 991 C 1]

(c) Civil P. C., S. 105—Interlocutory order can be objected to in appeal against final decree and no separate appeal lies.

No separate appeal lies against an interlocutory order, passed in a partition suit between the dates of the preliminary and the final decrees and which is not independent of the final decree and is meant to be embodied therein. The method of attack against such an order is not by an independent appeal but by an appeal against the final decree: 24 *Cal.* 725 and 35 *All.* 159, *Ref.* [P 991 C 2]

T. M. Krishnaswamy Iyengar and *N. Swaminathan*—for Appellant.

T. V. Muthu Krishna Iyer, S. V. Narayana Iyer, K. S. Krishnaswami Iyengar, M. Patanjali Sastri N. Srinivasa Iyengar and *A. V. Vishwanatha Sastri*—for Respondent.

Judgment.— This appeal and the civil revision petition relate to the same matter, an order passed by the District Court of West Tanjore. The civil revision petition is put in by way of caution in case this Court holds that the civil miscellaneous appeal does not lie. The respondents have in fact

taken a preliminary objection that the civil miscellaneous appeal does not lie, but the discussion on that point is more easily set out if we deal first of all with the case on the merits.

The facts necessary for disposal are: The parties to these proceedings are some of the parties to what is known as the Tanjore Palace Estate suit, an inter-pleader suit filed by the receiver of the estate to determine who were the rightful owners. The chief contesting respondents before us are the defendents known as the Mangalavilas defendants originally defendants 4 to 11. A preliminary decree in that suit was passed on 1st July 1918. It awarded 3/4th share to these defendants. Appeals were preferred to the High Court. While these were pending a stay petition was put in by one of the other defendants, and in his order thereon passed on 7th November 1919, Krishnan, J., at the request of the Mangalavilas defendants allowed these latter to withdraw moneys deposited to the credit of the estate in the lower Court up to the limit of the shares due to them under the preliminary decree but subject to security being given for the return of these moneys if the High Court decree diminished their shares. Various sums of money were then drawn out under these conditions. The High Court's preliminary decree was passed on 21st January 1924 and it reduced the share of the Mangalavilas defendants to 317. The Mangalavilas defendants had drawn moneys in excess of this share under Krishnan, J.'s order and therefore had to refund. Now, on on 29th January 1923 before the preliminary decree of the High Court was passed defendants 8, 9, 11, 25 and 26, the two latter being the legal representatives of the 7th defendant, who are some of the Mangalavilas defendants sold half of their right, title and interest in the property to the present .appellant. At the time of the sale that half-share represented 5/32 of the property. By the High Court decree that was reduced to 5/56. After the High Court decree the suit was sent back to the District Court for final decree. In that Court on 27th March 1925 the appellant was on his application made a party to the suit as defendant 31. On 16th September 1925, the District Court passed what it called an interim final decree. apparently on some agreement between the parties allotting his proportionate share to each. On 21st September 1925, defendant 2, one of the successful appellants in the High Court applied in I. A. No. 346 of 1925 for restitution of the amounts overdrawn by the Mangalavilas defendants under the order of Krishnan, J. Instead of ordering restitution or payment back into Court, the District Court on 25th November 1925, directed that the shares allotted to the Mangalavilas defendants be made subject to a charge for the overdrawn amounts, and directed further that the half-share brought by defendant 31 be also subject to this charge. This charge has been embodied in the final decree of the District Court dated 26th February 1926. It is against the order of 25th November 1925, this Civil Miscellaneous Appeal and the Civil Revision Petition are preferred, by defendant 31 on the ground that the order errs both in law and on the merits.

The main arguments are: (1) that if the order imposing a charge at that stage of the trial of the suit, namely between the preliminary decree and the final decree, is to be regarded as an order in the suit itself, it is beyond the powers of the Court, whose duty after the preliminary decree has been passed is only to work out the preliminary decree and not go beyond it, that its duty is limited to delivering the shares to which the preliminary decree has declared the parties entitled, that this interim final decree and the order under appeal are proceedings unknown to law, that the Court cannot by way of an interlocutory order in the suit engraft on the preliminary decree a decision on the matter of a charge which, as being a matter concerning the rights of the parties inter se can only be lawfully decided before the passing of the preliminary decree; (2) that, if this order is to be regarded as a separate order under S. 144, as indeed it purported to be, it is ultra vires, since S. 144 applies only to matters in execution; (3) that, however the order be regarded, it has imposed a charge for the recovery of what was a mere personal obligation on the part of the Mangalavilas defendants and that the Court has no right so to convert a personal obliga

tion into a charge by a mere interlocutory order; (4) that the lower Court was wrong in imposing a charge until the remedy offered by the security had been exhausted, it being admitted that no attempt to enforce that has yet been made, and (5) that in any case the charge will take effect only from the date of the order, the 25th November 1925 and therefore cannot affect the property transferred on 29th January 1923 to defendant 31.

As to the power of the Court to impose such a charge by order or by final decree in the suit itself, it is not disputed that in an ordinary partition suit the Court may in working out its preliminary decree for the purpose of adjusting shares instead of making an actual division of all the property, give one coparcener a charge over the share of another for any difference in favour of the former: see *Poovanalingam Servai* v. *Veerayi* (1) and the ratio decidendi of *Raja of Vizianagram* v. *Raja of Setucherla Somasekhara* (2). In such a case it is obvious that the charge was not created by the preliminary decree but springs out of the obligation of the Court to allot each coparcener his proper share. That, it appears to us, is what the District Court has really done in this case. It is true that this was not a partition suit, but was an interpleader suit. But when the preliminary decree was passed the suit became to all intents and purposes a partition suit and, so far as the appellant is concerned, it could be nothing else, since his vendors did not include all the Mangalavilas people. Therefore even if the Mangalavilas defendants had been entirely successful, there still had to be a partition between them.

Clearly, in the working out of a preliminary decree which declares certain parties entitled to certain shares, the Court is entitled to employ all reasonable methods in adjusting those shares, especially measures which will entail the least amount of trouble to all concerned, and if the imposition of a charge is, in the opinion of the Court, a suitable alternative to depriving a coparcener of some property in order to adjust the shares, the Court has discretion to impose a charge. That the order under appeal was in the course of the preparation of the final decree is clear. A petition for final decree had been put in by defendant 1 on 26th March 1925 long before the order now appealed against and it was in the course of the proceedings to determine the final decree that the order appealed against was passed. Viewing the order broadly, we think this is what the lower Court intended to do and has done. In working out for the final decree the manner in which the property should be adjusted according to the theoretical allotments under the preliminary decree, by what is called an interim final decree, the Court decided that the imposition of such a charge was a reasonable method by which the excess amounts overdrawn should be recovered. That seems to us a proper discretion. Amounts had been drawn by virtue of the preliminary decree and under an order passed while the suit was pending. The situation created by that order had to be adjusted by the final decree in the suit. When defendant 31 took his sale, the suit had clearly assumed the character of a partition suit, and the Court had jurisdiction to impose a charge on the share of the Mangalavilas defendants for the amounts overdrawn in order to compensate the other defendants for the amounts subtracted thereby from their rightful shares. The imposition of such a charge being within the scope of the suit and within the jurisdiction of the Court, any such charge imposed on the shares of the Mangalavilas defendants will bind their alienees who purchased pendente lite.

This is sufficient to decide the matter and we need not deal at length with the other points. As to the contention that the charge will have effect only from its date, that is answered by what has already been said, namely, that the imposition of a charge is within the scope of the suit and defendant 31's sale was pendente lite. As to the technical argument that the order is erroneous because it purports to have been passed under S. 144 and that that section will not apply because no decree has been varied or reversed, we are not satisfied that the principle of S. 144 is confined exclusively to matters in execution. The Privy Council has in *Jai Barham* v.

(1) A. I R. 1926 Mad, 186=92 I. C. 1055.
(2) [1903] 26 Mad. 686=13 M. L. J. 83.

Kedarnath Marwari (3) laid down that the power of restitution is inherent in the Court and should be exercised when necessary in order to do justice. This Court has so exercised that principle in a suit at a stage between preliminary decree and the final decree in a case, *Cunniah Mudaly* v. *Rangaswami Mudaly* (4). In any case, if the money was taken out under Krishnan, J's order by way of "execution" of that order in the suit, if that phrase may be used, it must follow that it should also be restored by way of "execution" of an order in the suit, that is, by provision in the final decree. As to the argument that the Court should not have imposed a charge until the remedy by way of enforcing the security had been exhausted, there were risks in that procedure. It might for example be held, as in fact this Court has held in a correlated matter, A. A. O. 263 of 1926, that Krishnan, J's order enures only for the benefit of that single defendant who applied for the stay.

As to the preliminary objection that no appeal lies at all, we are inclined to hold it is a good objection, although the appellant has cause to complain about the manner in which the lower Court phrased its order. The order has been unnecessarily drawn up in a decretal form as well as in a judgment form. In the judgment form the District Judge has recorded it in the following terms:

"Relief (9) has been granted in the order just passed in O. S. No. 3 of 1919 (the main suit."

In the decretal form this has been recorded as follows:

"That relief (3) be granted (vide order passed in O. S. No. 3 of 1919)."

A reference to the order passed in O.S. No. 3 of 1916 shows that the order was:

"When the restitution amounts payable to defendants 1 and 2 are determined, the final decree will provide for a charge on the shares of defendants 8 to 11, 25, 26, 28 and 29 in immovables under the final decree (evidently interim final decree) dated 16th September 1925, enforceable in execution in addition to their personal liability; and the charge will bind defendant 31."

It is clear from this that the order was not an order independent of the final decree but that the order was to be embodied in the final decree, and therefore not until the final decree was drawn up did it come into force. This was in accordance with what the lower Court had power to do and was entitled in its discretion to do. The office in drawing up the decretal form of the order wrongly phrased it as if it were an order independent of the final decree. In the view we take, any attack on this order ought to be put forward only by way of an appeal against the final decree and defendant 31 has not put in any such appeal. The ruling in *Jogodishury Debee* v. *Kaliash Chundra Kahiry* (5) is no doubt an authority for the position that a party can attack an interlocutory order passed preparatory to a final decree, but where the order complained against has been embodied in the final decree the method of attack is not by an independent appeal but by an appeal against the final decree: see also *Bharat Indu* v. *Yakub Husain* (6).

For reasons given this appeal and the Civil Revision Petition must fail. We dismiss them with costs in the appeal.

P.R.S./K.N. *Appeal dismissed.*

(3) A. I. R. 1922 P. C. 269=69 I. C. 278=49 I. A. 351=2 Pat. 10 (P.C.).

(4) [1918] 48 I. C. 7.

(5) [1897] 24 Cal. 725=1 C. W. N. 374 (F.B.).

(6) [1913] 35 All. 159=18 I. C. 701.

* A. I. R. 1930 Madras 991

BEASLEY, C. J., AND WALSH, J.

(*Somisetti*) *Seshayya Chetty* and *others* —Appellants.

v.

(*Rolla*) *Subbadu* and *others*—Respondents.

Letters Patent Appeal No. 99 of 1929, Decided on 15th August 1930, from judgment of Madhavan Nair, J., in Second Appeal No. 966 of 1925, reported in *A.I.R.* 1929 *Mad.* 791.

*** (a) Limitation Act (1908)—Construction should be favourable to plaintiff.**

Courts in dealing with questions of limitation should, as far as possible, place upon the Act a construction favourable to plaintiffs. [P 9 4 C 2]

(b) Limitation Act (1908), Ss. 19 and 31—Plaintiff relying on acknowledgment of liability in suit on hypothecation bond made after expiry of period of 12 years but within two years provided by S. 31—S. 31 prescribes period of limitation and so suit is within time.

A suit on hypothecation bond was brought long after the period of 12 years prescribed by Art. 132 had expired. Plaintiff however relied upon an acknowledgment of the liability made after the expiry of the said period of 12 years but within the period of two years provided by S. 31.

Held: that S. 31 prescribed a period of limitation and that the suit was within time: *A. I. R.* 1929 *Mad.* 791, *Impliedly affirmed*: *A.I.R.* 1927 *All.* 114; 31 *All.* 375; *A.I.R.* 1925 *All.* 68; *A.I.R.* 1927 *All.* 577; *A.I.R.* 1929 *Cal.*

68 and 21 *I.C.* 770, *Appr.*; 36 *Bom.* 238 and *A.I.R.* 1921 *Mad.* 654, *Dist.*; *A I.R.* 1922 *Mad.* 268, *Ref.* [P 994 C 2]

S. Varadachariar and *S. V. Venugopalachariar*—for Appellants.

P. Chenchiah—for Respondents.

Judgment.—The defendants in this suit are appellants here. This was a suit based upon a hypothecation bond dated 31st March 1897, executed by the father of defendants 1 and 2 and his coparceners. Admittedly Art. 132, Lim. Act, is the appropriate article in such cases and that provides for a 12 year's period of limitation. The suit in this case was filed on 2nd February 1921, and 12 year's period of limitation provided by Art. 132, Lim. Act, expired on 31st March 1909, but in order to get over the bar of limitation raised against the plaintiffs by Art. 132 an acknowledgment of liability dated 6th May 1909 is relied on by the plaintiffs. It must be noted that this acknowledgment was after the period of limitation provided by Art. 132 had expired, but the plaintiff's case is that by virtue of S. 31, Lim. Act of 1908, which came into force together with S. 1 on 7th August 1908, the period of limitation was in this case extended by two years from the date of that Act. The appellant's case is that S. 31 does not prescribe a period of limitation and that therefore in the case of suits already time barred, when the Act came into force, no acknowledgment made within the two years provided by S. 31 can be availed of by the plaintiffs in such suits. If the plaintiff's contention is correct, the present suit was filed within time because they would have, under S. 19, Lim. Act, a fresh period of limitation of 12 years from the date of the acknowledgment.

We have to consider the effect of Ss. 19 and 31, Lim. Act, and in doing so it must be stated that it is beyond question that S. 31 was enacted on account of a conflict of opinion between the Allahabad High Court and other Courts with regard to what was the period of limitation in suits on simple mortgages. The Allahabad High Court as well as some other High Courts had taken the view that the article applicable was Art. 147 which gave a period of 60 year's limitation and certain other High Courts thought that the period of limitation was only 12 years under Art. 132. All doubts on the matter were finally set at rest by the decision of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1), which decided that the period of limitation was 12 years under Art. 132. The result of this decision was that mortgagees in the United Provinces, through a wrong interpretation of the law which had prevailed there, had lost the right of suit, and in order to prevent this hardship that S. 31 was enacted. That section allows mortgagees to bring suits on their mortgages within two years from the date of the passing of the Act or within 60 years from the date when the money became due whichever period expires first. That section applies to cases where the mortgagee's right to sue had become time barred before the Act was passed. It may also have been intended to apply to suits not already time barred but on the point of being so. That section also applies to suits time barred and dismissed on that account and also to pending suits. It will be seen therefore, that section was designed to embrace only a special class of cases.

Mr. Varadachariar for the defendants-appellants contends that S. 31 is purely remedial and gives a period of two years from the passing of the Act for the institution of the special class of suits more as a concession or an act of grace and that S. 31 does not prescribe any period of limitation. There is certainly much force in this contention very ably presented to us by Mr. Varadachari. In support of it he has referred to Ss. 3 and 4, Lim. Act. The former says that every suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by Sch. 1, shall be dismissed. That section is perfectly clear and does not give rise to any confusion whatever. S. 4 provides that where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal, or application may be instituted, preferred or made on the day that the Court reopens. His contention is that S. 4 does not extend the period of limitation at all, that expires on the last day of the period set out in the schedule, but gives the mortgagee a day or days of grace in which to

(1) [1907] 30 Mad. 426=34 I.A. 186=17 M.L. J. 444 (P.C.).

institute the suit. He contends that S. 19, which is the acknowledgment section saving limitation, limits the acknowledgment to the period set out in the schedule. The opening words of the section are:

"Where before the expiration of the period prescribed for a suit . . . an acknowledgment of liability in respect of such property or right has been made . . ."

He contends that "the period prescribed for a suit" means the period prescribed in the schedule. Mr. Chenchiah on the other hand for the respondents in his very able argument contends that the words "the period prescribed for a suit" mean not only the period of limitation given in the schedule but such further days as are given to persons by other sections of the Act and that the words in S. 19 do not mean "prescribed in the schedule" but in their relation to S. 31 mean the further period of two years provided for in S. 31. He points out that in S. 3 the words used are:

"every suit instituted after the period of limitation prescribed therefor by Sch. 1,"

that there is a definite reference to the schedule and that in S. 4 the words are "the period of limitation prescribed for any suit," the words "in the schedule" being omitted. Our attention was also drawn to S. 5 where the words are "the period of limitation prescribed therefor" and other sections and pointed reference was made by him to S. 19 where the words are "period prescribed for a suit."

This question has been considered by the High Courts of Bombay, Allahabad, Madras and Calcutta. The Allahabad High Court has consistently held the view that S. 31 does prescribe the period of limitation and I think that the respondent's contention that the Madras High Court has taken the same view as that held in Allahabad is correct. The Calcutta High Court also, in the one case to which we were referred in that High Court, shared the Allahabad opinion. The Bombay High Court on the other hand has taken a different view.

In *Shevdas Daulatram* v. *Narayen* (2) the question arose as to whether a suit for which provision is made under S. 31 (1), Lim. Act of 1908, if instituted on a Monday, one day after the period of two years from the date of the passing of the Act has expired, could be taken to have been instituted within the period of two years and it was held that S. 31, Lim. Act, did not prescribe a period of limitation and that the suit could not be taken to have been instituted within the period of two years. That Court had not to consider S. 19, Lim. Act, and is on that ground certainly distinguishable from the present case. An earlier case in the Bombay High Court under the old Act, *Bai Hemkore* v. *Masamalli* (3), was a case of an acknowledgment by the defendant. That was a case of a suit to recover money due under a bond. The defendant made an acknowledgment of liability during the time that the Courts were closed for the vacation. When the acknowledgment was made the three years period of limitation provided in the Act had expired although the plaintiff's right to institute the suit on the date was subsisting under S. 5 of the old Act which is the same as S. 4 of the present Act. In *Sheo Pratab Singh* v. *Tajammul Hussain* (4), a case like the one now under appeal, of acknowledgment of liability, it was held that S. 4 does not prescribe any special pericd of limitation for any kind of suit but only lays down that when the prescribed period of limitation expires on a day when the Court is closed then the suit must be instituted on the day when the Court reopens and while in full agreement with the view taken by the Bombay High Court in *Bai Hemkore* v. *Masamalli* (3), last referred to, they held that that case was distinguishable from the case then before them. On p. 70, Mears, C. J., and King, J. state as follows:

"It has been argued for the respondents that in S. 19 the words "before the expiration of the period prescribed" must be taken as meaning before the expiration of the period prescribed in the schedule. We see no reason for limiting the meaning of the words in the manner suggested."

A contrary view to that contended for here by the appellants was also taken by the Allahabad High Court in *Hira Singh* v. *Mt. Amarti* (5). There the special period of limitation of two years prescribed by S. 31 of the Act of 1908 expired on a Sunday and it was held that a suit for sale to which S. 31,

(2) [1912] 36 Bom. 268=12 I.C. 811.

(3) [1902] 26 Bom. 782= Bom. L. R. 608.

(4) A. I. R. 1927 All. 114=98 I. C. 1005=49 All. 67.

(5) [1912] 34 All. 375=14 I. C. 154.

applied instituted upon the following Monday was within time. In the opinion of the Bench the time fixed for the institution of suits under S. 31, was as much prescribed as if suits instituted under that section found place in the schedule. Another Allahabad case is *Harish Chandra* v. *Kastola Kunwar* (6), where it was held that the words "prescribed in S. 19, Lim. Act," mean "prescribed by any law for the time being in force" and not limited to the period prescribed in Sch. 1, of the Act. Again in *Abdul Ghani* v. *Chiranji Lal* (7), a decision of a single Judge, it was held that an acknowledgment of a debt made after the expiration of the three years period prescribed by Sch. 1, Lim. Act of 1908, for a suit upon a promissory note but made before a suit on the note is actually barred by limitation is a good acknowledgment and there was no reason to limit the sense of the expression "period prescribed" to the period prescribed in the schedule alone. I now turn to the decision of Rankin, C. J., in *Debendra Nath Roy* v. *Kartic Prasad Das* (8). In that case there had been a payment of interest on a simple money bond after the expiration of the three years from the date limited for payment when the Court was closed but it was held that it could not save limitation under S. 20, of the Act if a suit on the bond was not brought on the day the Court reopened after the vacation. In his judgment Rankin, C. J., dealt with the case in *Bai Hemkore* v. *Masamalli* (3), and he found himself in agreement with what was there laid down. The case in *Sheo Prasad Singh* v. *Tajammuli Hussain* (4), which is exactly in point here and which distinguished *Bai Hemkore* v. *Masamalli* (3), was also dealt with by him. He states at p. 1214 as follows:

"That section was really intended for a limited class of people to amend the schedule to the Limitation Act and substitute for them a longer period than the period which the schedule really mentions."

This case clearly supports the view of the Allahabad High Court. The view expressed by the Bombay High Court in *Shevdas Daulatram* v. *Narayen* (2), was dissented from in Madras in *Murugesa Mudali* v. *Ramaswami Chettiar* (9), where it was held that the benefit of S. 4, Lim. Act, could be invoked in computing the period prescribed by S. 31, Lim. Act. The reasoning in the judgment in *Hira Singh* v. *Mt. Amarti* (5), was adopted but that in *Shevdas Daulatram* v. *Narayen* (2), was not followed. In *Subbarayan* v. *Natarajan* (10), a decision of Spencer and Ramesam, JJ. on S. 48, Civil P. C., in the opinion of Spencer, J., the word "prescribed" used in S. 15, Lim. Act means "prescribed by Sch. 1 to the Act" though the words "in the schedule" do not appear in the section as in Ss. 3 and 6 of the Act. In *Ummathu* v. *Pathmu* (11), a case not really in point, Ramesam, J. appears to think *Bai Hemkore* v. *Masamalli* (3), was correctly decided but here again that case is distinguishable from this for the reasons already given. In *Mari Narasayya* v. *Peruri Krishnamurthi* A.I.R. 1928 *Mad.* 1255 reference is made to *Murugesa Mudali* v. *Ramaswami Chettiar* (9), where *Shevdas Daulatram* v. *Narayen* (2), was dissented from but Reilly, J., had not to consider S. 31 at all but the effect of S. 4 of the Act and he held that the period of limitation mentioned there must be understood not only as prescribed in the schedule but also as qualified by Ss. 5 and 22.

In our opinion, the correct view of the effect of S. 31 has been taken by the Allahabad High Court in *Sheo Prasad Singh* v. *Tajamul Hussain* (4) by this Court in *Murugesa Mudaliar* v. *Ramaswami Chettiar* (9), and by the Calcutta High Court and therefore S. 31, Lim. Act, does prescribe a period of limitation. Courts in dealing with questions of limitation should, as far as possible, place upon the Limitation Act a construction favourable to plaintiffs and adopting that principle here, this Letters Patent must fail and be dismissed with costs.

P.R.S./P.N. *Appeal dismissed.*

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(6) A. I. R. 1925 All. 68=80 I.C. 743.
(7) A. I. R. 1927 All. 577=102 I. C. 111=49 All. 726.
(8) A. I. R. 1929 Cal. 68=114 I. C. 483=55 Cal. 1210.
(9) [1914] 21 I.C. 770.
(10) A. I. R. 1922 Mad. 269=70 I. C. 306=45 Mad. 785.
(11) A. I. R. 1921 Mad. 654=63 I. C. 924=44 Mad. 817.

* A. I. R. 1930 Madras 995

REILLY AND ANANTAKRISHNA AIYAR, JJ.

(*Srimathi*) *Deivasikamoni Annamalai Desikar, Pandara Sannadhi* and *another* —Petitioners—Appellants.

v.

Raju Pillai and *others*—Defendants—Respondents.

Appeal No. 141 of 1927, Decided on 22nd July 1930, from order of Dist. Judge, North Arcot, D/- 25th October 1926, in E. P. No. 26 of 1924.

*** (a) Limitation Act (1908), Art. 182 (5)—Decree passed for recovery subject to payment for improvements to defendant — Application by plaintiff for extension of time to make payment is not step-in-aid of execution.**

Where decree is passed in favour of plaintiff for recovery of property subject to payment by him of certain amount for improvements to defendants, application by plaintiff for extension of time to enable him to raise money is not step-in-aid of execution : *A. I. R.* 1922 *Mad.* 247, *Doubted* and *Dist.*; 38 *Mad.* 695 *not Appr.* 41 *Mad.* 251 and *A. I. R.* 1928 *Mad.* 143, *Rel. on.* ; 36 *Bom.* 638 ; 37 *Bom.* 317 ; 17 *A. L. J.* 841 and 24 *All.* 300, *Dist.* [P 996 C 2]

(b) Limitation Act (1908), Art. 181—Decree for possession passed on condition that plaintiff should pay improvements — Amounts to be decided later on commissioner's report — Art. 181 applies and time to apply for execution accrued from date on which amounts were finally fixed by Court.

A decree for possession of property was passed in favour of plaintiff on condition that he should pay to defendants certain amounts for improvements. The amounts however were not settled at the time of the decree but were to be fixed later on report of the Commissioner appointed for the purpose.

Held : that for the purposes of execution of the decree, Art. 181 would govern the case, and the right to apply for the execution accrued from the date on which the amounts were finally settled by the Court : 51 *I. C.* 576 and 24 *All.* 300, *Dist.* [P 997 C 1, 2]

*** (c) Limitation Act (1908), Arts. 182 and 181—Interpretation.**

Article 182 ought to be read as "for the execution of a decree or order not provided for as regards dismissal by Art. 183 and by S. 48, Civil P. C." In the same way Art. 181 should be read as application for which no period of limitation for the purpose of dismissal is provided elsewhere in the schedule or by S. 48, Civil P. C. [P 998 C 1]

K. Rajah Iyer and *V. Ramaswami Iyer*—for Appellants.

T. R. Ramachandra Iyer, S. Srinivasa Iyer and *V. C. Veeraraghavan*—for Respondents.

Reilly, J.—In this case a decree was made that the plaintiff should recover certain property from the defendants and that he should pay to certain of the defendants amounts for improvements. Grammatically, those might be two separate provisions in the decree ; but I think there is no doubt that the intention of the decree was that on the payment of those amounts the plaintiff should be entitled to recover possession. The learned District Judge adopted a rather curious course in making his decree in respect of those amounts to be paid for improvements. He fixed them provisionally. He provided in the decree that they were subject to revision on the report of a Commissioner to be appointed by the Court. There was an appeal against the decree ; but it was dismissed by this Court in December 1918. On 15th December 1919 the plaintiff put in an execution petition, in which he prayed for the appointment of a commissioner to fix the amounts to be paid for improvements and for possession of the property. Eventually the commissioner made his report, and the District Judge after considering it adopted the amounts suggested by the commissioner on 12th November 1920, and ordered that the plaintiff should pay those amounts into Court by 17th December 1920. The amounts were not paid by that date, and the execution petition was adjourned from time to time ; and eventually on 8th August 1921 the plaintiff put in an application that further time might be granted to him for payment, and time was granted to him up to 16th August 1921. On that date the money had not been paid and the execution petition was dismissed. Then on 6th August 1924, the plaintiff put in E. P. No. 26 of 1924 for delivery of the property on payment of the amounts fixed. Objection was taken by some of the defendants that the petition was time barred, because it was put in more than three years after the previous execution petition. The plaintiff contended that the bar of limitation was saved by his application of 8th August 1921, for the adjournment of the previous execution petition in order to allow him time to make the payments. The learned District Judge decided against that contention and dismissed the second execution petition. The present appeal is against that order of dismissal.

Mr. Rajah Ayyar, who appears for the plaintiff, has first contended that the

application for extended time for payment, which was made on 8th August 1921, was a step-in-aid of execution within the meaning of Art. 182, Lim. Act. He has first referred us to *Sankara Nainar* v. *Thangamma* (1), in which it was held that an application made by a mortgagor for extension of the time allowed him for payment in a decree for redemption was a step-in-aid of execution. With very great respect I am not able to understand that decision. The application of the mortgagor in that case appears to me to have been an application to extend the time fixed in the original decree, that is an application to vary the original decree. There are provisions for making such applications in respect of redemption decrees. I do not myself understand how such an application could be treated as coming within the words "step-in-aid of execution," in Art. 182, Lim. Act. But that, as I have said, was a decision in a mortgage suit and so perhaps may be regarded as not exactly applicable to the present case. What appears to be of more use to the plaintiff in this case is the decision in *Abdul Kader Rowther* v. *Krishnan Madhavan Nair* (2), in which an application for time to get an encumbrance certificate for the purpose of a sale in execution was regarded as a step-in-aid of execution.

Ayling, J., in *Masilamani Mudaliar* v. *Sethuswami Ayyar* (3), expressed dissent from that view; and it has to be noticed that there is a decision directly in conflict with it in *Ramaswami* v. *Veeranna* (4). But Mr. Rajah Ayyar has brought to our notice two cases of the Bombay High Court, *Haridasanabhai* v. *Vithaldas Kisandas* (5), and *Seshadascharya* v. *Bhimacharya* (6), in which applications for time for getting copies of decrees or other documents were held to be steps-in-aid of execution, and has also quoted *Pitam Singh* v. *Tota Singh* (7), *Bhairon Prasad* v. *Amina Begam* (8), and *Raghunath Prasad Singh* v. *Lakshmi Narain Singh* (9), which are to the same effect. But, even if to ask for time to get from other persons documents necessary for execution proceedings can properly be regarded as a step-in-aid of execution, in my opinion to defer, or to ask time for, doing something which concerns the decree-holder himself cannot properly be regarded as aiding execution.

It is rather in my opinion postponing execution. To say that it is aiding execution to ask for extended time for payment, because the decree-holder, if he gets time, may be able to earn or borrow or otherwise raise money, appears to me unreasonable; and no decision has been brought to our notice in which an application for time for that purpose has been held to be a step-in-aid of execution. The payment of the money may well be a step-in-aid of execution; but the means and the opportunity of the decree-holder for raising it appear to me to be entirely unconnected with execution. In my opinion therefore the application of the plaintiff for further time to make the payment was not a step-in-aid of execution.

But Mr. Rajah Aiyar has contended alternatively that Art. 182 of the Act has no relation to this case, because in the decree no time was fixed for the payment of the amounts for improvements and they could not have been paid on the date of the decree as they had not then been determined. That appears to me to be a good argument, and, if it is so, then we must turn to Art. 181. If we do that, we find that the period of limitation is three years from the date when the right to apply accrues. Mr. Rajah Aiyar indeed goes further and has contended that as no time was fixed for payment in the decree the plaintiff might have paid at any time up to the end of twelve years and in support of that he has quoted *Rukmini Kuar* v. *Sheo Dat Rai* (10) and *Chhedi* v. *Lalu* (11). Neither of those cases appears to me to support that contention as each turned upon the interpretation of the particular words of the decree concerned. In the first case the decree-holder was at

(1) A I.R. 1922 Mad. 247=70 I.C. 333=45 Mad. 202.
(2) [1915] 38 Mad. 695=23 I.C. 533.
(3) [1918] 41 Mad. 251=41 I.C. 701.
(4) A.I.R. 1928 Mad. 143=106 I.C. 648.
(5) [1912] 36 Bom. 628=17 I.C. 30.
(6) [1913] 37 Bom. 317=17 I.C. 969.
(7) [1907] 29 All. 301=4 A.L.J. 184=(1907) A. W.N. 74.
(8) [1916] 38 All. 690=25 I.C. 633.
(9) A.I.R. 1925 All. 394=88 I.C. 271=47 All. 667.
(10) [1919] 51 I. C. 576.
(11) [1902] 24 All. 300=(1902) A. W. N. 60.

liberty to pay the amount at any time in a certain month in any year. In the second case which was one of pre-emption time was held to run from the date of the payment of the pre-emption amount within the period allowed in the decree. Neither of those cases I think can help the plaintiff. The appropriate article appears to me to be Art. 181, and we have only to determine the date when the right to apply accrued. In this case the accrual could not be a continuing thing the right must have accrued on some particular date. Now as I have said the District Judge left the amounts to be paid for improvements unsettled in the decree and under the decree they were to be fixed later on the report of a commissioner. A commissioner was appointed and on his report the District Judge fixed the amounts on 12th November 1920.

In my opinion the effect of that was that those amounts were fixed upon that day and then became part of the decree. If there was anything irregular in the learned District Judge's procedure in arriving at his decree in that way the plaintiff or any one else concerned had his right to appeal but that is not a question to be decided in execution. The amounts were fixed on 12th November 1920 and the order then made was that they should be paid by 17th December 1920. But as I have mentioned they were not paid and that execution petition was eventually dismissed on 16th August 1921. Mr. Rajah Aiyar contends that even if we are to take the amounts as brought into the decree when the District Judge eventually fixed them in November 1920, yet because the execution petition was not disposed of until 16th August 1921, his right to apply within the meaning of Art. 181 did not arise until the dismissal of the petition on 16th August 1921. That appears to me an untenable contention. The suggestion is that the fixing of the amounts on 12th November 1920 was merely an interlocutory matter which did not really take effect until the execution petition was finally disposed of in August 1921. But if we look upon the fixing of the amounts as an interlocutory matter incidental to the execution petition when that petition was dismissed the order fixing the amounts went with it. I do not think that is the proper way to regard the matter. If we remember the way in which this decree was drawn the fixing of the amounts by the learned District Judge on 12th November 1920, appears to me to have been the final settling of the decree and from that date the plaintiff was at liberty to make his payment and his right to apply within the meaning of Art. 181 accrued.

Mr. Rajah Aiyar has raised one more contention, viz., that even apart from the facts that no date for payment was fixed in the decree and payment could not be made on the date of the decree, Art. 181, Lim. Act, does not apply to this case but only S. 48, Civil P. C., which gives the decree-holder 12 years from the date of his decree for his application. That contention depends upon the wording of Art. 181. The wording is:

"applications for which no period of limitation is provided elsewhere in this schedule or by S. 48, Civil P. C. of 1908."

Mr. Rajah Aiyar suggests that S. 48, Civil P. C., does provide a period of limitation of 12 years for all decrees other than decrees for injunction and that if we exclude from Art. 181 all applications which are provided for in other articles of the Limitation Act, and also decrees (other than decrees for injunction) which are provided for in S. 48 of the Code there is very little left for Art. 181 and certainly not enough to cover this case. That is a curious result of what at first sight might be taken to be the grammatical meaning of Art. 181. If we look at Art. 182 we find that the wording on the face of it may present almost the same difficulty. It runs:

"For the execution of a decree or order not provided for by Art, 183 or by S. 48, Civil P. C. of 1908."

Literally, according to Mr. Rajah Aiyar's interpretation that would mean that Art. 182 first excludes decrees included within Art. 183 and then excludes every decree which comes within S. 48, Civil P. C. Then to what decrees other than decrees for injunction would Art. 182 apply? I think those conundrums arise only from a superficial view of the wording of Arts. 182 and 181. Those articles like the rest of Sch. 1, Lim. Act, must be read with S. 3 of the Act. S. 3 of the Act provides that suits, appeals and

applications made after the periods of limitation prescribed in Sch. 1 shall be dismissed, that is, these periods of limitation set out in the different articles of Sch. 1 of the Act are only to be taken in reference to the question of dismissal. Then we come to Art. 182. If we read it, as I think we ought to :

"for the execution of a decree or order not provided for as regards dismissal by Art. 183 or by S. 48, Civil P. C."

there is no difficulty about it because S. 48 of the Code only provides for the dismissal of execution petitions which come in after the period of 12 years. It has no application to execution petitions put in at an earlier date and does not purport to deal with them. And in the same way if we read Art. 181, as

"application for which no period of limitation for the purpose of dismissal is provided elsewhere in this schedule or by S. 48, Civil P. C."

there is no difficulty about it and in fact the universally recognised interpretation of those articles is the right one, not the curious interpretation which Mr. Rajah Aiyar suggests from his view of the grammatical language of the articles which is perhaps not very happy.

Mr. Rajah Aiyar's last contention therefore that neither Art. 181 nor Art. 182 applies to this case but only S. 48, Civil P. C., in my opinion also fails. In my opinion this appeal must be dismissed with costs.

Anantakrishna Ayyar, J.—I agree.

P.R.S/S.N. *Appeal dismissed.*

** A. I. R. 1930 Madras 998

REILLY AND ANANTAKRISHNA AYYAR, JJ.

T. V. Gopalakrishna Ayyar and *another*—Appellants.

v.

Official Receiver, South Malabar, and *others*—Respondents.

Appeal No. 13 of 1926, Decided on 24th July 1930, from order of Dist. Judge, South Malabar, in Civil Misc. Appeal No. 6 of 1925.

**** (a) Provincial Insolvency Act (5 of 1920), S. 46—Word "due" does not cover debts already time barred.**

The word "due" as used in S. 46 means "legally recoverable" and not debts which have become time barred. [P 999 C 1]

*** (b) Provincial Insolvency Act (5 of 1920), S. 46—Scope.**

The Official Receiver has no right to set off against the creditor's claim a time-barred claim against the creditor. [P 999 C 1]

C. S. Swaminathan—for Appellants.

T. S. Anantaraman—for Respondents.

Reilly, J.—This is an appeal against the order of the District Judge of South Malabar in an insolvency matter. The appellant, a creditor of the insolvent, has put in a claim before the Official Receiver for an amount which he says is due to him from the insolvent. The learned District Judge has found that the Official Receiver is entitled to set off against that claim a time-barred debt due from the creditor to the insolvent. I do not think it can be disputed, and I did not understand Mr. Anantaraman for the Official Receiver to dispute, that a creditor in an insolvency can prove only a debt which at the date of the adjudication has not become time barred. If we examine Ss. 34 and 28 (2), Prov. Insol. Act, I do not think that there can be any doubt on that point. But it is suggested that, although the creditor cannot recover from the insolvent a time-barred debt and although a day before he is adjudged insolvent the insolvent himself could not set off against the creditor a time-barred claim, the Official Receiver has a higher right and can set off against the creditor's claim a time-barred claim. That appears to me to be a very startling proposition.

Mr. Anantaraman argues that it can be founded on the wording of S. 46, Prov. Insol. Act. That section runs:

"Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

Now in that section Mr. Anantaraman contends "due" does not mean "legally recoverable" but "justly due"; and he has pointed out that in S. 60, Contract Act, "due" is used of a debt which is no longer legally recoverable from the debtor but which is actually and justly due from him. No doubt the word "due" is used in that sense in S. 60, Contract Act ; but we have to ascertain in what sense it is used in S. 46, Prov. Insol. Act. I think that, if we try to work that section out, there can be no doubt

that "due" as used in it means "legally recoverable" because, if it includes not only debts which are legally recoverable but also debts which have become time barred, then that meaning of the word must apply to both parties, and, if we take into account what is due otherwise than legally recoverable from the insolvent to the creditor and from the creditor to the insolvent and arrive at the balance in the way indicated in the section, the balance may well be in favour of the creditor by reason of a time-barred debt due to him. The result of that would be that under the Insolvency Act a creditor could recover a time-barred debt, which I think is entirely out of the question. For that reason alone without discussing the matter further I may mention neither side has been able to find any authority on this point—it appears to me clear that the learned District Judge's view of the matter is wrong and that the Official Receiver in this case has no right to set off against the creditor's claim a time-barred claim against the creditor.

But it is represented to us that, although the learned District Judge disposed of the appeal on his view of the law in this matter and then sent the case back to the Official Receiver to be worked out in accordance with that view, it has not yet been determined whether the claims of the insolvent against the creditor are actually time barred, and that question of course must be investigated. So, although I do not agree with the learned District Judge's view of the law, I agree with him that it is necessary that this case should go back to the Official Receiver for further investigation. In the circumstances the appellant is entitled to his costs on this appeal.

Anantakrishna Ayyar, J.—I agree. I wish to add that the object of S. 46, Prov. Insol. Act, is not to do away with the provisions of Limitation Act and to revive claims already barred by limitation before a person became insolvent. The logical result of the contention raised by the learned advocate for the respondent would be that once a person becomes insolvent, not only could the Official Receiver representing the estate of the insolvent enforce claims of the insolvent which had become barred by limitation long before the insolvency, but also the creditors of the insolvent whose debts had became barred by limitation long prior to the insolvency could seek to enforce such claims against the estate of the insolvent in the hands of the Official Receiver. In the absence of any specific provision in the Insolvency Act, I am not prepared to agree to a contention which leads to such results. I can understand that claims not barred by limitation on the date of adjudication should be taken to be not barred so long as the adjudication subsists ; but the contention that the effect of insolvency is to revive debts already barred by limitation is, I think, a startling one, and, in the absence of authority, should not be accepted. No decision of any English or Indian Court in support of such a contention has been cited before us.

It seems to me that the object of S. 46, Pro. Insol. Act, is to provide for a just and equitable mode of "adjustment of" mutual dealings of the insolvent and his creditor ; but for such a provision the creditor of an insolvent if he also owed a debt to the insolvent would have to pay the whole of the debt to the Official Receiver, i.e., he will have to pay the full sixteen annas in the rupee in respect of the debt due by him to the insolvents' estate, whereas he would be entitled to receive from the estate only pro rata dividend from the estate. Such a result was considered unjust and inequitable in cases where "mutual dealings" of the nature contemplated by the section existed between the parties. The section accordingly provides that

"an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and that the sum due from the one party shall be set off against any sum due from the other party, and the balance of account and no more shall be claimed or paid on either side respectively."

Whether any amounts are due from the one party to the other, and whether they are barred by limitation, are all questions to be decided under the general law and S. 46 only provides how the respective rights of the parties should be adjusted by set-off in cases of mutual dealings. I agree with my learned brother that the appeal should be allowed.

P.R.S./S.N. *Appeal allowed.*

A. I. R. 1930 Madras 1000

BEASLEY, C. J., AND CURGENVEN, J.

(*Yanati*) *Rami Reddi* and *another*—Defendants—Appellants.

v.

Tanati Chenchu Polamma—Plaintiff—Respondent.

Appeal No. 171 of 1927, Decided on 9th April 1930, from decree of Sub-Judge, Nellore, D/- 25th February 1926, in Original Suit No. 89 of 1925.

(a) Hindu Law — Maintenance — Widow suing her deceased husband's brother for maintenance—Net income of defendant's family consisting of seven members, being Rs. 15,000 per year—Rs. 100 p. m. would be proper maintenance.

Plaintiff, a Hindu widow, sued her deceased husband's brother for maintenance. The annual net income of the defendant's family, which consisted of seven members in all, was Rs. 15,000. The plaintiff was a young woman of about 18 years and was in need of education,

Held: that an allowance in all of Rs. 100 per mensem would be the proper amount of maintenance. [P 1001 C 1]

(b) Civil P. C., O. 33, Rr. 10 and 11 — Court-fees.

Under O. 33, Rr. 10 and 11, Civil P. C., Court should direct the defendant to pay as court-fees the amount which is payable only on that portion of the plaintiff's claim which is successful: *A. I. R.* 1928 *Mad.* 216 and 38 *All.* 469, *Foll.* [P 1001 C 1]

T. V. Ramanatha Ayyar—for Appellants.

B. Somayya—for Respondent.

Beasley, C. J.—This is an appeal from the Court of the Subordinate Judge at Nellore. The defendants in the suit are the appellants and there are also objections by the successful plaintiff in the suit, the respondent here. The plaintiff, whose deceased husband and defendant 1 were undivided brothers filed the suit claiming maintenance. Defendant 2 is the undivided minor son of defendant 1. The plaintiff's husband died on 12th June 1919 and the suit was filed on 21st December 1923 claiming current maintenance at Rs. 250 a month and arrears from 12th June 1919 to the date of the plaint. The total valuation of the claim was Rs. 16,500. The learned District Judge awarded the plaintiff Rs. 50 in cash per mensem and three putties of paddy per annum equivalent to Rs. 240 per annum in respect of current maintenance and arrears at the rate of Rs. 35 per mensem; and with regard to costs, he directed defendant 1 to pay the plaintiff's costs of the suit and also the whole of the court-fee payable to Government by the plaintiff who brought her suit in forma pauperis.

The members of defendant 1's family consist of himself, his wife, a minor son, two minor daughters, his mother and a widowed sister. The plaintiff's case was that the net income of the family amounted to about Rs. 20,000 a year; on the other hand defendant 1's case was that the net income was only Rs. 6,000 a year and he offered to pay only Rs. 25 per mensem as current maintenance. The learned Subordinate Judge took the gross income of the family to be Rs. 24,000 from which he made deductions for kist and estimated the net income at about Rs. 15,000 although there does not seem to be anything on the record which would justify a reduction of the family income below Rs. 19,000 a year. He seems to have been generally satisfied with the evidence as to the family income given on behalf of the plaintiff. Though defendant 1, the managing member of the family, admitted that he had accounts he did not produce them. He must have known that on the question of maintenance it was all important that he should show to the Court not only what the expenditure of the family was but what its profits were and assist the Court in arriving at the proper figure of the income of the family. He chose not to disclose those books and the learned trial Judge has quite properly drawn all inferences adverse to him by reason of the non-production of these books. The inference to be drawn is that had he produced them, the figures therein as to the income of the family would have been more approximating to those given on the plaintiff's behalf than those given by the defendants. We see no reason for thinking that the estimate of the income of the family arrived at by the learned Subordinate Judge erred on the side of liberality to the plaintiff, and we are prepared to take it that the net income of the family was about Rc. 15,000 a year. We have got to see whether he has on that net income awarded to the plaintiff the proper amount of maintenance. The net income of Rs. 15,000 means a monthly income to the family of Rs. 1,250. In fixing maintenance at the rate of Rs. 50 per mensem in cash and the equivalent

of another Rs. 20 per mensem in paddy making a total of Rs. 70 per mensem, we think he has not been liberal to the plaintiff. We are not fixing maintenance in this case by taking any particular proportion of the net income but we are taking into consideration the fact that Rs. 1,250 per mensem is a very good income for a family of this size which after all is quite a small one consisting of some seven members only; and we think that the evidence shows that the plaintiff who is a young woman of about 18 years of age has been educated and is still in need of education and that her requirements certainly are more than those of a woman older than herself. The conclusion we have come to with regard to this is that the current maintenance should be fixed at Rs. 80 per mensem plus the three putties of paddy awarded by the learned Subordinate Judge. This gives the plaintiff a monthly maintenance of approximately Rs. 100.

Defendant 1 has been directed to pay the court-fee of Rs. 1,004-15-0 to the Government that being the sum which the plaintiff would have to pay to Government, she having been allowed to bring the suit as a pauper. Defendant 1's contention is that he should be ordered to pay court-fee only on the amount the plaintiff has succeeded in getting under the decree and that would amount to Rs. 247. In support of this contention *Srinivasa Ayyar* v. *Lakshmi Ammal* (1) is relied upon. There it was held that under O. 33, Rr. 10 and 11, Civil P. C., it is not open to the Court to direct the defendants to pay court-fees exceeding the amount which is payable on that portion of the plaintiffs claim which is successful; and another case to the same effect is *Ganga Dayal Rai* v. *Mt. Gaura* (2). We think that the order of the trial Judge directing defendant 1 to pay the court-fee in respect of the amount in excess of that recovered in the suit under the decree by the plaintiff is wrong and we accordingly modify that part of the decree and direct defendant 1 to pay court-fee on the amount the plaintiff has succeeded in getting. The plaintiff will pay the balance of court-fee payable to Government.

(1) A. I. R. 1928 Mad. 216=108 I. C. 712.
(2) [1916] 38 All. 469=35 I. C. 46.

In the result the appeal, except as regards the question of the court-fee is dismissed and the cross-appeal of the respondent allowed in part with costs. The respondent will get costs on the appeal to the extent the appellant is unsuccessful and the appellant will get costs to the extent he is successful in the appeal. In the cross-appeal the appellant will pay the respondent's costs to the extent the respondent is successful.

P.R.S./S.N. *Appeal dismissed.*

A. I. R. 1930 Madras 1001

WALLACE AND JACKSON, JJ.

Ekambara Mudali — Accused — Petitioner.

v.

Alamelammal—Respondents.

Criminal Revns. Nos. 571 and 572 of 1929 and Criminal Revn. Petns. Nos. 519 and 520 of 1929, Decided on 27th March 1930.

Criminal Trial—No subordinate Court can decide whether its proceedings should be treated as null—If it is thought that there is mistake matter must be referred to High Court.

It must be taken as the procedural law in the Presidency of Madras that no subordinate Court can sit in revision upon its own record, and decide whether upon a certain view of the facts its proceedings should be treated as null. If it is thought that a mistake has been committed, the matter must be referred to the High Court: 42 *Cal.* 365, *not Foll.*; 2 *Weir* 307, *Expl.*; 11 *Weir* 308, *Ref.* [P 1002 C 2]

A. Ramaswami Aiyar—for Petitioner.

P. Govinda Menon—for Respondents.

Public Prosecutor—for the Crown.

Judgment.—The petitioner has been sentenced to a fine of Rs. 15, in default two weeks' rigorous imprisonment under S. 352, I. P. C., in the following circumstances. The case was filed before the First Class Bench, Vellore, on 19th February 1929 and posted to 26th February. On 26th February, according to the diary extract, it was adjourned to 1st March. On 1st March the complainant was absent, and the accused, the present petitioner, was acquitted under S. 247, Criminal P. C. On the 5th March the complainant's vakil represented that the posting to the 1st was a mistake for the 5th. Thereupon an entry was made in the diary for the 5th March:

"Alamelu Ammal prefers a complaint against Ekambara Mudali. Her sworn statement is recorded. The case is taken on file under S. 352, I. P. C., and posted to 19th March 1929."

This was merely a revival of the old complaint dismissed on 1st March 1929. There was, as a matter of fact, no fresh stamped complaint and no sworn statement on 5th March. There was a complaint on plain paper dated 5th March and a sworn statement dated 26th March. The petitioner complains that having once been acquitted he cannot be retried for the same offence. The President thinks that his Court can act as a Court of revision and decide which of its decisions may or may not be quashed. In any circumstances there is no legal authority for making false records in the Court's diary. If the President thought he could treat the order of acquittal as a nullity, he should have done so, proceeding with the case of 19th February on 5th March as though nothing had happened on 1st March. But such procedure is quite contrary to the Code, which has never contemplated a Court sitting in revision upon its own completed and pronounced judgments. The President, if he thought there had been a miscarriage of justice, should have referred the matter to the District Magistrate, who, if so advised, could have acted under S. 438.

A case very similar to the present case is considered in *Achambit Mandal* v. *Mahatab Singh* (1), and there it is held that the acquittal following upon a mistake about the posting date is a nullity, and the trial may proceed as if it had never been pronounced. This ruling is in terms based upon High Court Proceedings, 17th August 1875 No. 1793 (2), but the Madras decision is no authority for the Court acting in revision upon its own proceedings. A Third Class Magistrate posted a case to a certain date without informing the parties, and on their non-appearance acquitted the accused. The District Magistrate ordered him to restore the case to file. The Sessions Judge questioned the legality of his order and this Court, holding that the Third Class Magistrate's procedure was substantially irregular, set aside the order of acquittal. It did not confine itself to returning the record with the observation that there was no cause for interference, which it would have done if it had held, as the Calcutta case assumes, that the Third Class Magistrate could himself restore the case. That the District Magistrate has no jurisdiction to order a retrial was ruled in the next case but one in *Weir's Collection*: see 11 *Weir* 308 *C. P.* 342. It must be taken as the procedural law in this province that no Subordinate Court can sit in revision upon its own record and decide whether, upon a certain view of the facts, its proceedings should be treated as null. If it is thought that a mistake has been committed the matter must be referred to the High Court. The petition is allowed; the sentence is cancelled; the fine is ordered to be refunded; and the President is enjoined that his diary must be a plain record of fact and not a pious adaptation to circumstances.

P.R.S./S.N. *Petition allowed.*

(1) [1915] 42 Cal. 365=16 Cr. L. J. 148=27 I. C. 212.
(2) 2 Weir 307.

A. I. R. 1930 Madras 1002

PANDALAI, J.

(*Palavallu*) *Krishtayya* and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 26 of 1930 and Criminal Revn. Petn. No. 25 of 1930, Decided on 14th August 1930, from order of Panchayat Court, Hemavathi, D/- 5th December 1928, in Criminal Case No. 5 of 1928.

Madras Village Courts Act (1889)—Rules under R. 64—Conviction by panchayatdars in case instituted after they cease to be panchayatdars is invalid and not coverable by R. 64.

Where persons constituting Court of Panchayatdars cease to be panchayatdars, owing to effiux of the term of their office long before the case was instituted, they have no jurisdiction to try the case. Conviction by such panchayatdars is invalid and the defect cannot be covered by R. 64. [P 1003 C 1]

V. S. Narasimhachariar—for Petitioners.

K. Venkataraghavachariar for *Public Prosecutor*—for the Crown.

Order.—This is a petition to revise the conviction under Ss. 160 and 352, I. P. C., of the petitioner by the Panchayat Court of Hemavathi dated 5th December 1928. The short ground is that the gentlemen who formed the Court and recorded the conviction, namely Messrs. Thimme Gowd, Kurnam Ramappa and Hanumantha Gowd, had ceased to be panchayatdars by efflux of time long before the case was insti-

tuted. Ex. A, a copy of the Anantapur District Gazette for June 1925, shows that the above-named three gentlemen were notified as having been duly elected as panchayatdars of the Hemavathi Court. According to R. 17 of the rules framed under the Village Courts Act the term of office of panchayatdars commences from the date of the publication in the District Gazette. By S. 9 (4) the term of office is three years, and therefore the term of office of these three gentlemen expired in June 1928. The case against the petitioner was instituted on 18th September 1928, and therefore long after the above said gentlemen had ceased to be panchayatdars. They were therefore functus officio and had no power to try or convict anyone. The Public Prosecutor referred to R. 64 of the rules made under the Village Courts Act which says that no proceeding or act of a panchayat Court shall be deemed to be invalid by reason only of any defect in the constitution of such Court or that any member of such Court was disqualified or disentitled to act as such or to hold any office in relation to such Court or by reason of any such proceeding or act having taken place during any vacancy in the office of president or member of such Court. The defect disclosed in this case is not any of the ones mentioned in this rule. But the proceeding was by a set of persons purporting to act as a Court and not having any power so to do. There was entire want of jurisdiction and the proceeding was from the beginning invalid. The conviction is set aside and the fine, if paid, will be refunded.

P.R.S./S.N. *Conviction set aside.*

N. B.—The High Court interfered under S. 107, Government of India Act.

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* A. I. R. 1930 Madras 1003
Full Bench

BEASLEY, C. J., AND ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

S. M. Periasamy Nadar and *others* —Petitioners.

v.

Commissioner of Income-tax, Madras—Respondent.

Original Petn. No. 179 of 1929, Decided on 11th April 1930.

*** Income-tax Act (1922), S. 10 (2) (iii)—Partnership claiming deduction as interest on capital contributed by individual members—No agreement entered into, before partnership started, to contribute capital or to pay interest—Case does not come within S. 10 (2) (iii).**

The assessee partnership claimed a deduction of certain amount from the gross profits, basing their claim on S. 10 (2) (iii). It was contended by the assessees that the amount was interest on capital borrowed from the individual members of the partnership. But there was no agreement entered into before the partnership was started to contribute any capital or to lend any moneys, nor was there an agreement to pay interest.

Held: that as there was not a definite and enforceable agreement to pay interest, the case would not come within S. 10 (2) (iii): *A. I. R.* 1928 *Mad.* 923 (*F. B.*), *Dist.*

[P 1004 C 2]

K. V. Sesha Ayyangar—for Petitioners.

M. Patanjali Sastri—for Respondent.

Beasley, C. J.—On this petition we are asked to direct the Commissioner of Income-tax to refer the following question:

"Whether interest payments made to partners of the petitioners' firm under the circumstances mentioned in the petition, and in the order of the Assistant Commissioner of Income-tax are admissible items of expenditure under S. 10, (2) (iii), Income-tax Act."

The assessees are a partnership firm carrying on business in the purchase and sale of cotton seeds and it appears now to be a very flourishing business. In the year of assessment, 1928-29, it was assessed to income-tax in the amount of Rs. 25,095. In arriving at this assessment, the Income-tax Officer disallowed a sum of Rs. 7,633-4-0 which the assessees claimed to be entitled to a deduction from the gross profits of the partnership. They based their claim, as is apparent from the question we are asked to direct the Commissioner of Income-tax to refer, on S. 10, (2) (iii), Income-tax Act. That section allows a deduction

"in respect of capital borrowed for the purposes of the business where the payment of interest thereon is not in any way dependent upon the earning of profits, the amount of interest paid."

It was contended by the assessees that this sum of money was interest on capital borrowed from or at least a loan to the partnership by the individual partners and as such not assessable to income-tax. In this connexion much reliance was placed by Mr. K. V. Sesha Ayyangar on the Full Bench decision in *Commissioner of Income-tax* v. *Subra-*

mania Chettiar (1). There a Full Bench of which I was a member held that where a partner genuinely lends money, beyond the initial capital, to the partnership at an agreed reasonable rate of interest, and the money is used for capital expenditure, the interest paid by the partnership to him in the year of assessment must be deducted in computing the profits or gains of the partnership as provided by S. 10 (2) (iii), Income-tax Act. That is all that that case decides; and when the facts of the case are looked into, it will be seen that before the partnership started, there was an agreement in which the amount of capital contributed by each of the partners was set out and the rate of interest agreed to be paid upon the capital so contributed was also agreed upon. In this case there is no such agreement. Furthermore, in the agreement in that case there was a provision that after the partnership started working, the partners might contribute further capital to the partnership and that if they did so, they should receive interest at a certain rate on the capital so contributed. That case in no way, in our view, supports the contention of Mr. Sesha Ayyangar. There is no agreement whatever in the present case to contribute any capital or lend any moneys nor is there an agreement to pay any interest. It is contended by the assessees that when the partnership started the business, the business was a very small one and that there was no initial capital. But it is quite obvious, as the Assistant Commissioner of Income-tax says in his order, that a business with so large a turnover as this one could not possibly be conducted without some capital and that what happened in this case was that a certain amount of the profits earned by the partnership was allowed to remain in the partnership as capital by means of which to carry on the partnership.

This is a very different case to the Full Bench case where there was a specific agreement to contribute further capital beyond the initial capital already contributed. There is a further difficulty in the way of Mr. Sesha Ayyangar, namely, that whereas in the Full Bench case there was an agreement to pay a fixed rate of interest, here, as I have already stated, there is no agreement to pay any interest at all. But as a fact it does appear that for a period of 17 years 12 per cent interest was paid on the amounts allowed to remain in the partnership by the partners and it is therefore quite obvious that in those years the partnership earned sufficient profits to enable the partnership to pay that high rate of interest. It must also be equally clear that had there been no such profits no such rate of interest could have been paid. Therefore, the payment of interest was dependent on the earning of profits. There is not, as in the Full Bench case, a definite and an enforceable agreement to pay interest. What was strenuously argued before us in that case, so far as my recollection serves me, was that, quite irrespective of any profits being earned, the rate of interest agreed upon was payable. Mr. Sesha Ayyangar is therefore unable to bring himself within the provisions of S. 10, (2) (iii), Income-tax Act.

Another matter which I think I ought to mention is that Thiruvenkatachariar, J., who was a member of that Full Bench, in his answer to the question referred, stated that this question is purely a question of fact, and with that statement I am inclined to agree. Under these circumstances, we decline to direct the Commissioner of Income-tax to refer this case. The assessees will pay Rs. 150 costs to the Commissioner.

Anantakrishna Ayyar, J.—I agree.

Curgenven, J.—I agree.

P.R.S./S.N. *Order accordingly.*

(1) A. I. R. 1928 Mad. 923=110 I. C. 889=51 Mad. 787 (F. B.).

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* A. I. R. 1930 Madras 1004

KUMARASWAMI SASTRI AND REILLY, JJ.

Kothakota Venkata Rami Reddy—Defendant—Appellant.

v.

Sri Maharaja Seetha Rama Bhupal Rao and *others*—Plaintiff and his legal representatives—Respondents.

Appeal No. 192 of 1924, Decided on 13th February 1930, from decree of Sub-Judge, Kurnool, in Original Suit No. 34 of 1922.

*** (a) Civil P. C. (1908), S. 84—Characteristic of "Foreign State."**

Any State which has preserved any degree of sovereignty must have at least three characteristics. First, the people of the territory con-

cerned must owe allegiance to the ruler of the supposed State, and in the term "ruler" is included any person in whom, or body in which the sovereign power resides. Secondly the law enforced in the State must be the ruler's laws, either made or recognized by him, not laws imposed by any outside authority, nor laws made by him in virtue only of a delegated authority. And thirdly, those laws must be enforced by his Courts, that is Courts deriving their authority from him and not subject to the judicial control of any outside authority. [P 1006 C 1, 2]

(b) Negotiable Instruments Act (1881), S. 4 —Promissory note made in favour of person described by his office and not by name is valid.

Promissory note made in favour of a person described by his office (such as Mahathameen Saheb Guru of Gadwal Samasthanam) is one made in favour of a "certain person" as required by S. 4 and is therefore valid: 5 *P.L.J.* 536 and 41 *Mad.* 353, *Rel. on.* [P 1007 C 2, P 1008 C 1]

*** (c) Promissory Note—Admissibility.**

A promissory note made in the Nizam's Dominions, but unstamped and so inadmissible in evidence in any of the Nizam's Courts, can be proved in a Court in British India: 42 *Bom.* 522, *Foll.*; *Briston* v. *Sequlville*, 5 *Ex.* 275, *Ref.* [P 1008 C 2]

Advocate-General—for Appellant.

R. Srinivasa Ayyangar—for Respondents.

Reilly, J.—In this suit the Raja of Gadwal sued the defendant, a resident of the Kurnool District, on ten documents, which are called shokhas. The defendant admitted liability on one of them, Ex. K, and disputed liability on the others. The Subordinate Judge made a decree for the plaintiff for the full amount claimed. The defendant appeals.

Before the Subordinate Judge in his written statement the defendant objected to the suit on the ground that Gadwal was a foreign State and that the plaintiff was suing, not to enforce a private right, but to enforce a State right arising out of liability to pay revenue due to the State. The learned Subordinate Judge did not consider at the trial the question whether Gadwal was a foreign state. He found that the right which the plaintiff was suing to enforce was a private right. When the appeal came on for hearing in this Court, the defendant raised a rather different objection, which was not set out in his appeal memorandum, namely, that Gadwal is a foreign State, but not a foreign State recognized by His Majesty the King Emperor or the Governor-General in Council, and so the plaintiff as the ruler of that State could not sue in British India to enforce a private right, because he did not come within S. 84, Civil P. C. A first sight it seems not very likely that within the borders of the Indian Empire there should be a foreign state the establishment of which has not yet been recognized by His Majesty or the Governor-General in Council. But Mr. Kothandarama Ayyar, who appears for the defendant, has urged that the Gadwal Samasthanam is a State, not in direct relations with His Majesty or the Governor-General in Council, but a State under the suzerainty of the Nizam of Hyderabad. It is possible that there might be a State, not itself recognized by His Majesty or the Governor-General in Council, but subject to the suzerainty of some other State within the borders of the Indian Empire which was so recognized. But it is not disputed that, if Gadwal is to be found to be such a State, we must find that at any rate some degree of sovereignty has been preserved to it. When the case came on first before Devadoss and Mackay, JJ., they thought that it was necessary to inquire of the Government whether Gadwal was a State recognized by His Majesty or the Governor-General in Council for the purpose of S. 84, Civil P. C., and in reply to an inquiry made by the Registrar on that question a letter was received from the Chief Secretary to Government of Madras saying:

"I am directed to state that the Govsrnment of India have intimated that S. 84, Civil P. C. 1908, doee not apply to Gadwal Samasthanam in Hyderabad State."

It will be seen that there are various implications in that letter, but that it does not directly meet the point raised by Mr. Kothandarama Ayyar. If we received through the regular official channel any intimation in regard to the relations of a Foreign State with His Majesty or with the Governor-General in Council, or any statement that a foreign State had or had not been recognized by His Majesty or the Governor-General in Council I need hardly say that we should accept that intimation as conclusive. But in this case it happens that the answer to the inquiry made does not conclude the contention raised by the defendant. Having received that answer, Devadoss and Mackay, JJ., thought it well to frame an issue:

"Is Gadwal Samasthanam a Foreign State"? and send it to the Subordinate Judge for a finding. The Subordinate Judge, after taking further evidence has submitted a finding that Gadwal Samasthanam is not a "State" or a "Foreign State." The defendant has raised objections to that finding and has urged before us that Gadwal is a State, a foreign State, but not one recognized by His Majesty or the Governor-General in Council, and that therefore the plaintiff, as the ruler of that State, could not bring this suit in a Court in British India.

The position is rather curious because defendant 4 is trying to thrust upon the plaintiff an honour which the plaintiff does not claim. The plaintiff maintains that the Raja of Gadwal is a subject of the Nizam of Hyderabad, a subject indeed with a long and very distinguished history behind him, a subject in a very special position, a subject with special rights and privileges and exercising some of the powers usually exercised by ruling sovereigns, such as the rights of escheat and wardship, the right to hold Judicial Courts, but nevertheless a subject, not a sovereign. We must remember that in many parts of the world such powers as I have just mentioned have been exercised by subjects in feudal or quasi feudal relations with their sovereigns, but nevertheless their legal position has been that of a subject. In the circumstances of this case it does not appear necessary to me to enter into any elaborate discussion of the character and essence of sovereignty. But I think it cannot be denied that any State which has preserved any degree of sovereignty and various attributes of sovereignty may have been ceded to their suzerains by different States must have at least three characteristics. First, the people of the territory concerned must owe allegiance to the ruler of the supposed State, and in the term "ruler" I include any person in whom, or body in which, the sovereign power resides. Secondly, the law's enforced in the State must be the rulers laws, either made or recognized by him, not laws imposed by any outside authority, nor laws made by him in virtue only of a delegated authority. And, thirdly, those laws must be enforced by his Courts, that is Courts deriving their authority from him and not subject to the judicial control of any outside authority. Mr. Kothandarama Ayyar in the course of his argument referred to Federated States. What I have said in regard to the power of law-making does not relate directly to Federated States; but I do not think it is in any way in conflict with the position of a body of Federated States. A group of co-ordinate sovereign States can agree together that the whole body shall make laws which are to run in the territory of each member: but those laws are made not by any external authority, but by virtue of authority derived from the sovereign members themselves.

If we look at the evidence regarding the laws which run in Gadwal, and the Judicial Courts which are established there, we shall find, I think, no difficulty in deciding the question before us. Diwan Bahadur Aravamuda Ayyangar, an advocate of this Court, whose father was a judicial officer of the Gadwal Samasthanam and who himself has been the legal adviser of the Samasthanam for nearly 30 years, has given evidence as P. W. 5. He states that the Raja of Gadwal has no legislative power; and he has also given evidence to the effect that the Nizam's laws run in the Gadwal territory, instancing the Nizam's Criminal Procedure Code and the Nizam's Land Revenue Act. D.W. 3, a vakil called by the defendant, has stated that Gadwal is governed by the laws prevailing in the Nizam's State and there is no independent power in the Gadwal Samasthanam to frame laws. In regard to Courts Mr. Aravamuda Ayyangar has stated that judicial officers in Gadwal are nominated by the Raja, but not appointed by him, they are appointed by the authorities of the Nizam's State. He has also stated that for more than 30 years there has been a right of appeal from the Courts of Gadwal to the Nizam's Courts—it must be noticed, not to the Nizam as suzerain in any political or executive capacity, but to the Nizam's Courts. The defendant himself as D.W. 2 has made a similar statement regarding the position of the Gadwal Courts. I think that evidence is quite conclusive to show that the Gadwal Samasthanam is in no sense a sovereign State or a foreign State for the purpose of S. 84, Civil P. C.

Besides this objection to the maintainability of the suit the defendant has urged a number of points in regard to the shokhas before us. The learned Subordinate Judge has treated all the nine shokhas in dispute as promissory notes. But I think it is quite clear, when they are examined, that all except three of them are not promissory notes. Exs. A, B and H do contain unconditional promises to pay for a certain consideration named, that is trees assigned. But the other shokhas except Ex. K are offers for date trees. I think it will be convenient to deal first with the shokhas which are promissory notes Exs. A, B and H. The defendant maintains that there was no consideration for these notes. But consideration is recited in them. In the ordinary way it is for him to prove want of consideration. He is a witness whose evidence does not read in a very convincing way, and the attitude he has taken up in this suit has shifted from time to time. The learned Subordinate Judge has not believed him on this point. I can see no sufficient reason why we should differ from the Subordinate Judge as regards that.

But apart from the question of consideration Mr. Kothandarama Ayyar has urged other points. One is that the defendant executed these notes only as the agent of another man called Rangayya. There is nothing whatever in Ex. A to suggest that the executant was anybody but the defendant himself or that he was acting for anybody else. Nor is there in Exs. B and H as they appear before us. But unfortunately part of the paper on which Exs. B and H have been written appears to have been torn or cut off just below the defendant's signature. It is suggested for the defendant that under his signature on these notes he wrote some words to indicate that he was the agent for Rangayya. It is a suspicious thing that the paper should have been torn below the signature in these notes. An allegation was made before the Subordinate Judge that the notes had been tampered with while they were in the Subordinate Judge's Court. The clerk of the plaintiff's vakil filed an affidavit that they were not torn in that way when he put them into Court. The learned Subordinate Judge made an inquiry with the aid of affidavits into the matter but was unable to come to any conclusion. But, because the paper on which the notes were written has been torn or cut off in this way, can we accept the defendant's statement that he signed as agent for Rangayya? His own evidence in the matter is extraordinarily halting. He says:

"I do not well remember if in the suit shokhas I had written anywhere that I was Rangayya's agent. I remember in some shokhas which I executed for him I mentioned that I was agent. Some of the suit shokhas were in full paper when I executed them. Exs. B, H, J and D were in fuller paper when I executed them. Below my signature in Ex. J. some letters are missing in the part found torn. The letter that appears now is "a"; the missing word should be agent. In Ex. D, I similarly find the Yethavam of Ye. Rangayya."

Then he goes on to explain that in the other notes:

"out of laziness and because plaintiff and his Abkari Superintendent were aware that I was Rangayya's agent I failed to mention in the rest that I executed them as Rangayya's agent."

But it will be seen that he does not say specifically that in the case of Ex. B or in the case of Ex. H he signed as agent. When we look at these notes themselves it does not appear at all probable that he did so. Each of them is headed, as indeed all these shokhas are "shokha executed by Kothakota Venkatarama Reddi," that is the defendant. There is no suggestion then that it was executed for anybody but himself. It has also to be noticed that, when a lawyer's notice was sent to him, in his reply he said that the claim was false, but he did not say that he executed any of the shokhas in question as agent for Rangayya. In these circumstances I think that the contention that Exs. B and H were executed only as agent for Rangayya clearly fails.

Another objection taken for the defendant is that these three promissory notes are made in favour of the "Mohathameen Sahib Garu of Gadwal Samasthanam," that is the officer holding that post, and not in favour of any person by name. It is contended that to make a note in favour of a person described by his office is not to make it in favour of a certain person as required by S. 4, Negotiable Instruments Act. But in *Damodar Das* v. *Benares Bank Ltd.* (1), it was decided that a promissory note made in favour of

(1) [1920] 5 Pat. L.J. 536=58 I.C. 265.

"the manager or acting manager of the Benares Bank Ltd."

was properly made and the person who was certainly indicated was the Benares Bank. Following that I am quite prepared to find that these promissory notes were executed in favour of the Raja of Gadwal, sufficiently described through his officer by the name of the office. It must be remembered that in this country we have the last part of S. 5, Negotiable Instruments Act, to help us in this matter, which 'provides that, if it is clear to whom payment is to be made, he may be a "certain person" within the meaning of S. 4 of the Act although he is misnamed or only designated by description. In *Ramanathan Chetty* v. *Katha Velan* (2), it was held that a note drawn in favour of a trustee of a temple by name and office was really in favour of the trust and could be sued on by a successor of the trustee. In my opinion this objection also fails.

Another objection to these notes is that none of them is stamped, though they were all executed in the Nizam's Dominions, where promissory notes must be stamped in a manner similar to the way in which they have to be stamped in British India. The result of this is that none of these three notes could have been admitted in evidence according to the Negotiable Instruments Act in force in the Nizam's territories to prove the plaintiff's claim. It appears that there is a provision in the Negotiable Instruments Act of the Nizam's Dominions that, although other documents which have not been stamped at the time of execution may be made admissible in evidence by paying a fee or penalty, the defect of want of stamp cannot be cured in that way in the case of promissory notes. Mr. Kothandarama Ayyar suggests that the result of that is that these notes were void in the Nizam's territories. But that is not what the Act says. It merely makes them inadmissible in evidence. If they were void in the Nizam's Dominions, the place where they were made, certainly they could not be used as the basis of a suit instituted in British India. But, if they are merely inadmissible in evidence in Courts in the Nizam's Dominions because they are not stamped, it does not follow that they are inadmissible in Courts in British India. A note made in British India and unstamped would be inadmissible in our Courts ; but we cannot stretch the provisions of our Nagotiable Instruments Act to exclude on that basis a promissory note executed in foreign territory. This particular point came before the Bombay High Court in *Dhondiram Chatrabhuj* v. *Sadasuk Savitram* (3), and it was there decided that a promissory note made in the Nizam's Dominions, but unstamped and so inadmissible in evidence in any of the Nizam's Courts, could be proved in a Court in British India. That is the principle which has been adopted in England, as may be seen from *Briston* v. *Sequeville* (4). I cannot agree with Mr. Kothandarama Ayyar's contention that because those promissory notes being unstamped could never have been admissible in any of the Nizam's Courts and so were practically unenforceable in his territory they must be regarded as void. That is not, so far as I can see, the effect of the penalty imposed in the Nizam's territory for failure to stamp them.

So far in regard to Exs. A, B and H. There remains the other six shokhas. These are, as I have said, in the form of applications for date trees, apparently required for the purpose of drawing toddy. They are offers for date trees and promises to pay certain amounts in certain periods. For the defendant it is contended that they are mere offers, that, though on the back of each paper there is an endorsement saying that it was accepted, no such acceptance was ever communicated to the defendant and that therefore he is not bound by the documents at all. On the other hand Mr. Venkatachariar for the plaintiff contends that there is evidence that the right to tap date trees was given in consequence of these applications to the defendant's knowledge and therefore there was acceptance by performance and he got consideration of these documents and is bound by them. All these six documents refer to date trees required for the "Rajavole Mamla Savukattu," which we are told means trees required for the toddy tapping lease in the Rajavole village. There is

(2) [1918] 41 Mad. 353=42 I.C. 934.

(3) [1918] 42 Bom. 522=46 I. C. 174.

(4) 5 Ex. 275=14 Jur. 674=19 L. J. Ex. 289

the evidence given by P. W. 4, which, combined with .that of D. W. 1, shows sufficiently I think that the lease of trees for toddy tapping in the Rajavole village for Fasli 1329 was granted to Rangayya and a man called Thimma Reddi, who is a brother of the defendant. If the defendant applied for trees for the purpose of that lease, and the lease was granted to Rangayya and Thimma Reddi, we can hardly suppose that the defendant was not aware of that.

I think that the defendant must be held liable on any of these six shokhas I am now discussing which can be shown to relate distinctly to the lease of trees in Rajavole for Fasli 1329. Exs. D, E, F and G by their dates must refer to trees required for that Fasli. Ex. C is dated 19th November 1920, that is about a fortnight after the expiry of the fasli, and Ex. J is dated 13th October 1920, about 16 days before the end of the Fasli. It is obvious that Ex. C cannot refer to Fasli 1329 at all; nor can we reasonably suppose that Ex. J refers to trees required for that Fasli, as it is a promise to pay Rs. 1,125 for a very large number of trees, which could be used only for a few days if it were for Fasli 1329. Exs. C and J must I think refer to the succeeding fasli, and we cannot find from the evidence who got the lease for that fasli. Possibly the defendant himself was applying for it; but there is no evidence who got the lease.

I think therefore that we cannot say that the offer made in Ex. C or the offer made in Ex. J was accepted to the knowledge of the defendant or that trees were let in accordance with them, and therefore the plaintiff's claim in respect of these two documents must be dismissed. Of the remaining shokhas Exs. D, E, F and G, Ex. D is torn in a manner similar to Exs. B and H, and the defendant takes advantage of that to urge that he only acted as an agent in connexion with Ex. D. But that contention, I think, fails, as it did in respect of Exs. B and H.

In my opinion therefore this appeal should be allowed in respect of the amounts concerned in Exs. C and J, but in other respects should be dismissed, and in the circumstances the parties should pay and receive proportionate costs throughout.

Kumaraswami Sastri, J.—I agree.

P.R.S./S.N. *Appeal partly allowed.*

1930 M/127 & 128

A. I. R. 1930 Madras 1009

BEASLEY, C. J., AND WALSH, J.

T.S. Venkatabalagurumurthi Chettiar —Plaintiff—Appellant.

v.

T. A. Balakrishna Odayar and *others* —Defendants—Respondents.

Letters Patent Appeal No. 25 of 1927, Decided on 25th July 1930, from judgment of Odgers, J., D/- 1st September 1926, in Second Appeal No. 1716 of 1923.

Hindu Law — Religious Endowment — Trustees buying goods for temple necessity —Temple funds are liable for price.

Although there is a great distinction between a mutt and a temple there is no distinction between the borrowing powers of a swami of a mutt and the borrowing powers of the trustee of a temple. [P 1010 C 2]

Where the trustees of a temple purchased goods on credit, not for their private purposes but in the discharge of the duties under which they lay in the performance of the worship and feeding of the worshippers and the goods so bought were legitimately applied for these purposes, the temple funds in the hands of the trustees are liable for the price of the goods so bought: *A. I. R.* 1927 *P. C.* 131, *Appl.*; *A. I. R.* 1923 *Mad.* 288 and *A. I. R.* 1926 *P. C.* 112, *Expl.* [P 1010 C 2]

T. R. Ramachandra Iyer and *P. J. Kuppanna Rao*—for Appellant.

Ramaswami Iyengar and *Srinivasa Varadachariar*—for Respondents.

Beasley, C. J.—This is an appeal which originated in a suit in the District Munsif's Court of Kumbakonam (O. S. No. 4 of 1920). In that suit the plaintiff who was carrying on a maligai business sued the Sri Sarangapaniswami Temple and its two trustees personally to recover a sum of Rs. 900 odd which represented the balance of money owing to him by the temple for the supply of groceries to the temple, those groceries having been supplied for the purposes of the puja. There was also a claim for interest. It is worthy of note that the dealings between the plaintiff and the defendants were from 1st January 1912 to 14th March 1919, and we are here eleven years afterwards, finally I hope, adjudicating upon the plaintiff's claim. In the District Munsif's Court the hearing of this quite a small claim took sixteen days; it took one day when it was taken up on appeal by the receiver in this case to the Subordinate

Judge's Court and there the decree of the District Munsif in favour of the plaintiff was set aside and the appeal before Odgers, J., lasted two days, and there the decision of the learned Subordinate Judge was upheld, so that before the case reached us 19 days of judicial time had been occupied in determining the rights of the parties in this very simple case, and I feel bound to say that the action of the receiver in taking the case up on appeal from the District Munsif has resulted in a gross waste of time and money.

It is admitted that the goods supplied by the plaintiff to the temple were ordered and utilized for the puja performed in the temple; and it is also admitted that the orders were placed by persons whose duty it was to place those orders, namely the trustees of the temple; so that the goods were supplied for the proper and necessary purposes of the temple and were ordered by persons who were doing so in the discharge of their duties as trustees of the temple.

The District Munsif gave a decree in favour of the plaintiff, but the Subordinate Judge reversed that decree because he held himself bound by a decision in *Lakshmindra Thirthaswamiyar* v. *Vibhudapriya Thirthaswamiyar* (1), which was a decision with regard to the borrowing of money by the swami of a mutt. That case went up to the Privy Council and had not been decided at the time when the Subordinate Judge gave his judgment, nor had it been decided when the case came before Odgers, J., and no mention appears to have been made of the case before him.

What we have got to consider now is whether that decision of the Privy Council, *Vibhudapriya* v. *Lakshmindra* (2) concludes this matter. As I have already stated the facts of that case were that the head of a mutt had borrowed money for the purpose of discharging the duties for which he was responsible as the head of the mutt and the money had been legitimately applied for that purpose, and it was held that it could be recovered from the succeeding head of the mutt, so that the decision of the High Court in *Lakshmindra Tirthaswamiar* v. *Vibhudapriya Tirthaswamiyar* (1) was reversed on appeal by their Lordships of the Privy Council. I desire to refer to only one passage in the judgment of their Lordships at p. 507 of *Vibhudapriya* v. *Lakshmindra* (2), where they state the essentials in such a case. It is as follows:

> "What their Lordships have to see in this case is, firstly, whether the debts were contracted by the deceased swami for his own purposes or for the purposes of the temple and in discharge of the duties under which he lay in the performance of the worship and the feeding of pilgrims; and, secondly, whether the moneys so borrowed were legitimately applied for those purposes".

Applying that test to the facts in this case it is quite clear that the credit was obtained not for the private purposes of the trustees but for the purposes of the temple, and the goods were bought in the discharge of the duties under which the trustees lay in the performance of the worship and the feeding of the worshippers, and it is not contested that the goods so bought were legitimately applied for those purposes. The facts in this case, when tested by the Privy Council decision clearly make this claim sustainable by the plaintiff. But Mr. Srinivasavaradachariar argues on behalf of the receiver that this decision of the Privy Council in *Vibhudapriya* v. *Lakshmindra* (2) is inapplicable to this case because that is a decision with regard to a mutt, that temple stands on an entirely different footing and that the trustees of temples are more restricted in their rights than persons who have charge of mutts. But he has been quite unable to satisfy us that there is any such real distinction. Obviously there is a great distinction between a mutt and a temple, but it does not follow that there is a distinction between the borrowing powers of the swami of a mutt and the borrowing powers of the trustee of a temple, and a good deal of confusion seems to have crept into the arguments on behalf of the respondent with regard to what really trustees are. Mr. Srinivasa Varadachari argued the case on the footing that trustees are as restricted as trustees in England. One case which he relies on is *Swaminatha Ayyar* v. *Srinivasa Ayyar* (3). Mr. T. R. Ramachandra

(1) A. I. R. 1923 Mad. 288=72 I. C. 109.
(2) A. I. R. 1927 P. C. 131=101 I. C. 545=54 I. A. 228=50 Mad. 497 (P.C.).
(3) [1917] 33 I. C. 172.

Ayyar points out that that case has been explained and distinguished in *Sundaresan Chetty* v. *Viswanatha Pandarasannathi Avergal* (4), (at p. 150 *of* 43 *M. L. J.*). That is a case which clearly shows that the essential is that the borrowing should be for temple necessity and not necessarily for financial necessity. Personally I cannot see very much distinction between "temple necessity" and "financial necessity." They both seem to me to be equally important. The argument put forward on behalf of the respondent, namely, that at the time when credit was taken by the trustees of the temple they had cash on hand with which to pay for the goods, does not seem to me to have very much force. The argument, of course, is that there was no financial necessity for the credit being opened or taken by the trustees since they had cash on hand, and we are asked to say that there has been a finding of fact upon this point which we cannot interfere with. It is quite true that the Subordinate Judge says in his judgment that there is evidence that during this time large sums of money came into the hands of the trustees, that there was money put out with Chetties; and from this he draws the inference that there was no legal necessity for having these goods on credit. But it seems to me that that inference is an inference really of law to be drawn upon those facts. It does not follow that because cash was coming into the hands of the trustees, they were able to pay for the goods when they got them. Unless it is known what their other liabilities were at the time it cannot be said with any certainty that there was sufficient cash on hand to pay for the goods. And moreover we know this: that the trustees of the temple were quarrelling and one of them was withholding the money of the temple, and at any rate no payment was made and the trustees were very glad to take the very long credit which was given to them by the plaintiff.

Another argument pressed upon us is that there was no contract, as it is argued there must be, by the trustees to make the temple funds liable for these debts. But that argument cannot prevail in the face of the very strong facts. Exs. L series show that written orders were given to the plaintiffs for the supply of these articles, that those orders were written on paper headed the Sri Sarangapaniswami Devasthanam and were signed at the end by one or other of the trustees or trustee. That in itself, to my mind, is a clear indication that the articles were ordered for the purpose of the temple by a person entitled in the ordinary course of his duties to order them and that the temple funds were to be liable for the payment of those articles. Any other construction of these documents I think would be absurd. Therefore it seems to me perfectly clear that the trustees contracted that the goods would be paid for out of temple funds. The learned District Munsif himself points out in para. 10 how it was that these goods were ordered and he refers to one important matter, namely that in the books of the temple themselves the money for these goods was entered as a debit against temple funds. I cannot see how the Privy Council decision in *Vibhudapriya* v. *Lakhsmindra* (2) is inapplicable to this case. I think that no real distinction, so far as the necessity for borrowing is concerned, can be drawn between the swami of a mutt and the trustee of a temple. Under these circumstances, I feel myself bound by that decision and this appeal must therefore be allowed with costs throughout. The Subordinate Judge did not decide two other matters raised in the appeal before him, namely the question of limitation and the right of the plaintiff to get interest. With regard to the former Mr. Srinivasa Varadachari, says that he is not in a position to press the point and with regard to the latter he made a suggestion that the rate of interest should be reduced to 6 per cent and to this Mr. T. R. Ramachandra Ayyar agrees. Therefore the decree of the District Munsif will be restored except with regard to the rate of interest which is reduced to 6 per cent.

Walsh, J.—I entirely agree with the judgment my Lord the Chief Justice has just delivered and I would only like to add the following points. In the case in *Lakshmindra Tirthaswamiar* v.

(4) A. I. R. 1922 Mad. 402 = 72 I. C. 103 = 45 Mad. 703.

Vibhudapriya Tirthaswamiar (1) which was reversed on appeal by the Privy Council in *Vibhudapriya* v. *Lakshmindra* (2) Krishnan, J., laid it down that mutt properties in the hands of a matathipathi will not be liable for the debts of his predecessor either on the ground that the borrowing was for a purpose which was not justifiable at all or on the ground that though the purpose was a legitimate one the predecessor had enough funds of the mutt in his hands at the time and therefore had no necessity to borrow at all to meet the expenses. As regards the facts found in that case on that point, it may be said to have been found that the mutt would have had Rs. 1,00,000 in hand, but they incurred a debt of Rs. 1,30,000. The Court found it unnecessary to pursue the question further under this head as they held that the expenses were for an illegitimate purpose.

Therefore, when their Lordships of the Privy Council held that these expenses were legitimate they must by implication be held to have negatived the proposition that the mere fact that the mutt may have had cash in its hands made the borrowing of money for legitimate expenses a charge which could not be recovered from the temple, because it is clear that had they shared the view of Krishnan, J., on this point they must have found that as regards the Rs. 1,30,000 borrowed the temple was nct chargeable to the extent of Rs. 1,00,000 which the mutt had as money in hand. As I agree with my Lord that there is no distinction in this matter between the matathipathi of a mutt and the trustee of a temple, it follows that this test propounded by Krishnan, J., has not to be satisfied. As to this decision applying to a temple we find their Lordships themselves refer to the case of *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannathi* 5). That no doubt is the case of a matathipathi of a mutt but he was in that particular transaction acting as the trustee of a temple. This is an indication that they did not intend to draw any distinction in principle which they enunciated between a mutt and a temple. I may also refer to the remarks of their Lordships in *Niladri Sahu* v. *Mahant Chaturbuj Das* (6). At p. 151 (of 6 *Pat.*) they say as follows :

"The learned Judges of the High Court appear to their Lordships to be rather of opinion that the procurement of a loan of money on easy terms for the purpose of paying off antecedent loans obtained on very oppressive terms can never in a case of this character be held to be a necessary proceeding unless the obtaining of the oppressive loan was, at the time it was obtained, a matter of necessity also. If these learned Judges held that view their Lordships cannot agree with them."

From that it would seem to follow that the mere fact that a temple trustee may have money in his hands would not per se render the raising of a loan a charge which cannot be attached to the temple. It would appear for example from this that the temple might under necessity have raised a loan of Rs. 1,000 at 50 per cent and been able next day to raise a loan of a similar amount at 25 per cent and that though they had this Rs. 1,000 in hand they could raise a second loan to pay off the first. Therefore the principle that no loan raised would attach liability to the temple merely from the fact that there may have been ready money in hand equal to the amount of the loan to be raised seems to be too wide. The only other fact that I would like to notice in this case is that the receiver had already paid under orders of Court a sum of Rs. 3,000 to this very plaintiff as part of the bill and under these circumstances the temple has certainly been put to considerable loss by contesting the decision of the District Munsif as to this small portion.

P.R.S./K.N. *Order accordingly.*

(5) A. I. R. 1917 P. C. 33=39 I. C. 722=44 I. A. 147=40 Mad. 709 (P. C.).

(6) A. I. R. 1926 P. C. 112=98 I. C. 576=53 I. A. 253=6 Pat. 139 (P. C).

A. I. R. 1930 Madras 1012

VENKATASUBBA RAO, J.

S. Sabapathi Rao and *others*—Petitioners.

v.

Sabapathi Press Co., Ltd.—Respondents.

Original Petition No. 94 of 1922, Decided on 3rd September 1930.

(a) Companies Act, Ss. 228 and 229—Interest on debts carrying interest.

Where a company has been ordered to be wound up. the interest upon debts which carry interest, ceases to run from the date of the

winding up order unless the assets are enough to pay all debts in full. [P 1015 C 1]

Where the estate is insolvent, nothing should be allowed for interest, but the opposite rule applies where the estate is solvent, that is, where there is a surplus. In the latter case, in whatever manner the dividends may originally have been made, if it turns out that there is an ultimate surplus, the account must be taken as between the company and the creditors in the ordinary way; that is, by applying each dividend in the first place to the payment of the interest due at the date of such dividend and the surplus, if any, to the reduction of the principal: *In re Humber Iron works* and *Shipbuilding Co*, (1869) 4 *Ch. Ap.* 643; *In re Duncan & Co.* (1905) 1 *Ch.* 307; 1 *Lah.* 154 and 1 *Lah.* 368, *Rel. on.* [P 1015 C 2]

(b) Companies Act, S. 227 (2)—Winding up order—Effect of.

The effect of a winding up order under S. 227 (2) is to avoid all dispositions of the property of the company made between the date of the presentation of the petition for winding up and the winding up order unless the Court otherwise orders and the practice of the Court is to allow them if made honestly and in the ordinary course of business. [P 1016 C 1]

(c) Companies Act, S. 231 (1)—Company contracts to purchase goods between dates of presentation of petition and winding up order—Court will confirm transaction if goods were purchased in ordinary course of business.

Where the company has contracted to purchase goods between the date of the presentation of the petition for winding up and the winding up order and has actually taken delivery of these goods, the Court will confirm the transaction if the goods were purchased by the company in the ordinary course of business: *Gosling* v. *Gaskell*, (1897) *A. C.* 575, *Ref.* [P 1016 C 2]

B. Somayya for *N. Venkataswamy Chetty*, *P. Sankiah*, *Hanamathappa* and *T. R. Arunachala Ayyar*—for Official Liquidator.

T. M. Venugopala Mudaliar—for Applicant.

T, Krishnaswamy Ayyangar — for Creditor.

Judgment.—I have to deal with this claim in the winding up proceedings. A creditor, Pola Sankariah by name, applied to the liquidator for payment of his debt. He failed to comply with the request and I have now to decide whether the creditor's claim is well founded.

To make the point at issue clear, I must briefly set forth the course taken by these liquidation proceedings. The petition to wind up this company, the Sabapathy Press, Co. Ltd., was filed on 8th May 1922. Kumaraswami Sastri, J., dismissed the petition on 30th November 1922 holding that no valid grounds existed for making an order of compulsory winding up. Against this order an appeal was filed and, on 5th November 1924 the appellate Court set it aside and remanded the petition to the original side for fresh disposal. The matter then came up before Beasley, J., and on 9th April 1927 he made an order referring two questions to the Official Referee. With one of those questions we are directly concerned. That related to the debt now claimed as due by the creditor. It was then pleaded that that debt was discharged either by payment or adjustment on 31st December 1921. The Official Referee submitted his report, finding inter alia that the debt due to the applicant was not discharged as alleged. Beasley, J. (as he then was) accepted the Official Referee's findings, found that the company's affairs were in a very unsatisfactory state and made an order dated 16th November 1927 directing the company to be compulsorily wound up. Mr. Venkata Rao, by dubious methods (this is the effect of the judgment of Beasley, J.,) acquired a dominant position in the company and by adopting an aggressive and high-handed attitude, used that position to gain dishonest advantage for himself, his relations and friends. A firm known as "K. V. S. R." which, as the learned Judge observed, was Venkat Rao's own firm, was appointed treasurers of the company and some of the company's factories were leased to this firm on terms highly detrimental to the company. This K. V. S. R. firm in their turn subleased the factories making a large profit, to a joint family concern of which the present applicant Pola Sankariah was a member. There were two factories, one at Tadpatri and the other at Adoni. The sublessees effected certain repairs to those factories and a large sum became payable to them on this head by the company. The debt became due before December 1921. It amounted to about Rs. 25,000. This fact is not disputed. Before proceeding further I may mention that the winding up order made by Beasley, J., was confirmed on 18th April 1929..

The question to be decided is whether the debt due to the creditor was discharged by payment on 31st December 1921. Mr. Venkata Rao, I have said,

raised this incidental question, and it was decided in favour of the creditor. As the liquidator raises the point again, I shall deal with it fully.

The account books of the company containing entries of 31st December 1921 have been produced. There are some entries to be found which were made apparently after the accounts were closed and the balance was struck on that date. It is among such entries that those relating to the alleged payments find a place. The applicant alleges that these entries were fraudulently interpolated. Mr. Venkata Rao, the Chairman of the Board of Directors, annexes to his affidavit dated 13th June 1922 as Ex. B, what he calls an "unaudited balance sheet." It purports to disclose the state of affairs of the company as at the end of December 1921. The amounts due to the applicants are shown in that balance sheet under the heading "Liabilities." There are two amounts shown as due in respect of the two concerns, and the total is given as Rs. 25,546-2-1. This then is an admission by Venkata Rao as representing his company. According to it the debt due to the applicants was not discharged by payment on 13th June 1922. From this the inference must follow that the entries showing payment in the books of the company are spurious and fraudulent. It will be seen from what I have said, that their very position, and the manner in which they were made, render them extremely suspicious. Added to this there is the further fact that Mr. Venkata Rao admitted on 13th June 1922 that the debt was subsisting. It is therefore fairly clear that these entries of payment were made not on 31st December 1921, the date they bear, but some time subsequent to 13th June 1922. There was an "audited balance sheet" prepared in September 1922 as distinguished from the "unaudited balance sheet" to which I have referred. In this balance sheet the debt due to the creditor is shown as having been discharged. I understand that among the numerous charges made in this winding up petition, there is a complaint against the accuracy of this balance sheet. With that I am not at present concerned, but the fact that emerges is that the impeached entries must have been made after 13th June 1922, the date of Venkata Rao's affidavit, and before 27th September 1922, the date of the "audited balance sheet." It is also noticeable that in the unaudited balance sheet, the amount shown as cash in the hands of the treasurers is Rs. 33,000 odd, whereas in the audited balance sheet it dwindles down to a little over Rs. 12,000. This is of course consistent with the theory of payments having been made between these two dates. Such payments must necessarily diminish the cash in the hands of the company's treasurers. So much for the payment alleged on 31st December 1921.

The liquidator asks me to deal with another suggestion, namely that the payments were made on 31st December of the following year. It is not the account books of the company that are relied on for this purpose, but the liquidator says that he is perplexed by the entries in the account books of K. V. S. R. & Co., the company's treasurers. In their books certain adjustment entries were made on 31st December 1922. The applicants are credited with the amounts which the company owed them, those sums being debited against the company. In other words, the applicants' position is changed K. V. S. R. & Co., being substituted as their debtors in the place of the company itself. The entries refer to and purport to derive their authority from the company's audited balance sheet of September 1921. How can these entries in the account books of K. V. S. R. & Co, bind the applicants? Before they can be bound it must be shown that there was an arrangement amounting to a novatio to which they were also parties.

These later entries show that it is not even pretended that actual payments were made to the applicants. K. V. S. R. & Co., instead of holding the moneys due to the applicants as the company's treasurers continue to hold them in their individual capacity. This, in short, is the effect of these dubious entries. This is the kind of evidence that the liquidator places before me in support of his suggestion that the debt has been discharged. I therefore find that neither on 31st December 1921 nor on 31st December 1922 was the debt due to the creditor discharged by payment or adjustment.

Then there is another question that the liquidator raises. I have already said that the petition for winding up was originally dismissed in 1922. Till the winding up order was made in 1927 Mr. Venkata Rao continued to act as the Chairman of the Board of Directors. On 10th December 1926, in that capacity, he entered into a settlement of accounts with the creditor in question. It was found that the debt was reduced to Rs. 19,987-3-9. The creditor wants to abide by this settlement, and the question is: Is it binding upon the liquidator? The capital of the company is represented by 500 shares. Mr. Somayya appears for persons owning 342 shares and Mr. Venugopala Mudaliar for a gentleman holding 9 shares. On behalf of these shareholders I am asked to treat the settlement as binding. Then there are three creditors of this company, two represented by Mr. Somayya and one by Mr. T. Krishnaswami Iyengar. On behalf of these creditors also it is stated that the settlement should be treated as binding. In the view that the settlement is beneficial to the company the liquidator now concurs. My decision therefore is that the settlement dated 10th December 1926 must be taken as binding.

In regard to this debt there is a further question raised. In the case of a winding up by the Court the winding up dates from the presentation of the petition: S. 168, Companies Act. In this case nearly six years elapsed between the presentation of the petition and the winding up order. I have already said that the petition was presented on 8th May 1922 and the winding up order was made on 9th April 1927. The question I am asked to decide is, whether interest is to be computed or not subsequent to the winding up. It is not disputed that the debt carries interest. The law on this point is stated thus in Palmer's Company Law: Edn. 12, p. 439:

> "When a company has been ordered to be wound up, the interest upon debts which carry interest ceases to run from the date of the winding up order unless the assets are enough to pay all debts in full."

The point was first fully considered in *In re Humber Iron works and Shipbuilding Co.* (1). The position of the creditors, Selwyn, L. J., observes, must be considered under two aspects, first when there is, and next when there is not, a surplus. Where the estate is insolvent, nothing should be allowed for interest, but the opposite rule applies where the estate is solvent, that is, where there is a surplus. In the latter case, in whatever manner the dividends may originally have been made, if it turns out that there is an ultimate surplus, the account must be taken as between the company and the creditors in the ordinary way; that is, by applying each dividend in the first place to the payment of the interest due at the date of such dividend and the surplus, if any, to the reduction of the principal. The rule that interest is payable notwithstanding the winding up, when there are surplus assets, is also laid down in *In re Duncan & Co.* (2). This is now treated as settled law. This question was considered in a Lahore case and this principle was applied. Shadi Lal, J., after stating the rule in the terms I have just mentioned, proceeds to lay down the test of solvency. The company's solvency is established if, after payment of the principal and interest up to the date of winding up, there are some assets sufficient to meet the liability on account of interest accruing after the commencement of the liquidation: *Gansham Das* v. *The Public Banking and Insurance Co.* (3). The same view was taken in another Lahore case, *Devi Ditta Mal* v. *Official Liquidator, Amritsar Bank* (4). In the present case it is admitted that even after all the creditors are paid in full there will be a substantial balance available for meeting the claims of the contributories. I therefore hold that interest has not ceased to run from the date of the winding up order.

These, I understand, are the only three points in regard to which the liquidator wants my direction in respect of this debt. In the light of my judgment, the parties are directed to bring in a statement showing the amount due to the applicant.

The matter will stand adjourned a week for this purpose.

The applicant's costs, which I fix at Rs. 400, must be paid out of the

(1) [1869] 4 Ch. A. 643.

(2) [1905] 1 Ch. 307.
(3) [1920] 1 Lah. 154=56 I. C. 251.
(4) [1920] 1 Lah. 368=56 I. C. 69.

assets. I do not propose to allow the liquidator his costs, but as he does not press for them I need not give my reasons.

I shall now deal with the question of unpaid dividends. During the pendency of the petition for winding up, dividends were declared for 1921-25 (both yeare inclusive). Mr. Venkata Rao, as a part of the general policy he has been pursuing, preferred such of the shareholders as were his friends and relations and paid them the dividends due and made default in regard to the rest. Some of the shareholders belonging to the latter class now apply that the liquidator should be directed to pay them also the dividends declared. To place all the shareholders on a footing of equality, I must comply with this application. The liquidator, after satisfying himself that the dividends claimed are due, shall make the payments. If he feels any doubt, the matter may be brought up before the Court.

Next, as regards Hanumanthappa's claim: the liquidator will examine this and state in one week what his view is.

I shall now proceed to deal with the claim of Messrs. R. D. Lakshmi Das & Co., represented by Mr. T. Krishnaswami Ayyangar, their counsel. They claim Rs. 3,381-13-6 in respect of goods supplied to the company between the commencement of the winding up,that is, the presentation of the petition and the winding up order. The effect of a winding up order under S. 227 (2) is to avoid all dispositions of the property of the company made between these two dates, unless the Court otherwise orders; that is to say, the winding up order has a retrospective effect. What are avoided under the section are dispositions by the company of its property. But even payments by the company after the commencement of the winding up are avoided unless sanctioned by the Court:

Lindley on Companies, 6*th Edn.*, *Vol.* 11, *p.* 889.

Where payments are honestly made and in the ordinary course of business, it is usual for the Court to allow them.

Palmer's Company Law, 12*th Edn.*, *p.* 220:

In regard to dispositions pending petition, the practice of the Court is to allow them if made honestly and in the ordinary course of business.

Palmer p. 426; *Lindley*, *Vol.* 2, *p.* 900.

But what we are here concerned with is neither a disposition of property nor a payment. The company contracted to purchase goods and actually took delivery of them. Section 227 (2) does not in terms apply to such a transaction, but in *Gosling* v. *Gaskell* (5) Lord Herschell seems to assume that once the winding up order is made, the company becomes as from the date of the petition incapable of entering into contracts without the sanction of the Court (p. 591). In the present case, it is conceded that the goods were purchased by the company in the ordinary course of trade. I therefore confirm the transactions.

As regards the amount: it is admitted that Rs. 50 must go out from the amount claimed. Out of a balance of Rs. 3,331-13-6 I authorize payment of that sum less Rs. 500 with interest at 9 per cent per annum from 1st January 1927. As regards the sum of Rs. 500 shown against 15th December 1926, it is described as a hand loan paid to Mr. Venkata Rao, who purported to receive it as the Chairman of the Board of Directors. Whether the liquidator is bound to pay this sum or not, I do not wish to decide at present. Granting that the liquidator is not bound to pay this sum from the assets of the company it may be open to the creditor to ask that it should be paid over to him from any amount to be found payable by the company to Mr. Venkata Rao. This point I must reserve for future consideration. The applicant's costs, which I fix at Rs. 150, shall come from the assets. The liquidator may pay himself Rs. 50 for his costs. I also direct that Mr. Gopalaswami Mudaliar be paid from the assets the costs of his application, which I fix at Rs. 50.

In pursuance of my judgment dated 25th August 1930 a statement has now been brought in, showing that the amount due up to 31st August 1930 to Pola Sankariah is Rs. 20,369-4-10 including the costs awarded. By consent this figure is accepted. The principal amount of Rs. 16,781-0-2 shall carry further interest at 6 per cent per annum till date of payment.

(5) [1897] A. C. 575=66 L. J. K. B. 848=77 L. T. 314.

The amount due to Hanumanthappa is by consent declared to be Rupees 2,756-8-6. This amount shall carry interest of 9 per cent per annnm from 28th December 1926 to the date of payment. The liquidator shall pay Hanumanthappa's costs, which I fix at Rs. 150, from the assets. The liquidator's costs I fix at Rs. 50. This sum he may retain out of the assets.

P.R.S./K.N. *Order accordingly.*

A. I. R. 1930 Madras 1017

ANANTAKRISHNA AYYAR AND SUNDARAM CHETTY, JJ.

Alagammal—Plaintiff—Appellant.

v.

Sadasiva Padayachi and *others*—Defendants—Respondents,

Civil Misc. Appeals Nos. 500 and 501 of 1928, Decided on 6th August 1930.

(a) Civil P. C., O. 41, R. 23— Preliminary point illustrated.

Where in a suit for possession of immovable property, an issue was framed which was entended to raise the question whether the plaintiff was entitled to an unconditional decree for possession, and also whether the defendants would be entitled to redeem, in which case the plaintiff would be entitled to possession only if the defendants failed to redeem, and the trial Court held that the defendants were not entitled to redeem and gave the plaintiff a decree for unconditional possession of the property, but on appeal by the defendants, the appellate Court took a contrary view holding that the defendants were entitled to redeem and remanded the suit for finding out the exact amount payable on redemption and for disposal of the suit according to law.

Held: that the decision of the trial Court was on a preliminary point, that the appellate Court was entitled to remand the suit under O. 41, R. 23, and that the appeal against the order of remand was maintainable under O. 43, R. 1 (u): *A. I. R.* 1922 *Lah.* 505 (*F. B.*), *Foll.*

[P 1018 C 2]

(b) Civil P.C., O. 34, R. 1—Purchaser from Government of mortgaged property attached under S. 88, Criminal P.C. is entitled to be made party to mortgage suit and has the right to redeem.

In 1912 *A* mortgaged his immovable property to plaintiff's deceased husband. In 1919 this property was attached under S. 88, Criminal P. C., as *A* was alleged to have committed the offences of robbery and dacoity and to have been evading service of summons and subsequently a receiver was appointed in the same year. In 1923 the defendants became purchasers of the property from Government. Plaintiff instituted a suit in 1922 for recovery of money due on the mortgage of 1912 against *A* without making Government a party to the suit. After obtaining the usual mortgage decree she had the property sold in execution of it and herself became the purchaser and obtained the sale certificate in 1924. When she sought to obtain delivery of possession of the mortgaged property according to the sale certificate she was obstructed by the defendants who were in possession thereof. Thereupon she filed a suit for possession against them. The defendants pleaded that the Government ought to have been made party defendants in the mortgage suit of 1922 and that as they derived their title through Government they were entitled to redeem the mortgage.

Held: that the possession of the Government was not merely that of an attaching decree-holder, nor as agent of *A* the absconder. The effect of S. 88, Criminal P. C., being to create an interest in the property under attachment and to entitle the Government to be in possession of the property, the Government was a necessary party to the mortgage suit of 1922 under O. 34, R. 1, Civil P. C. Not having been made a party, the Government's right of redemption could not be affected and that the defendants, who derived their title from Government were entitled to redeem : 9 *Cal.* 861; 39 *Mad.* 831; 6 *I. C.* 214 and 19 *Mad.* 151, *Ref.*

[P 1020 C 2]

K. Bhashyam Iyangar and *V. C. Veeraraghavachariar*—for Appellants.

Govt. Pleader and *Patanjali Sastri*—for Respondent.

Judgment.—These miscellaneous appeals arise out of two orders of remand passed by the learned Subordinate Judge of Trichinopoly in two connected appeals on his file. When these appeals came on for hearing the learned advocate for the respondents took the preliminary objection that the appeals did not lie. In order to appreciate the nature of the suits and of the preliminary objection raised before us it is necessary to state a few facts. One Arumugam was owner of the suit properties. On 5th March 1912 he hypothecated these properties in favour of the plaintiff's husband. The plaintiff filed O. S. No. 686 of 1922 on the file of the District Munsif's Court of Ariyalur after her husband's death to recover the money due on the mortgage of 5th March 1912. To that suit she made Arumugam, the mortgagor, as defendant. After obtaining the usual mortgage decree, she had the properties sold in execution of the decree and herself became the purchaser, and the sale certificate Ex. A was issued in her name on 15th March 1924. On 10th May 1924 she sought to obtain delivery of the properties in execution of the sale certificate. There she was obstructed by the defendants who claimed to have purchased these properties from the Government under circumstances which would be described later on. Being obstructed in thus obtaining

possession she filed these two suits, one against the defendants who were in possession of some of the properties included in the sale certificate but which were claimed by them as having been purchased from the Government, the defendants in the other suit being in possession of the other property covered by the sale certificate which they had purchased from the Government. The defendants pleaded that the Governmeat ought to have been made party-defendant in O. S. No. 685 of 1922, and that as they derived their title through the Government they would be entitled to redeem the plaintiff's mortgage. The learned District Munsif raised Issue 3 as follows : "Is the plaintiff's mortgage redeemable as contended." The learned District Munsif who tried the suit was of opinion that the possession of the Government was only that of an attaching creditor and consequently the Government was not entitled to be made a party to the suit brought on the mortgage, and in any event could not claim any right to redeem plaintiff's mortgage at present. He accordingly decreed the plaintiff's suit for possession unconditionally. The defendants preferred appeals to the lower appellate Court, and the learned Subordinate Judge of Trichinopoly came to the conclusion that the defendants were entitled to redeem the plaintiff's mortgage as they had not been made parties to the prior suit O. S. No 685 of 1922. He modified the decree of the trial Court and declared that the defendants were entitled to redeem the plaintiff and to find out the exact amount payable on redemption. He remanded the suit to the trial Court for disposal according to law. It is against the order of remand passed in each of these two connected appeals that the plaintiff has preferred these two miscellaneous appeals.

The learned advocate for the respondents took the preliminary objection that in these circumstances these miscellaneous appeals do not lie. The appeals have been preferred under O. 43, R. 1, Cl. (u) on the footing that the orders of remand were passed by the lower appellate Court under O. 41, R. 23, Civil P. C. The learned advocate argued that it should not be taken that the trial Court decided any preliminary issue nor could the appellate Court be said to have reversed the finding of the trial Court on such a preliminary issue. He accordingly contended that the present must be taken to be a case where the lower appellate Court remanded these suits under its inherent jurisdiction, and he argued that having regard to the decisions which hold that no appeal would lie against orders of remand passed under the inherent jurisdiction of Courts, these appeals are not maintainable. We are unable to agree with that contention. As we read the pleadings and also the proceedings in the trial Court, we understand that Issue 3 was intended to raise the question whether the plaintiff was entitled to an unconditional decree for possession, and also whether the defendants would be entitled to redeem, in which case the plaintiff would be entitled to possession only if the defendants failed to redeem. We take that to be the real meaning and significance of Issue 3 framed in the suit. In this view, the lower appellate Court held that the defendants would be entitled to come to its own finding upon that preliminary issue and as the lower appellate Court held that the dafendants would be entitled to redeem, we think that on its reversing the finding of the trial Court on this preliminary issue it was entitled to remand the suit for disposal on the other points under O. 41, R. 23, Civil P. C. We are supported in this view by the decision of the Full Bench in *Raman Nayar* v. *Krishnan Nambudripad* (1). We accordingly overrule the preliminary objection.

Coming to the merits, the learned advocate for the appellant argued that the present is the case of an attaching decree-holder not having been made a party to the prior suit upon the mortgage. He drew our attention to the recent decision of Full Bench of this Court in *Subramania Chettiar* v. *Sinnammal* (2) where the Full Bench held that the mere circumstance that an attaching decree-holder was not made a party to a suit upon a mortgage is not a ground for compelling the purchaser of the properties in execution of the mortgage-decree to be redeemed by the attaching decree-holder. We may state that the

(1) A. I. R. 1922 Mad. 505=69 I. C. 828=45 Mad. 900 (F. B.).
(2) A. I. R. 1930 Mad. 801 (F. B.).

learned Government Pleader who appeared for the respondents did not having regard to the decision of the Full Bench, contest that proposition of law. The ground of decision by the District Munsif was that the position of the defendant was that of an attaching decree-holder merely. In para. 13 this is what the learned District Munsif said :

"All these circumstances go to show that the interest of the Government was only that of an attaching creditor and that the property did not vest in the Government."

We must now take it that if the interest of the Government was only that of an attaching creditor. it would follow from the recent decision of the Full Bench that the District Munsif's view should be upheld.

But it was argued on behalf of respondents by the learned Government Pleader that the position of the Government in such a case as this is simply that of an attaching creditor. Before examining this aspect of the case it is necessary to mention a few further facts to make the further discussion intelligible. It would appear that the mortgagor Arumugam was alleged to have committed the offences of robbery and dacoity and that he evaded service of summons. The properties of the absconder Arumugam, the immoveable properties now in dispute, were, accordingly attached under the provisions of the Criminal Procedure Code. Ex. 1 dated 19th August 1919 is the order of attachment. Subsequently a receiver was appointed on 22nd September 1919, and in 1923 the defendants became the purchasers of the properties from the Government. On these facts it was argued on behalf of the Government that, having regard to the provisions of Ss. 88 and 89, Criminal P. C., it should be taken that when the proclaimed person did not appear within the time specified in the proclamation, the property under attachment had come at the disposal of the Government and accordingly the Government took possession of the properties and subsequently sold them to the respective defendants in these suits. It was argued in the first instance that the properties must be taken to have become vested in the Government as owners. The learned Government Pleader also argued that the Government became the absolute owner of the income from these properties after the period fixed in S. 88, Cl. (7). Finally he argued that in any event the position of the Government should be taken to be that or analogous to that of a receiver in possession of the properties and entitled to rents and profits thereof and that in such cases the Government have got sufficient interest in the properties as entitled them to redeem the prior mortgage. Our attention was drawn to the decisions in *Golam Abed* v. *Toolseeram Bera* (3) and *Secretary of State* v. *Rangasami Aiyangar* (4) in support of these propositions.

The learned advocate for the appellant on the other hand argued that all that the Government would be entitled to under S. 88 (7) would be to keep the properties as agent of the absconder and that after the expiry of the two years their rights whatever they were, came to an end and the properties continued to be the properties of the absconder. For the purpose of disposing of these appeals, we do not think it necessary for us to come to a definite opinion on the first two questions raised by the Government Pleader on behalf of the respondents in this case. We are clearly of opinion that the possession of the Government is not merely that of attaching decree-holder which was the view taken by the learned District Munsif. We are also clear that the possession of the Government is not that of an agent of the absconder. An agent holds properties for and on behalf of the principal and not on a title inconsistent with the title of the principal. That surely is not the position of the Government in this case. The Government in the circumstances did not hold the property on behalf of the absconder, but as against him. Being of opinion that the analogy of an agent of the owner does not apply to the case on hand, we proceed to see whether there is any distinction between the effect of an attachment by a civil Court and the effect of an attachment under Ch. 6, Criminal P. C. We are of opinion that there are some essential differences between an attachment by a civil Court in execution of a

(3) [1883] 9 Cal. 861=12 C. L. R. 411.
(4) [1916] 39 Mad. 831=35 I. C. 168=17 Cr. L. J. 296.

money decree and an attachment contemplated by Ch. 6, Criminal P. C. We have to give effect to the words:

"the property under attachment shall be at the disposal of Government"

occurring in Cl. (7), S. 88, in cases where the proclaimed person does not appear within the time specified in the proclamation. The subsequent clause in our view affirms the view that the Government is not simply an agent of the owner. The clause proceeds to say: "But it shall not be sold until the expiration of six months from the date of the attachment."

That, we take it, means that, when once the property under attachment is declared to be at the disposal of Government, it would be open to the Government to sell that property. We are of opinion that it would also be open to the Government to dispose of the property in any other manner; surely it would be open to the Government to be itself in possession of the property, or to lease the property and receive the income of the property during this period. That being so, the position is, in our view, at the least analogous to the case where a receiver is appointed for the possession and management, etc., of immovable properties. In such a case it seems to us that any suit instituted to enforce any lien or charge by the sale of such properties for which a receiver has been appointed, and of which he is in possession, would be defective without the receiver being made a party to it. Our attention was drawn by the learned Government Pleader to the case reported in *Jotindra Nath Chowdhury* v. *Sarafaraj Mia* (5). There the Court (Mukerjee and Teunon, JJ.) observed at p. 657 that a receiver appointed in the course of a mortgage suit is not a necessary party to a suit by a creditor of the mortgagor for the enforcement of a purely personal claim against him, but in an action to enforce a lien against a specific property in which a receiver is interested he should be made a party. In that case it was further pointed out that, although a receiver is in one sense the custodian of the property involved in the litigation in which he is appointed, he had such special property therein as to make him the representative of the rights of the parties in all actions or proceedings affecting the property, and in that character he was entitled to notice in all cases in which parties would have been entitled to be brought before the Court had there been no receiver. Again, it was held in *Paya Matathil Appu* v. *Kovamel Amina* (6) that the verumpattom tenant in Malabar claiming under a lease from the ottidar is entitled to redeem the prior kanom. At p. 153 of the report the learned Judges conclude their discussion of the question as follows:

"So long as the plaintiff has an interest validly entitling him to possession, he is in a position to redeem."

As already mentioned, it is not necessary for the disposal of this appeal to define the exact nature and scope of the rights derived by the Government under S. 88, Cl. 7. We are clear that the interest possessed by the Government is not that of a mere attaching decree-holder. As we have already stated, it cannot be said that the expression "property at the disposal of Government" could with any propriety apply to the case of a mere attaching decree-holder. Being of opinion that the effect of S. 88 is to create an interest in the property, and to entitle the Government to be in possession of the property, we hold that the Government was a necessary party to the prior suit under O. 34, R. 1 of the Code. Not having been made a party the Government's right of redemption could not be affected. In this case we have the further fact that the suit, O. S. No. 685 of 1922, was filed more than two years after the date of the attachment. Under S. 89 the position of the Government after the expiry of the two years would surely be not weaker than it was before. How far it becomes stronger it is not necessary for us to exactly define in this case.

We therefore hold that the interest which the Government had in the immovable properties, now the subject of the suits before us, was such as gave them a right to redeem the properties, and the relief given to the defendants by the lower appellate Court, to which no objection has been taken by the respondents by way of cross-appeal, is not open to any legal objection by the plaintiff.

(5) [1910] 6 I. C. 214.

(6) [1896] 19 Mad. 151.

We therefore dismiss these miscellaneous appeals with costs (one set in each appeal).

P.R.S./K.N. *Order accordingly.*

A. I. R. 1930 Madras 1021

ANANTAKRISHNA AYYAR, J.

(*Gandreddi*) *Naganna* and *another* — Defendants—Appellants.

v.

(*Revinipati*) *Appalaraju* and *others* — Plaintiffs—Respondents.

Second Appeal No. 1782 of 1926, Decided on 31st January 1930, from decree of Sub-Judge, Vizagapatam, in Appeal Suit No. 63 of 1922.

(a) Transfer of Property Act, S. 54 — Contract to sell — Vendee in possession — Absence of registered sale deed — Payment of consideration — Doctrine of part performance applies—Part Performance.

If the vendee has been put into possession (of the properties agreed to be sold to him) at the time of the sale, and consideration paid, the circumstance that a registered sale deed has not been executed in his favour is no ground to give a decree against him and in favour of a subsequent purchaser with notice who sues to recover possession from him. The doctrine of part performance has been applied in such cases, and the defendant in possession in such circumstances has been protected by Courts: *A. I. R.* 1924 *Mad.* 271, *Foll.*; 48 *M.L.J.* 264, *Ref.* [P 1023 C 1]

(b) Part Performance — Applicability of, to cases where right to sue for specific performance is time barred.

It is not necessary that the agreement at the time of defence should be capable of specific performance; it may even be barred and possession need not be given only at the time of the agreement, but need only be retained if it already exists. [P 1023 C 2]

(*Obiter*) The plea of part performance is limited to cases where the right to sue for specific performance is not barred on the date of the subsequent suit: *A.I.R.* 1928 *Bom.* 150 and *A. I. R.* 1922 *Bom.* 9, *Foll.*; 38 *Mad.* 1158; *A. I. R.* 1925 *Mad.* 566; *Maddison* v. *Alderson*, (1883) 3 *A. C.* 475; *A. I. R.* 1929 *Cal.* 101 and 67 *I. C.* 167, *Ref.* [P 1024 C 2]

P. Somasundaram—for Appellants.

Y. Suryanarayana—for Respondents.

Judgment. — Defendant 1 was entitled to one-fourth of the suit lands, and he sold his one-fourth share to defendant 6 on 28th July 1900 for Rs. 500 (Ex. 1). The father of defendants 3 and 5 was entitled to one-fourth of the suit lands, and he sold the said one-fourth share to defendant 6 on 2nd June 1901 for Rs. 500 (Ex. 2). Defendant 1 executed a kadapa on 8th July 1903 to defendant 6 in respect of the lands so purchased by defendant 6. Defendant 6 sold to the plaintiff on 24th June 1917 (Ex. A) the half-share in the suit lands purchased by him under Exs. 1 and 2. The plaintiff sued to declare his title to a moiety of the plaint lands and to recover possession of the same after partition. Defendant 6 did not appear in the suit; the other defendants contended that the sale in favour of the plaintiff was a sham transaction, that when the properties were sold to defendant 6, defendant 6 agreed to re-convey the properties to the vendors on their repaying Rs. 500, the price mentioned in Exs. 1 and 2, that defendant 1 was in possession of the properties as a lessee from defendant 6 (Ex. 3, 1903); that defendant 1 paid defendant 6 Rs. 500 in March 1905, but as defendant 3 was not then ready with his money, defendant 6 promised to execute a sale deed in favour of defendant 1 but had delayed in doing so; that the suit was barred by limitation; and that the plaintiff was not entitled to any relief.

The trial Court found that Ex. A, the sale deed in favour of the plaintiffs, was a sham transaction. It also found that the defendants had acquired title by adverse possession, and dismissed the suit. On appeal by the plaintiff, the learned Additional Subordinate Judge of Vizagapatam found it unnecessary to go into the question of the sham nature of the sale deed to the plaintiff, since defendant 6 as P. W. 3 admitted execution of the sale deed to the plaintiff and also receipt of consideration for the same, and thought that the suit should be decided on the footing that the rights of defendant 6 passed to the plaintiff. As regards the contentions raised by defendant 3, the plaintiff and defendant 3 having settled matters between themselves the only question that remained was whether the plaintiff was entitled to possession of the one fourth-share of the lands claimed by defendant 1. The lower appellate Court found that defendant 1 had paid Rs. 500 to defendant 6 as agreed, and that Ex. 7 a letter executed by defendant 6 in favour of defendant 1 on 22nd December 1912, was genuine; but as no registered sale deed had been executed by defendant 6 in favour of the first, the Court held that defendant 1 could not resist the plaintiff's suit. The suit was accordingly decreed against defendant 1. Defendant 1 and his son defendant 2

have preferred the present second appeal.

Both the lower Courts have found that Ex. 7 is genuine and that Rs. 500 was paid by defendant 1 to defendant 3. Defendant 3 was in possession of one-fourth share in question as a lessee, at least, from 1903 : see Ex. 3 executed by defendant 1 to defendant 6. On the date of Ex. 7 defendant 1 was in possession. Ex. 7 states as follows:

"You paid back to me Rs. 500 being the sale amount of the absolute sale effected in my favour on 28th July 1900 in respect of the jirayeti lands known as Pallapupampulu and requested me to re-sell the same to you, and I have, out of grace, agreed to execute a sale deed in your favour. I shall execute a sale deed and give the same to you registered within one month from this day."

The contention of defendant 1 in the lower Courts was that as he was in possession and as he had paid Rs. 500 to defendant 6, and as defendant 6 had promised under Ex. 7 to execute a registered sale deed to him, the plaintiff would not be entitled to any relief as against him for two reasons:

(1) Defendant 1's possession after payment of Rs. 500 at any rate after Ex. 7, should be taken as possession as vendee, and that his prior possession as lessee was changed since he was given possession as vendee, that the absence of a registered sale deed by defendant 6 in his favour is no obstacle, since there was part performance as defendant 1 was given possession as vendee at the time of Ex. 7.

(2) The plaintiff having notice that defendant 1 was in possession at the time of the plaintiff's purchase, the plaintiff must be taken to have notice of defendant 1's claims, and therefore the plaintiff is not a bona fide purchaser for value without notice.

The lower appellate Court, while finding that Rs. 500 was repaid by defendant 1 to defendant 6 as recited in Ex. 7, was not quite sure when exactly the same was paid. It disbelieved defendant 6's statement, as P. W. 3, that money had not been paid. Relying on the recital in Ex. 7 and the evidence of defendant 1, the lower appellate Court held that Rs. 500 had been paid by defendant 1 to defendant 6 and that Ex. 7 was genuine, though it was not quite sure as to the exact date on which the said Rs. 500 was paid. The lower appellate Court however disallowed defendant 1's contention for the following reasons:

"It cannot be said that possession was meant to be given in pursuance of the agreement Ex. 7 by a change in the nature of possession. If lessee's possession was meant to be changed into that of an owner's possession, reference must have been made to delivery of possession thereunder. I therefore find that until the date of suit defendant 1 continued to be in possession, not in his own right and that the character of the original permissive possession as lessee was not changed into adverse possession after Ex. 7. The ruling in *Muthukaruppan* v. *Muthusamban* (1) cannot assist the defendants. I find that the plaintiff and his vendor were in legal possession within the statutory period ..... There was no agreement which could have been specifically enforced at the time of the suit, and possession which was given under a kadapa executed in 1903 and which was continued till 1912 could not be in pursuance of the contract to sell. There is therefore no doctrine of part performance to be applied in this case as there was no part performance under the agreement, possession not having been given under it. Defendant 1 cannot therefore claim any equitable right to resist the plaintiff's suit for recovery of possession of the land under the circumstances."

Having regard to the finding that Ex. 7 is genuine and that Rs. 500 had been paid by defendant 1 to defendant 6, having regard to the undertaking in Ex. 7 that defendant 6 would execute a sale deed to the plaintiff and having regard to the fact found by the lower Conrts that both Ex. 1 the sale deed executed by defendant 1 to defendant 6 in 1900, for this very land, and Ex. 3 the registered kadapa exesuted by defendant 1 to defendant 6 in 1903 relating to this very land, were returned by defendant 6 to defendant 1 and were produced by defendant 1 in this suit I think that the proper inference to be drawn from the facts proved in this case is that the possession of defendant 1 as lessee was put an end to on the date of Ex. 7, and that the understanding of the parties should be taken to be that the defendant's possession, subsequent to Ex. 7, was to be that of owner, and that defendant 6's only further obligation was to execute a registered sale-deed. I am unable to draw any inference to the contrary from the mere circumstances that Ex. 7 does not specifically refer to possession ; but having regard to the circumstance that Ex. 1 (sale deed) and Ex. 3 (the lease deed) executed by defendant 1 were returned to defendant 1 and the only fur-

(1) [1914] 38 Mad. 1158=25 I. C. 772.

ther undertaking was that defendant 6 was to execute a registered sale deed I think the reasonable inference to be drawn from the facts is that defendant 1's possession after Ex. 7 was to be as owner, and not as lessee as before. It has been held that if the vendee had been put into possession (of the properties agreed to be sold to him) at the time of the sale, and consideration paid, the circumstance that a registered sale deed had not been executed in his favour is no ground to give a decree against him and in favour of a subsequent purchaser with notice who sues to recover possession from him. The doctrine of part performance has been applied in such cases, and the defendant in possession in such circumstances has been protected by Courts. The Full Bench decision of this High Court in the case reported in *Vizagapatam Sugar Co.* v. *Muthuramareddi* (2) is an authority for the proposition that part performance by way of delivery of possession and an enforceable right on the defendant's part to specific performance are each good defences to a suit in ejectment.

But it was argued by the learned advocate for the respondent (if I understood him correctly) that part performance by way of delivery of possession must be delivery of possession at the time of the agreement, and that if the defendant was in possession already, the doctrine of part performance would not apply. I am unable to agree. In Fry on Specific Performance, S. 602, it is stated as follows :

"Continuance in possession may, if unequivocably referable to the contract alleged, be a sufficient act of part performance, although the taking of possession was antecedent to the contract."

In *Biss* v. *Hygate* (3), A. T. Lawrence, J., observed :

"The respondent's retention of possession after 25th March was an act of part performance unequivocally referable to the agreement ..... There was therefore no evidence on which the Judge could find either that the respondent was not in possession under the agreement or that there was no part performance of the agreement. Consequently the appeal must be allowed."

Avery, J., added:

"The decision in *Hodson* v. *Heuland* (4) is a conclusive authority on this point. The decision in that case was that although the entering into possession was antecedent to the contract, yet the continuing in possession after the contract, being unequivocally referable to the contract, was a sufficient part performance. The case is referred to as an authority in Art. 602 of Fry on Specific Performance. ..... I cannot see how any other inference can be drawn than that the respondent was in possession under and in pursuance of the contract which he had made on 18th March. I agree that the appeal should be allowed."

As remarked by Kekewich, J., in *Hodson* v. *Heuland* (4) possession taken before, but continued after, a parol contract, for lease may, if unequivocally referable to the contract, constitute part performance taking the case out of the Statute of Frauds. The learned Judge quotes an observation of Knight Bruce, L. J., to the following effect :

"Is there any authority for the proposition that the continuance in possession after a parol agreement, or after a variation of the parol agreement, may not be part performance of a contract with reference to the Statute of Frauds? I am not persuaded at present that it may not."

Kekewich, J., observed, that no case had been cited to show that the doctrine of part performance was not equally applicable to a case of this kind as to the other cases to which it had been applied.

The only Indian case to which my attention was drawn supports this view. In *Ramappa* v. *Yellappa* (5) at p. 312 (*of* 52 *Bom.*) the learned Judges held that the possession of the mortgagee, coupled with the subsequent agreement to sell, was a good defence. At p. 312 the learned Judges remarked :

"It follows therefore that possession coupled with the agreement to sell will ordinarily be a good defence. It is not necessary that the agreement at the time of defence should be capable of specific performance ; it may even be barred .... and possession need not be given only at the time of the agreement, but need only be retained if it already exists."

In the case reported in *Venkatesh Damodar* v. *Malappa Bhimappa* (6), referred to by the appellants' learned advocate, the plaintiff agreed to sell certain property to the defendants, which property was already in their possession. The defendants paid up the whole purchase money to the plaintiffs, but omitted to take from him a registered

(2) A. I. R. 1924 Mad. 271=76 I. C. 886=46 Mad. 919 (F.B.).
(3) [1918] 2 K. B. 314=87 L. J. K. B. 1101=119 L. T. 284.
(4) [1896] 2 Ch. 428=65 L. J. Ch. 754=44 W. R. 684=74 L. T. 811.
(5) A. I. R. 1928 Bom. 150=109 I. C. 532=52 Bom. 307.
(6) A. I. R. 1922 Bom. 9=66 I. C. 868=46 Bom. 722.

sale deed. After their right to obtain specific performance of the agreement to sell had become time barred, the plaintiff sued to recover possession of the property. The Court held that the defendants were entitled to remain in possession against the plaintiff and dismissed the plaintiff's suit. S. 27, Specific Relief Act, and Ill. 3, Cl. 3, were also relied on in support of the general proposition that possession was notice of all rights claimed by the person in possession. But I do not think that these are relevant to answer the specific contention raised by the learned advocate for the respondents. The learned advocate for the respondent referred to *Maddison* v. *Alderson* (7); but I do not see anything in that decision which supports the respondent's view. The decisions reported in *Muthu Karuppan* v. *Muthu Samban* (1) and *Sheik Dawood Saheb* v. *Moideen Batcha Saheb* (8), though passed under S. 54, T. P. Act, also support in principle this view. I am therefore unable to accept the view of the learned Subordinate Judge, and I hold that the doctrine of part performance applies to the present case, that defendant 1's continuing in possession after Ex. 7 must be taken unequivocally to refer to the contract Ex. 7 and that it is a sufficient act of part performance although the taking of possession was antecedent to the contract.

(7) [1883] 8 A. C. 475.
(8) A. I. R. 1925 Mad. 566=87 I. C. 331.

It was also argued by the learned advocate for the respondent that the defendant's right to specific performance was barred by limitation and that therefore the plaintiff's suit was properly decreed by the lower appellate Court. There seems to be some difference of opinion on this question in the Calcutta High Court: see *G. H. C. Ariff* v. *Jadu Nath Majumdar* (9); and Phillips and Devadoss, JJ., held in *Vizianagaram Sugar Co.* v. *Muthurama Reddi* (2) that the plea of part performance is not limited to cases where the right to sue for specific performance is not barred on the date of the subsequent suit. They followed *Meher Ali Khan* v. *Aratunnessa Bibi* (10). The decision in *Ramappa* v. *Yellappa* (5), at p. 312 (*of* 52 *Bom.*), already referred to, also supports this view. There however seem to be some Calcutta cases apparently against this view: see case referred in *G. H. C. Ariff* v. *Jadu Nath* (9). But I need not pursue this matter further, since I am bound by the decision in *Vizianagaram Sugar Co.* v. *Muthurama Reddi* (2).

For the above reasons I reverse the decision of the lower appellate Court and restore that of the first Court, with costs of defendants 1 and 2 here and in the lower appellate Court.

P.R.S./R.M. *Appeal dismissed.*

(9) A. I. R. 1929 Cal. 101=112 I. C. 865=55 Cal. 1090.
(10) [1922] 67 I. C. 167.

END

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